
IMPERATