

# EVOLUTION OF DOCTRINE OF JUDICIAL REVIEW: COMPARATIVE ANALYSIS IN INDIA AND USA

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## ABSTRACT

Supremacy of law is essence of Judicial Review. It is power of the court to review the actions of legislative and executive and also review the actions of judiciary , it is the power to scrutinize the validity of law or any action whether it is valid or not. It is the great weapon in the hands of the court to hold unconstitutional and unenforceable any law and order which is inconsistent or in conflict with the basic law of the land. The two principal basis of judicial review are “Theory of Limited Government” and “Supremacy of constitution with the requirement that ordinary law must confirm to the Constitutional law.” Judicial Review is a mechanism and therefore the Concept of Judicial Activism is a part of this mechanism .In many countries, Constitution is considered as Supreme and the essence of Judicial Review lies therein. The term judicial control denotes a broad concept and also includes within itself the concept of judicial review. It is the influential and empowering tool in the hands of judiciary to hold any action unconstitutional or invalid, if it is found inconsistent with the law of the land. Judicial review is nothing but a tool or a means to hold those authorities or people accountable for the manner in which they exercise their power, especially when decisions are arbitrary and unjust. In India judicial review proceeds towards judicial overreach while in United States it is still a strict doctrine that is there to maintain the supremacy of their Constitution. Thus it can be said that that in present era judicial review is broader in India that United States and it is reflected with present judgements pronounced by Supreme Court of India that due to this broader doctrine judiciary is at some level doing judicial overreach.

**Keywords-** Judicial Review, Judicial Activism, Judicial Overreach Constitution, Administration, Democracy, and Judiciary.

## INTRODUCTION

Judicial review is a doctrine which provides extensive power to upper judiciary. In a very basic sense it can be understood as a constitutionality check on legislative and executive by judiciary. It is the power of courts to decide the validity of acts of the legislative and executive branches of government. If the courts decide that a legislative act is unconstitutional, it is nullified. The decisions of the executive and administrative agencies can also be overruled by the courts as not conforming to the law or the Constitution. Judicial review literally means the revision of the decree or sentence of an inferior court by a superior court. Judicial review of the constitutionality of statutes is a peculiarly American phenomenon which has been coped with varying degrees of success by other nations also.

The concept of Judicial Review has its foundation on the doctrine that the constitution is the supreme law. It is often confusing for people that judicial review is an asset for judicial activism and even judiciary in the doctrine of judicial review crosses its line and named it as judicial activism. Judicial Review refers to the power of the judiciary to interpret the constitution and to declare any such law or order of the legislature and executive void, if it finds them in conflict the Constitution of India whereas Judicial activism is a legal term that refers to court rulings that are partially or fully based on the judge's political or personal considerations, rather than existing laws. In basic terms, judicial activism occurs when a judge presiding over a case allows his personal or political views to guide his decision when rendering judgment on a case.

The line between judicial activism and Judicial Overreach is very narrow. In simple terms, when judicial activism crosses its limits and becomes judicial adventurism it is known as Judicial Overreach. When the judiciary oversteps the powers given to it, it may interfere with the proper functioning of the legislative or executive organs of government. Judicial Overreach destroys the spirit of separation of powers. The most important factor here is that

in USA constitution there is no prescribed provision for judicial review and the doctrine has its roots form there only because all other countries only adopted the idea. According to Howard Mebain, an American author judicial review mean, the power possessed by American courts to declare that legislative and executive action are null and void if they are volatile of the written constitution. The development of Judicial Review continued and it was followed by many precedents.

The framers of our Constitution also appreciated the same. The framers of the constitution were aware of the inherent weaknesses of judicial review, therefore they tried to define its scope and adopted several devices to prevent courts from abusing their powers and acting as “super legislature” or permanent “third chambers”. The Constitution of India, 1950 specifically provided for Judicial Review in Article 13, 32 and 226. Basically Judicial Review goes forward from the concept to the doctrine which is a big change and the journey of it is very long. Judicial review is a good way for the development of law but it should be recognized by judiciary that in behalf of judicial review they should note done judicial review. The most important function of the judiciary under a written Constitution is to safeguard the Supremacy of the Constitution and to keep all authorities within constitutional limits because judiciary is the guardian of constitution.

Judicial review of the constitutionality of statutes is a markedly American phenomenon which has been coped with varying degrees of success by other nations also. The concept of Judicial Review has its foundation on the doctrine that the constitution is the supreme law. Under this research project the doctrine has been analysed through recent judgements.

## **EVOLUTION OF JUDICIAL REVIEW**

### ***Historical background-***

Judicial Review has a long and chequered history. It originated in English legal system and became a very important principle in the systems of government based on Rule of Law.

When India was a colony of the British Empire the concept of Judicial Review was followed by the Courts and has continued to be a part of the legal system of our country since then. It is true that the doctrine of judicial review was only a concept formerly. It has passed a long journey to become a doctrine.

In the United States, judicial review is the facility of a court to examine and decide if a statute, treaty or administrative regulation contradicts or violates the provisions of existing law, a State Constitution, or ultimately the United States Constitution. While the U.S. Constitution does not explicitly define a power of judicial review, the authority for judicial review in the United States has been inferred from the structure, provisions, and history of the Constitution. Judicial Review flourished in English legal system on the theory that there is always a higher law to which the legislative, Executive or judicial action must be obedient. In the early days of its growth and development the concept of Judicial Review proceeded on the theory that Natural Law is the supreme law and any action by the officers or institutions must adhere to the dictates of this supreme law. Before the Constitutional Convention in 1787, the power of judicial review had been exercised in a number of states. In the years from 1776 to 1787, state courts in at least seven of the thirteen states had engaged in judicial review and had invalidated state statutes because they violated the state constitution or other higher law<sup>1</sup>.

These state court cases involving judicial review were reported in the press and produced public discussion and comment. Despite the fact that the former colonies have ceased to be part of the British Empire most of them have retained the concept of Judicial Review as an inherent power of the Courts. Same has been the case with the Indian Republic under its Constitution of 1950. The principles which the English courts had developed in the context of Judicial Review were adopted by the courts in India too.

The Constitution of U.S.A. makes no specific reference to the Judicial Review of legislation. There was a clear effect of common law on the U.S soil. Chief Justice Lord coke's decision

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<sup>1</sup> John C.Yoo, Saikrishnan .B, "*The Origins Of Judicial Review*", The University of Chicago law review.60(3): 887-982, (2003)

in *Bonham's case* repudiated in England but it found a fertile soil in the United States, where the U.S. Supreme Court it in number of decisions<sup>2</sup>. This has laid down the foundation of Judicial Review of legislation in the United States of America, which has now become one of the most outstanding features for the operation of that Constitution.

### ***Development of Judicial Review-***

The United States of America gave to the world a new sparkle of judicial review. The concept of judicial review as evolved in America was the result of continuous thinking and growth. It had the heritage of Plato and Aristotle, inklings of Magna Carta and the Crokeian theory of Common right and reason and the assimilation of the practical philosophy of Locke and many other legal thinkers of Europe<sup>3</sup>. Magna Carta yielded a great influence on Coke and Locke and it gave a great heritage to America for judicial review.

In America judicial review has tended to advance the national outlook to a great magnitude. It (Judicial review) has guided the progress of a very brief constitution of agrarian origins into a great body of constitutional doctrine for the governance of a highly technical industrial civilization. This in itself is a great achievement. The doctrine of judicial review of the United States of America is really the precursor of judicial review in other constitutions of the world which evolved after the 18<sup>th</sup> century and in India also it has been a matter, of great inspiration. The Americans have always pleaded for limited sovereignty which means that the law-making function of the legislative organ is governed by the fundamental rights of the people and other constitutional limitations. No law can be framed which snatches away the constitutional rights of the people. If sovereignty is considered to be all-powerful and uncontrolled any person or party who can acquire by whatever means the happenings of sovereignty can make binding commands, and law would then rest on force and chicanery, which makes nonsense of the normal meaning of law<sup>4</sup>.

The development of judicial review is studied in two parts:

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<sup>2</sup> Theodore F. T., *Bonham's case and judicial review*, 40 HARVARD LAW REVIEW, 30–70 (1926), <https://www.jstor.org/stable/1330126>

<sup>3</sup> Charles N. R., *The Doctrine Of Judicial Review And Natural Law*, 6 CATHOLIC UNIVERSITY LAW REVIEW, 97–102 (1956), <http://scholarship.law.edu/lawreview/vol6/iss2/3>

<sup>4</sup> Ronald Young, *American Law & Politics*, Harper & Law Publisher, New York, 1967 -p.151

- Pre Marshall Age, and
- The Marshall Age.

The important part for understanding the development of judicial review is **The Marshall Age**. John Marshall was appointed the fourth Chief Justice of America in 1801, and he continued in his exalted office till 1835. This was a glorious period in the American Constitutional history for the evolution of the doctrine of judicial review. His historic decision in *Marbury v. Madison*<sup>5</sup> was preceded by the famous judiciary debate in the senate in which the power of the judges for judicial review was strongly asserted.

In 1803 Marshall wrote the decision of *Marbury v. Madison* in which he declared that the legislature has no authority to make laws repugnant to the constitution and in the case of constitutional violation the court has absolute and inherent right to declare the legislative act void. By *Marbury* decision Marshall not only invents the system of judicial review which was already in the process of evolution, but by this decision he strengthened the system to a remarkable event. *Marbury V. Madison* is of crucial importance as the first case establishing the power of the Supreme Court to review constitutionality. The system of judicial review thereafter became the integral part of the American constitutional jurisprudence. Jerre S. William remarks-“In case after case, he had been building the constitutional structure with consistent plan and imperishable materials. The political winds blew and always against him. But Marshall withstood and built on and on”. On the whole, Marshall had a congenial back-ground for the establishment of judicial review through his constitutional decisions. The doctrine of judicial review established by Chief Justice Marshall in *Marbury V. Madison* is still vibrant and its force stands unabated, although it has ever been criticised. By 1803 judicial review had a long history in America. Marshall's concept of judicial review had a limited scope. His philosophy of judicial review was that a legislative Act in violation of the constitution was void. He did not envisage that even an arbitrary and unjust legislation would be considered to be the legislation against the will of the sovereign people for which the sovereign people did not delegate power to the legislature and as such the law should be void. This development took place later on.

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<sup>5</sup> 5 U.S. (1Cranch)137,138(1803).

Marshall was succeeded by Taney as Chief Justice of America. Chief Justice Taney also made a great contribution to the system of judicial review by upholding the supremacy of the constitution. He observed that as the constitution is the fundamental and supreme law, it appears that an Act of Congress if not pursuant to and within the limits of the power assigned to the Federal Government it is the duty of the courts of the United States to declare it unconstitutional<sup>6</sup>.

According to Francis H. Heller evolution of judicial review can be traced out through three main stages. The first stage according to him was the decision of *Marbury V. Madison*. The second stage in the development of the power of judicial review was reached in the *Dredscott* case decided in 1857. This case represented an important enlargement of the scope of judicial review over the doctrine of *Marbury V. Madison*. The court took up the task of determining whether congress has exercised power which the constitution had not delegated to it.

The third stage in the development of judicial review starts with the emergence of the court's modern doctrine of Due Process of law<sup>7</sup>.

Then a new era came which began with the constitutional agitation, which brought into existence in 1868 the Fourteenth Amendment by which principle of Due Process of Law was introduced. The Fourteenth Amendment came into existence as a result of constant thinking and necessity. No one, in fact, was wholly satisfied with the constitution. In America the "Due Process of Law" became a bulwark against arbitrary legislation. It imposes a limitation upon all the powers of government legislative, executive and judicial. Thus the Due Process clause was a great weapon for the enforcement of judicial review in America. The *Dredscott* case decided by Chief Justice Taney had created great reaction in the minds of the American people and the Fourteenth Amendment introducing Due Process Clause was intended to give wider power to the Supreme Court in judicial review.

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<sup>6</sup> *Dredscott v. Sanford*, 60 U.S. (19 How) 393,395 (1857).

<sup>7</sup> FRANCIS HOWARD. HELLER, INTRODUCTION TO AMERICAN CONSTITUTIONAL LAW: A SELECTION OF CASES AND MATERIALS(1953).

Judicial review is important because laws passed need to be checked to make sure they are constitutional. Judicial review is important because it allows the higher courts to review the outcomes of the lower courts. It helps to check on the other branches of government. The major importance of judicial review is to protect individual rights, to balance government power and to create and maintain equality to every person. The system of civil liberties that we know of today would be very different without judicial review.

From 1938 a new era emerged in the constitutional history of the United States of America. The remarkable feature of this period is that there grew up a tendency in the judicial atmosphere of the Supreme Court to show a great restraint in invalidating the laws either enacted by the state legislatures. It is said that though the justices of the Supreme Court have not abrogated the power of judicial review, but there developed a marked change in their judicial approach. The year 1954, is a remarkable year of the American Constitutional jurisprudence. On May 17, 1954 Chief Justice Warren gave majority decision in Brown's case<sup>8</sup>. It was in that year that the Supreme Court of America attempted to establish through the process of judicial review the long craved social equality. Thus in America in judicial review, the Judges have been mostly governed by the impulse of the time and the constitutionality of a legislative Act has been determined after consideration of the social, economic, religious and moral sentiments of the people.

### ***Difference between judicial review and judicial activism-***

In a democracy, the role of judiciary is crucial. Judiciary is a faithful keeper of the constitutional assurances. An independent and impartial judiciary can make the legal system vibrant. Judicial Review means the power of the judiciary to pronounce upon the Constitutional validity of the acts of public authorities, both executive and legislature. In any democratic society, judicial review is the soul of the system because without it democracy and the rule of law cannot be maintained.

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<sup>8</sup> Brown V. Board of Education of Topeka, 347 U.S. 483 (1954).



Judicial review is a legal process by which individuals can challenge decisions made by public authorities on the basis that they are unlawful, irrational, unfair or disproportionate. It is a directly accessible check on abuse of power, a means of holding the executive to account, increasing transparency, and of providing redress when public agencies and central Government act unlawfully.

Constitutional judicial review exists in several forms. In countries that follow U.S. practice (e.g., Kenya and New Zealand), judicial review can be exercised only in concrete cases or controversies and only after the fact—i.e., only laws that are in effect or actions that have already occurred can be found to be unconstitutional, and then only when they involve a specific dispute between litigants. Judicial review of administrative action is a mechanism of enforcing constitutional discipline over administrative agencies while exercising their powers. Judicial review of judicial actions can be visualized in Golaknath case, banks nationalization case, privy purses abolition case, Minerva mills etc.

Judicial activism on the other hand is a different thing although there is a very thin line difference between judicial review and judicial activism. According to Professor Upendra Baxi, judicial activism is an inscriptive term. It means different things to different people.

In the words of Justice J.S. Verma, Judicial Activism must necessarily mean “the active process of implementation of the rule of law, essential for the preservation of a functional democracy”. Judicial activism is the view that the Supreme Court and other judges can and should creatively reinterpret the texts of the Constitution and the laws in order to serve the judges' own visions regarding the needs of contemporary society. Judicial activism believes that judges assume a role as independent policy makers or independent “trustees” on behalf of society that goes beyond their traditional role as interpreters of the Constitution<sup>9</sup>. Technically the concept is related broadly to the constitutional interpretation and statutory construction<sup>10</sup>. In a modern democratic set up, judicial activism should be looked upon as a mechanism to control legislative adventurism and executive tyranny by enforcing

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<sup>9</sup> <http://definitions.uslegal.com/j/judicial-activism/>

<sup>10</sup> Christopher Wolfe, “*Judicial Activism: Bulwark Of Freedom Or Precarious Security*”, (Rowman and Little Field), 1997

Constitutional limits. Thus it is only when the legislature and executive fail in their working or try to ignore it, that judicial activism has a role to play. In other words, judicial activism is to be viewed as a “damage control” exercise. Failure on part of the legislative and executive wings of the Government to make available ‘good governance’ makes judicial activism an imperative. We can say in simple words that judicial activism is a practice by the judges that does not involve the balance of law, instead it obstructs it.

There are some very important cases which come in the talk whenever we discuss judicial activism in India. Bhopal gas tragedy<sup>11</sup> and Jessica murder case are top two. The latter was an open and shut case for all. Money and muscle power tried to win over the good. But lately, it was with the help of judicial activism that the case came to at least one decision. This shows that judicial activism is really important for avoiding miscarriage of justice.

So the basic essence is that judicial Review lies in the power vested in any court of law to comment on the constitutionality of a legislation passed by a Parliament. Having originated from the famous Marbury V. Madison case in USA the concept gives the court of law the power to interpret the letter of the constitution and decide if legislation is in violation of it and subsequently pronounce it invalid. In India, this power is enshrined in the Article 13 of the Constitution of India, which declares that every law that is enacted upon, if found to be in violation of the Fundamental Rights shall be deemed void.

Judicial Activism, in ideology is the use of a court of law to intervene in certain policies through precedent in case law. This is where the court of law has a much more involved outlook in the process of lawmaking and hence plays a much more significant role in the governance of the country. Clearly, the role of the jury becomes paramount in Judicial Activism as they would use their existing personal views in delivering a judgement. It is a departure from the age old role of the ‘interpreter of the constitution’ for the judges and gives them the freedom to reinterpret the constitution and frame laws as per the requirements of the contemporary scenario. Generally, failure on the part of Executive and the Legislative in a country signals for a need of Judicial Activism.

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<sup>11</sup> Union Carbide Corporation V. Union of India etc, 2 SCC 540 (1989).

## MEANING OF JUDICIAL REVIEW AND ITS CONSTITUTIONAL PROVISIONS

### 1. Constitutional provisions of U.S.A-

The Constitution of U.S.A. didn't expressly vest this function of guardianship in the judiciary. But the common law doctrine of ultra vires, according to which courts had the power and duty to invalidate the act of an inferior body which transgressed the mandate of a superior authority which is binding on the inferior or subordinate body. One of the fundamental processes in the U.S. to determine the validity of law is Judicial Review. The power of judicial review to declare the laws unconstitutional and to scrutinise the validity of law implicitly incorporated in the Art.III and IV of the Constitution of United States of America.

#### **Article III- The Judicial Branch:**

- Section 1-The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.
- Section 2-The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority, to all Cases affecting Ambassadors, other public ministers and Consuls, to all Cases of admiralty and maritime Jurisdiction, to Controversies to which the United States shall be a Party, to Controversies between two or more States, between a State and Citizens of another State, between Citizens of different States, between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

- Section 3-Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

**Article 6-Supremacy Clause-**

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

This article although contains three clauses but the most important from which the doctrine is connected is the supremacy clause which provides that the Constitution, federal laws made pursuant to it, and treaties made under its authority constitute the supreme law of the land. It provides that state courts are bound by the supreme law; in case of conflict between federal and state law, the federal law must be applied. Even state constitutions are subordinate to federal law.

The Supreme Court under John Marshall (the Marshall Court) was influential in construing the supremacy clause. It first ruled that it had the power to review the decisions of state courts allegedly in conflict with the supreme law, claims of “state sovereignty” notwithstanding. In Martin v. Hunter's Lessee<sup>12</sup> the Supreme Court confronted the Chief Justice of Virginia, Spencer Roane, who had previously declared a Supreme Court decision unconstitutional and refused to permit the state courts to abide by it. The Court upheld the Judiciary Act, which permitted it to hear appeals from state courts, on the grounds that Congress had passed it under the supremacy clause.

Gibbons v. Ogden<sup>13</sup> was another influential case involving the supremacy clause. The state of New York had granted Aaron Ogden a monopoly over the steamboat business in the Hudson River. The other party, Thomas Gibbons, had obtained a federal permit under the Coastal Licensing Act to perform the same task. The Supreme Court upheld the federal permit. John Marshall wrote, "The nullity of an act, inconsistent with the Constitution, is produced by the declaration, that the

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<sup>12</sup> 14 U.S. (1Wheat) 304 (1816).

<sup>13</sup> 22 U.S. (9Wheat) 1, (1824).

Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the State legislatures as do not transcend their powers, but though enacted in the execution of acknowledged State powers, interfere with, or are contrary to the laws of Congress, made in pursuance of the Constitution, or some treaty made under the authority of the United States. In every such case, the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it." Through these provisions the judicial power can be understood very well and the country where such extensive powers are given to the judiciary so it is beyond our imagination that how far they have the power of judicial review.

## **2. Provisions of Indian Constitution-**

The power of judiciary to review and determine the validity of a law or an order may be described as the powers of Judicial Review'. It means that the constitution is the supreme law of the land and any law inconsistent therewith is void through judicial review. It is the power exerted by the courts of a country to examine the actions of the legislatures, executive and administrative arms of government and to ensure that such actions conform to the provisions of the nation's Constitution. Judicial review has two important functions, like, of legitimizing government action and the protection of constitution against any undue encroachment by the government. The Supreme Court has been vested with the power of judicial review. It means that the Supreme Court may review its own Judgement order. Judicial review can be defined as the competence of a court of law to declare the constitutionality or otherwise of a legislative enactment.

Being the guardian of the Fundamental Rights and arbiter of the constitutional conflicts between the Union and the States with respect to the division of powers between them, the Supreme Court enjoys the competence to exercise the power of reviewing legislative enactments both of Parliament and the State's legislatures.

Both the political theory and text of the Constitution has granted the judiciary the power of judicial review of legislation. The Constitutional Provisions which guarantee judicial review of legislation are Articles 13, 32, 131, 136, 137 and 145(e).

- **Article 13-** This article declares that any law which contravenes any of the provisions of the part of Fundamental Rights shall be void.

In *A.K. Gopalan v. State of Madras*<sup>14</sup> Justice Kania, observed, “The inclusion of Art. 13(1) and (2) in Constitution appears to be a matter of abundant caution. Even in their absence, if any of the fundamental rights was infringed by any legislative enactment, to the extent it transgresses the limits, invalid.” In *Re, Delhi laws Act*<sup>15</sup>, Justice Kania observed, as the paramount law, the Constitution creates the Legislature itself and confers upon it power to make laws subject to certain limitations, without which, of course, the power of the Legislature to make laws would have been plenary.

- **Article 32-** It entrusts the roles of the protector and guarantor of fundamental rights to the Supreme Court.

Article 32 is known as the “spirit of the constitution and exceptionally heart of it” by Dr. Ambedkar. It makes the Supreme Court the safeguard and underwriter of the major rights. Further, the capacity to issue writs goes under the original jurisdiction of the Apex Court. This implies an individual may approach SC straightforwardly for a cure as opposed to by appeal. There are number of judgements under this where Supreme Court has reviewed the previous judgements and orders. In *Subhash Sharma v. Union of India*<sup>16</sup>, The court observed that judicial review is a basic and essential feature of the constitutional policy and held that the Chief justice of India should play the primary role in the appointment of judges of High court and Supreme Court and not the Executive.

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<sup>14</sup> (1950) SCR 88 (100).

<sup>15</sup> 1951) SCR 747 (765

<sup>16</sup> AIR 1991 SC 631

- **Article 131 and 136-** These articles entrusts the court with the power to adjudicate disputes between individuals, between individuals and the state, between the states and the union, but the court may be required to interpret the provisions of the constitution and the interpretation given by the Supreme Court becomes the law honoured by all courts of the land. In the case of *Karnataka v. Union of India*<sup>17</sup>, the Supreme Court had considered the scope of Art. 131 of the Constitution which confers exclusive original jurisdiction to the Supreme Court. The court has decided by a majority that the suit was maintainable, dealt with the suit on the merits.

The Constitution of India under Article 136 vests the Supreme Court of India, the apex court of the country, with a special power to grant special leave, to appeal against any judgment or order or decree in any matter or cause, passed or made by any Court/tribunal in the territory of India. It is to be used in case any substantial constitutional question of law is involved, or gross injustice has been done. It is discretionary power vested in the Supreme Court of India and the court may in its discretion refuse to grant leave to appeal. The aggrieved party cannot claim special leave to appeal under Article 136 as a right, but it is privilege vested in the Supreme Court of India to grant leave to appeal or not. So it is in the discretion of Supreme Court and thus this power has been held to be plenary, limitless, adjunctive, and unassailable on the grounds of unconstitutionality<sup>18</sup>. Supreme Court has described its power under article 136 in this way that the exercise of jurisdiction conferred by article 136 of the constitution however are in the nature of special powers which are exercisable outside the purview of ordinary law, in cases where the needs of justice demand interference by the Supreme Court of the land<sup>19</sup>. The article itself is worded in the widest terms possible. It vests in the Supreme Court a plenary jurisdiction in the matter of entertaining and hearing appeals, by granting of special leave, against any kind of judgement or order made by a court or tribunal in any cause or matter and the powers could be exercised in spite of the specific provisions

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<sup>17</sup> AIR 1978 SC 68

<sup>18</sup> *Esher Singh v. State of Andhra Pradesh*, (2004) 11 SCC 585,603

<sup>19</sup> *Durga Shankar v. Raghu Raj*, AIR 1954 SC 520:(1955)1 SCR 267



for appeal contained in the constitution or other laws. The Constitution for the best of reasons did not choose to fetter or circumscribe the powers exercisable under this article in any way.

➤ **Article 137-** This empowers Supreme Court to review its own judgment or order.

Review literally and even judicially means re-examination or re consideration<sup>20</sup>. Basic Philosophy inherent in it is the universal acceptance of human fallibility. Rectification of an order thus stems from the fundamental principle that justice is above all. It is exercised to remove the error and not for disturbing finality.

The Court has described its review power in *Lily Thomas v. Union of India*<sup>21</sup> as “the power of review can be exercised for correction of mistake and not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated like an appeal in disguise. The mere possibility of two views on the subject is not a ground for review”.

Since the Power given under the Article is subject to the any law made by the Parliament or any other rules made there under by the Apex Court, the Power is to be exercised under the rules made by the court in pursuance of Art.145 of the Constitution. Therefore, the review will lie in the Supreme Court on:

- Discovery of new and important matter or evidence- Since review of the judgment is neither an appeal nor a second inning to the Party who has lost the case because of his negligence or indifference, the Party seeking review on this ground must show that there was no remission on his part in adducing all possible evidence at the trail. In addition to this the evidence upon which the review is sought must be relevant and of such a character that if it would have been brought into the notice of the court, it might have possibly altered the judgment.

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<sup>20</sup>S.Nagraj vs State of Karnataka (1993) 4 SCC 595

<sup>21</sup>AIR 2000 SC 1650: (2000)6 SCC 224

- Error apparent on record- Since the word “Error apparent on the face of record has not been defined anywhere under the Code or the Constitution, it has to be determined sparingly and with great caution by the judiciary. However, it is to be mentioned that no error could be said to be an error apparent on the face of record where one has to travel beyond the record to see the correctness of the judgment. Therefore, the error must be self-evident and should not require an examination or argument to establish it.
- Other Sufficient reason- Since the “Other sufficient reason” has to be decided by the court, the apex court in order to prevent the misuse of this clause and relying on the judgment of Privy Council<sup>5</sup> and Federal Court<sup>6</sup> has held that “a reason sufficient on grounds should be at least analogous to those specified in the rule above”.

In the case of *Sarla Mudgal v. Union of India*<sup>22</sup>, the court refused to review its earlier judgement as there was no error apparent on the face of the record, no new material had come into light after the judgement. The earlier judgement was not violative of any of the fundamental rights guaranteed to the citizens. Review petition cannot be exercised merely because there is a possibility of taking a different view. So in simple words it can be said that Review Petition is a discretionary right of court. The grounds for review are limited and it is filed in the same court.

- **Article 145(e)** - Under this article Supreme Court is authorised to make rules as to the conditions subject to which the court may review any judgement or order.

The legitimacy of judicial review is based in the Rule of Law, and the need for public bodies to act according to law. Judicial review is a means to hold those who exercise public power accountable for the manner of its exercise, especially when decisions lie outside the effective control of the political process. Judicial Review is a great weapon through which arbitrary, unjust harassing and unconstitutional laws are checked.

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<sup>22</sup>(1995) 3 SCC 635 : AIR 1995 SC 1531

### 3. Comparative Analysis-

With the evolution of the doctrine of judicial review Indian judiciary became more powerful than previous stage of it. Previously the concept of judicial review when originated from United States it was a narrow concept but in the current situation where Indian judiciary is always be in lime light due to its decisions shows its position in using this doctrine.

The scope of judicial review is wider in India as comparison to US because US Constitution is very concise in nature and the words and expression are used therein are vague and general in nature. US Constitution is the most rigid Constitution in the world, it is very tend our and in cumbered. Whereas Indian Constitution is rigid as well as flexible in nature, it has detailed provisions and it is wealthiest Constitution in the world. The words and expressions used in the Indian Constitution are specific and exact.

In India, there is specific and extensive provisions of judicial review in the Constitution of India like article 13,131,136,137 etc. Though the term judicial review is not mentioned in these Articles but it is embedded in these Articles. Whereas U.S. Constitution doesn't have any specific provision for judicial review, Art.III and IV incorporates judicial power of the Court, and constitutional supremacy and all the laws are subject to Constitution, therefore, it is inherent in nature. Judicial review in U.S. is the formulation by court.

In India there is more judicial overreach sometimes in the context of judicial review while in USA the power of judicial review is strictly used to safeguard constitution to maintain its supremacy. In India, Art. 13 provides for Judicial Review of Pre-constitutional as well as Post-Constitutional laws whereas there is no such provision of judicial review of pre constitutional laws in U.S. and this is one of the reason that many times in the interpretation of provision Indian judiciary goes beyond the true essence of judicial review.

In India, power of judicial review can be used in three dimensions such as Judicial Review of Constitutional Amendments, Legislative Acts and Administrative acts. Whereas U.S. Constitution is very rigid in nature therefore review of constitutional amendment is very rarely used, Supreme Court of U.S. has power to scrutinize the Legislative Act and Administrative act which is contrary to Constitution. The American concept of judicial review has been instrumentally interpreted by the judiciary from the vague words of the constitution and then stated as facts whereas the concept was incorporated expressly through various provisions of the constitution in India. The most fundamental difference between the two is the method of judicial review's application by the Supreme Court. On one hand US, judicial review is majorly limited to review of Congressional and State Acts and abuse of power by administrative authorities, while the Indian Courts have included within their purview the three branches of government.

## **LANDMARK JUDGEMENTS ON JUDICIAL REVIEW**

In this chapter some landmark cases in the history of judicial review are mentioned where it has been discussed that how the scope of judicial review becomes so wider in India.<sup>23</sup> Judicial review is the power of the court to review statutes or administrative acts and determine their constitutionality. The examination of federal and state legislature statutes and the acts of their executive officials by the Courts to determine their validity according to written constitutions. Through these judgements the meaning and its implication becomes clearer.

### **U.S. SUPREME COURT CASES-**

#### **Hylton v. United States 3 U.S. (3 Dall.) 171 (1796)-**

This was the first case decided by the Supreme Court that involved a challenge to the constitutionality of an act of Congress. It was argued that a federal tax on carriages violated

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<sup>23</sup> Joseph Dunner, *Dictionary of Political Science*, 1965 p.285

the constitutional provision regarding "direct" taxes. "The Supreme Court upheld the tax, finding it was constitutional. Although the Supreme Court did not strike down the act in question, the Court engaged in the process of judicial review by considering the constitutionality of the tax. The case was widely publicized at the time, and observers understood that the Court was testing the constitutionality of an act of Congress. Because it found the statute valid, the Court did not have to assert that it had the power to declare a statute unconstitutional.

It was finally in 1803 that the American Supreme Court defined the boundaries of the judiciary and the executive branches of the government in US. The judgement made it clear that the Supreme Court would be the final authority and will decide the constitutionality of the actions of the Executive i.e. the President and the Legislature i.e. the Congress. The Supreme Court declared Constitution to be the supreme law of the land and any law in violation of it will be struck down.

### **Marbury v. Madison, 5 U.S.(1 Cranch) 137,177-79(1803)-**

In this case, when President John Adams did not win a second term in the 1801 Presidential Election, he utilized the last days of his administration to make substantial number of political arrangements. At the point when the new president (Thomas Jefferson) took office, he told his Secretary of State (James Madison), not to convey the official printed material to the administration authorities who had been named by Adams. In this way the administration authorities, including William Marbury, were denied their new employments. William Marbury filed petition in the U.S. Supreme Court for a writ of mandamus, to compel Madison to convey the commission.

On determining the issues the Supreme Court held that Supreme Court has no jurisdiction to issue Mandamus because to issuing writ of Mandamus, court should have the appellate jurisdiction. Further court held that Congress cannot expand the scope of the Supreme Court's original jurisdiction beyond the scope Article III of the Constitution. The Supreme Court observed that Supreme Court has the authority to review acts of Congress and

determine whether they are valid or not. It is inherent power of the Supreme Court to determine the validity of any law. The Supreme Court declared Section 13 of the Judiciary Act of 1789 unconstitutional and dismissed the writ petition and hence Madison didn't get the commission. In this way, Supreme Court of US formulated the concept of Doctrine of Judicial Review. This landmark judgment was given by Chief Justice Marshall.

## **INDIA'S SUPREME COURT CASES-**

### **Sampat Kumar v. Union of India,(1987) 3 SCR 386-**

Justice Bhagwati in this case held that Judicial Review is essential feature of the constitution and no law passed by Parliament in exercise of its constituent power can abrogate it or take it away. If the power of judicial review is abrogated or taken away the constitution will cease to be what it is. Through this judgment the court also upheld that power of judicial review over legislative action vested in the Supreme Court under article 32 is the basic structure of the Constitution. Power of judicial superintendence over decisions of all courts and Tribunals within their jurisdiction is the basic structure of the Constitution Judicial review of legislative action in exercise of power by subordinate judiciary or Tribunals created under ordinary legislation cannot be to the exclusion of the High Courts and the Supreme Court. However they can perform supplemental -as opposed to substitution -role in this respect.

The Supreme Court said that any legislation is amenable to judicial review, be it momentous amendments to the Constitution or drawing up of schemes and bye-laws of municipal bodies which affect the life of a citizen. Judicial review extends to every governmental or executive action – from high policy matters like the President's power to issue a proclamation on failure of constitutional machinery in the States like in *S.R. Bommai v. Union of India*<sup>24</sup> case, to the highly discretionary exercise of the prerogative of pardon like in *Kehar Singh v. Union of India*<sup>25</sup> case or the right to go abroad as in *Satwant Singh v. Assistant Passport Officer*<sup>26</sup>, New Delhi case.

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<sup>24</sup> (1994) 3 SCC 215

<sup>25</sup> (1989) AIR 653

<sup>26</sup> (1967) 2 SCR 525

**A.K. Gopalan v. State of Madras, 1950 AIR 27, 1950 SCR 88-**

In this case court held that in India it is the constitution that is supreme and that a statute law to be valid, must in all cases be in conformity with the constitutional requirements and it is for the judiciary to decide whether any enactment is constitutional or not. From *Maneka Gandhi v. Union of India*<sup>27</sup>, the judicial review has acquired the same or even wider dimensions as in the United States. Now 'procedure established by law' in Article 21 does not mean any procedure lay down by the legislature but it means a fair, just and reasonable procedure. A general principle of reasonableness has also been evolved which gives power to the court to look into the reasonableness of all legislative and executive actions.

Recent Judgment of Supreme Court dated 11.01.2007 rendered in the case in *I R Coelho (Dead) by LRs v. State of Tamil Nadu and Ors.*<sup>28</sup>, is a master stroke of the judiciary. Prima facie, it is laudable for the reason, that it is a unanimous judgment of nine judges Constitution Bench of the Supreme Court, unlike fractured earlier judgments on the point. The petitioner had challenged the various Central and State laws put in the Ninth Schedule including the Tamil Nadu Reservation Act. The Nine Judges Bench held that "any law placed in the Ninth Schedule after April 24, 1973 when *Keshvanand Bharti's* case judgment was delivered will open to challenge, the court said that the validity of any Ninth Schedule law has been upheld by the Supreme Court and it would not be open to challenge it again, but if a law is held to be violation of fundamental rights incorporated in Ninth Schedule after the judgment date of *Keshvanand Bharati's* case, such a violation shall be open to challenge on the ground that it destroy or damages the basic structure of constitution". The Supreme Court observed that "Judicial Review of legislative actions on the touchstone of the basic structure of the constitution

The scope of judicial review and brought in the due process clause through interpretation of Article 21. Furthermore, it was held that Article 14, Article 21 and Article 19 are too

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<sup>27</sup>(1978) 2 SCR 621

<sup>28</sup> (2007) 2 SCC 1

interpreted together. Thus scope of judicial review was broadened in India through Judicial Activism.

### **Keshvanand Bharti v. State Of Kerala, (1973) 4 SCC 255-**

This case have first propounded the Doctrine of basic structure of the Constitution, the Hon'ble 13 Judge Constitution Bench of Supreme Court delivered 11 truncated judgments. Since 24th April 1973, the date of the judgment of the Keshvanand Bharti case, the debate is, what is the ratio decidendi, viz., the point of law laid down in the said judgment. Fortunately, the present judgment of Supreme Court by providing unanimous verdict saved the Nation from such turmoil of searching for the ratio decidendi with magnified glasses. The whole of the present judgment is devoted to understand and lots of pains have been taken to impress that Doctrine of Basic Structure was propounded in Keshvanand Bharti case.

This was finally set at rest by the celebrated case of Keshvanand Bharti v. State of Kerala wherein the power of judicial review in certain cases was held to be the basic feature of the Constitution and hence cannot be amended. According to this judgment of largest bench in the constitutional history propounded the “Theory of Basic Structure: A Limitation on Amending Power.” This theory formulated By Supreme court through Doctrine of Judicial Review.

After the application of this decision Judiciary, as given by the Constitution, has become final arbiter to check violation of constitutional provisions. Since *Keshvanand Bharti case* overruled *Golak Nath case* it cleared the Parliament's way to fulfil their obligations to create a welfare state and an egalitarian society. Along with this it has also put a cap of restriction on the Parliament to keep its autocracy in check and to ascertain that there is no further violation of Fundamental rights. *Keshvanand Bharti Case* reflects judicial creativity of very high order. The majority bench's decision to protect the fundamental features of the Constitution was based on sound & rational reasoning. Throughout these judgements the



doctrine of judicial review get developed and presently in the name of this judicial overreach occurs which is reflected through recent judgements.

## **STUDY ON RECENT JUDGEMENTS CAME AFTER JUDICIAL REVIEW**

In the present scenario, Supreme Court plays a very crucial role to interpret the constitutional provisions and now the concept of Judicial Review became a fundamental feature of the Constitutional Jurisprudence. In Indian Supreme Court judicial interpretation has expanded the scope of the procedural requirement -“procedural established by law” enshrined in Article 21 and has successfully developed substantive as well as procedural standards of judicial review. Supremacy of the law is the spirit of the Indian Constitution. In India, the “DOCTRINE OF JUDICIAL REVIEW” is the basic feature of the Constitution. It is the concept of Rule of Law and it is the touchstone of Constitution India. The ostensible purpose of judicial review is to vindicate some alleged right of one parties to litigation and thus grant relief to the aggrieved party by declaring an enactment void, if in law it is void, in the judgment of the court. But the real purpose is something higher i.e., no statute which is repugnant to the constitution should be enforced by courts of law.

Recent judgements which shows the image of judicial review that how much it is effective and it is also interesting to note that nowadays judicial review is a great weapon in the hands of judiciary and with this weapon judiciary in recent judgements shows that how much power they have in present time.

Let Us Begin With The Most Highlighted Judgement Of This Year:

**Indian Case-****Navtej Singh Johar v. Union of India, 6 September 2018<sup>29</sup>-**

The central issue of the case was the constitutional validity of Section 377 of the Indian Penal Code, 1860 (Section 377) insofar as it applied to the consensual sexual conduct of adults of the same sex in private. Section 377 was titled ‘Unnatural Offences’ and stated that “whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”

The issue in the case originated in 2009 when the Delhi High Court, in the case of Naz Foundation v. Govt. of N.C.T. of Delhi<sup>30</sup>, held Section 377 to be unconstitutional, in so far as it pertained to consensual sexual conduct between two adults of the same sex. In 2014, a two-judge bench of the Supreme Court, in the case of Suresh Kumar Koushal v. Naz Foundation<sup>31</sup>, overturned the Delhi HC decision and granted Section 377 “the stamp of approval” When the petition in the present case was filed in 2016 challenging the 2014 decision, a three-judge bench of the Supreme Court opined that a larger bench must answer the issues raised. As a result, a five-judge bench heard the matter. The Petitioner in the present case, Navtej Singh Johar, a dancer who identified as part of the LGBT community, filed a Writ Petition in the Supreme Court in 2016 seeking recognition of the right to sexuality, right to sexual autonomy and right to choice of a sexual partner to be part of the right to life guaranteed by Article 21 of the Constitution of India. Furthermore, he sought a declaration that Section 377 was unconstitutional. The Petitioner also argued that Section 377 was violative of article 14 of the Constitution (Right to Equality before the Law) because it was vague in the sense that it did not define “carnal intercourse against the order of nature”.

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<sup>29</sup> <https://indiankanoon.org/doc/119980704/>

<sup>30</sup> (2009) 160 Delhi Law Times 277

<sup>31</sup> Civil Appeal No. 10972 Of 2013

There was no intelligible differentia or reasonable classification between natural and unnatural consensual sex. Among other things, the Petitioner further argued that:

- (i) Section 377 was violative of article 15 of the Constitution (Protection from Discrimination) since it discriminated on the basis of the sex of a person's sexual partner,
- (ii) Section 377 had a "chilling effect" on Article 19 (Freedom of Expression) since it denied the right to express one's sexual identity through speech and choice of romantic/sexual partner, and
- (iii) Section 377 violated the right to privacy as it subjected LGBT people to the fear that they would be humiliated or shunned because of "a certain choice or manner of living."

The Union of India submitted that it left the question of the constitutional validity of Section 377 (as it applied to consenting adults of the same sex) to the "wisdom of the Court". Some interveners argued against the Petitioner, submitting that the right to privacy was not unbridled, that such acts were derogatory to the "constitutional concept of dignity", that such acts would increase the prevalence of HIV/AIDS in society, and that declaring Section 377 unconstitutional would be detrimental to the institution of marriage and that it may violate article 25 of the Constitution (Freedom of Conscience and Propagation of Religion).

On the grounds of safeguarding individual right Supreme Court finally decriminalize section 377 of IPC with different opinions. Following are the different opinions by judges of Supreme Court-

CJI Mishra wrote a judgement on behalf of himself and Justice Khanwilkar. In his judgement, he emphasised an individual's right self-determination. He stressed that the section 377 fails to recognize an individual on the basis of inherent biological determinants, but also on the basis of individual's choices. Justice Mishra emphasised that the constitution protects and individual's sexual autonomy and intimate personal choices. He stuck down section 377 on ground of both 'manifest arbitrariness' and the failure to meet the 'reasonable classification test'.

Justice Chandrachud called section 377 an ‘anachronistic colonial rule’ and added that it had reduced a class of citizens to the margins. He said that non-recognition of the right to sexual orientation also leads to denial of privacy, a fundamental right recognised in Puttaswamy case<sup>32</sup>. Regarding gender identity, he noted that human sexuality cannot categorize individuals using a binary male/female construction. He remarked that the decriminalization of section 377 is only a necessary first step in the path to guarantee LGBTQ individuals their constitutional rights and that the constitution envisages much more.

Justice Nariman in his opinion analyzed the legislative history of Section 377 to conclude that since the rationale for Section 377, namely Victorian morality, “has long gone” there was no reason for the continuance of the law. He concluded his opinion by imposing an obligation on the Union of India to take all measures to publicize the judgment so as to eliminate the stigma faced by the LGBT community in society. He also directed government and police officials to be sensitized to the plight of the community.

Justice Malhotra affirmed that homosexuality is “not an aberration but a variation of sexuality”. She stated that the right to privacy does not only include the right to be left alone but also extends to “spatial and decisional privacy”. She concluded her opinion by stating that history owes an apology to members of the LGBT community and their families for the delay in providing redress for the ignominy and ostracism that they have suffered through the centuries so as to ensure favourable treatment for them.

This was a judgement which is against some societal principle but safeguarding individual rights. Even for a layman section 377 is still a question mark, wording of this section does not clearly explain what it was intended for or who it was targeted at. All that we are able to gather is that it made any voluntary act of “carnal intercourse against the order of nature” an offence punishable with up to 10 years imprisonment. But this section is decriminalized not only on the equality basis but to avoid the injustice which is happening to the people

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<sup>32</sup>Writ Petition (Civil) No. 494 of 2012

belonging to the LGBTQ community and it is important because they are also part of the society and also it is better to have different gender identity rather than criminal identity which is always happen due to stigmas upon them but still judgment is tool for social change, it may be unable to function as an effective measure for social acceptance.

The judgement came because of judicial review only which shows that in India judiciary has a wider scope of the doctrine of judicial review and due to undefined power of judicial review it often causes judicial overreach.

Homosexuality acceptance in India is not that much easy than US because of cultural difference, society difference and most importantly the mentality difference of people. There was a first judgement in 2003 which legalized homosexuality in US.

### **U.S. Supreme Court Case on homosexuality-**

#### **Lawrence v. Texas 539 U.S. 558 (2003)-**

- Case summary:
  - ✓ Lawrence and Garner were arrested for engaging in homosexual conduct at the home of John Geddes. Both men were convicted under the statute making it a crime to engage in sexual intercourse with another individual of the same sex.
  - ✓ Lawrence petitioned the United States Supreme Court, claiming that statute was unconstitutional and violated his 14th Amendment rights.
  - ✓ The Supreme Court held that intimate sexual conduct between consenting adults is a liberty interest protected under the 14th Amendment's Due Process Clause.
- Facts of this case:

Lawrence and Garner were engaging in sexual activity when an officer entered the home of Lawrence in response to a reported weapons disturbance. The officer arrested both Lawrence and Garner and held each in overnight custody. The two men were later charged in Texas by a Justice of the Peace.
- *Procedural History:*

Lawrence was convicted and exercised his right to a new trial. His convictions were affirmed. Lawrence then appealed to the Texas court of appeals. The court of appeals affirmed the decision and after petitioning the Supreme Court, certiorari was granted.

- *Issue and Holding:*

Is the right of consenting adults to engage in private sexual conduct, including homosexual activities, protected under the constitution?

*Yes.*

- *Rule of Law or Legal Principle Applied:*

The right of consenting adults to engage in sexual conduct in the privacy of their homes is protected by the Due Process Clause of the 14<sup>th</sup> Amendment's liberty interest. This right encompasses homosexual activities.

- *Judgment:*

Overruled, two consenting adults may engage in sexual activity in the privacy of their own home.

- *Reasoning:*

The Court in Bowers v. Hardwick<sup>33</sup>, upheld a statute in Georgia which prohibited consensual, private, sodomy amongst both hetero and homosexuals. The Bower's Court incorrectly framed the issue as whether homosexuals have a right to engage in sexual activity under the Constitution.

This Court held that a ruling stating the right is not protected, would essentially have the same consequence as determining whether or not homosexual relationships, in general, are lawful. This determination would intrude on the fundamental right of homosexuals to participate in familial relationships as well as intimate and personal relationships.

This Court held there is no historical precedent in America of laws directed at prohibiting distinct homosexual conduct. In addition, enforcing legal punish for consensual conduct would be very difficult.

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<sup>33</sup> 478 U.S. 168 (1986)

The Bower's Court was largely overstated when it relied on historical traditions in prohibiting homosexual activity and was likely based on religious and moral preferences of each Justice.

This Court noted that many states that have laws in place prohibiting homosexual conduct do not prosecute those who engage. The result is likely a reflection of the increasing social and legal acceptance of the right to privacy of consenting adults and homosexuals. The Court held that the rights of consenting adults to engage in homosexual activity are protected under the liberty interest of the substantive due process clause. Here, the sexual activity in question is protected by the Due Process Clause and Bowers is unconstitutional and overturned

Basically Lawrence case was the landmark case that decriminalized homosexual conduct and "keeps the government out of our bedrooms" so to speak. The right of consenting adults both homo and heterosexual to engage in sexual conduct was recognized as a constitutional right protected under the right to privacy. Through these cases judiciary actually done its work and shows that how much its power is growing within the purview of judicial review.

## **CRITICAL ANALYSIS OF JUDICIAL REVIEW IN INDIAN PERSPECTIVE**

The role of Judiciary has always been under attack, majorly from the legislative branch, which feels that the courts are crossing their power and have become an extra-constitutional lawmaking body. They argue that the job of the judiciary is to interpret laws and not to make them and the judiciary in many stances have overlooked the legislative authority.

It often happens that judiciary crosses its line although for me judiciary is supreme in India because it is not maker of the law but its interpreter which is wider than that of making of laws.

The duty of legislature is to make laws and its interpretation is the work of judiciary which actually is everything because once the laws are made they can be interpreted number of times as per the present era. The most important factor is that judicial review is for avoiding violation of constitution. It is a say that constitution is supreme but whenever judiciary give decisions like decriminalization of Section 377 of IPC and promoting homosexuality is only one sided because even after this judgement people did not accept gay marriage as a part of their culture and due to this people belonging to this community (LGBTQ) are facing trouble because now they are being pointed more than before.

This is my point of view that such judgements are judicial overreach because repeal of any provision is the function of legislature and not of judiciary. Decriminalization of homosexuality is seen in different views some were seen as a huge social transformation but I look it as increasing problems of homosexuals and society both because after the judgement society becomes more orthodox against them.

Not only the above judgement there are number of other judgements showing judicial overreach and tag it as judicial activism through judicial review doctrine. In October 2015, the Supreme Court of India struck down the *Constitution (Ninety-ninth Amendment) Act, 2014* along with the legislation passed in pursuance thereof namely *National Judicial Appointment Commission Act, 2014*. The case is popularly known as NJAC's case<sup>34</sup>. The decision not only violated the *doctrine of checks and balances*, but also the Constitution. The old collegiums system is to be operative again. Should such right to encroachment of power in legislative functions be vested with Judiciary under the head of Judicial Review? These questions suggest that there is a terrible need to recheck the principles and reconsider the idea of Judicial Review.

This power is not are given make Judiciary superior over other organs but to ensure a system of checks and balances between Judiciary-Legislature and Judiciary-Executive. It is not the purpose of judicial review to criticize legislative or executive actions, as the opposition is

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<sup>34</sup> Krishanadas Rajgopal , *SC Bench Strikes Down NJAC Act As 'Unconstitutional And Void'*, THE HINDU, May 23,2016.



expected to fulfil this function in a democratic polity. Judiciary in India has adopted doctrine of judicial restraint in order to limit the use of Judicial Review to restrain itself from striking down legislation unless they are obviously unconstitutional. It is a theory of judicial interpretation that encourages judges to limit the exercise of their own power. Judicial Review basically means review and striking down of the Law which violates the basic structure of the Constitution. Article 141 of Indian Constitution gives enforceability to Judgments of supreme-court and thereby that judgment qualifies to be law. As Separation of power is the basic structure of the constitution, a question arises here is whether such Judgment can be subject to comparison with constitution and can be deemed struck down if found inconsistent with constitution. If it does then the Constitutional Supremacy is still maintained in India or otherwise the judiciary is supreme.

There are numerous illustrations which show the bad facets of the Judicial Review and question India's approach to remove them. Judicial Review should go hand in hand with the written and democratic Constitution but its overreach has violated the Constitution more than its absence.

## **CONCLUSION**

To conclude this, let me say that the Judicial Review makes the Constitution legalistic. Doctrine of Judicial Review is very dynamic concept in a present scenario. In various countries Judiciary is acting as a guardian of the constitution by help of the doctrine of Judicial Review. It enables the Court to maintain harmony in the State. Judicial Review is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part. In India, courts are very strictly scrutinized the validity of law or any administrative actions if they inconsistent and illegal in nature.

The scope of judicial review in Administrative action is wider in the present scenario. Every organ must be within their limitation, is the spirit of judicial review. Parliament has authority to make law in India, but in USA courts evolving judicial legislation. Judicial review checks

the legislative power from delegating its essential functions and also sometimes discourages the legislature from enacting void and unconstitutional legislation. In India and US , there are various constitutional limitations implicitly and also explicitly, which incorporates limitations to the law making power of Legislature , such as legislature cannot go beyond its power to make law, it cannot make law against the Principles of Natural Justice. Judiciary doesn't have power to make laws, therefore there is also existence of Judicial Restraint. Court has also some limitations.

Court cannot anticipate a question of constitutionality in advance, court cannot declare void in a doubtful case. Court does not declare a law void merely on the grounds of sentiments and personal view. Judicial Review is developed on the ideological foundations of Constitutional Supremacy. However its inappropriate use and recent versions such as Judicial Interpretation has leded its failure. This concept was evolved to protect the basic natural and civil rights of the citizens from the tyranny of Legislature and limit the parliamentary sovereignty. The recent striking down of the various legislations and new trend of making laws by Supreme Court has left many debates endless.

When Judges start thinking they can solve all the problems in society and start performing legislative and executive functions (because the legislature and executive have in their perception failed in their duties), all kinds of problems are bound to arise. Judges can no doubt intervene in some extreme cases, but otherwise they neither have the expertise nor resources to solve major problems in society. Also, such encroachment by the judiciary into the domain of the legislature or executive will almost invariably have a strong reaction from politicians and others.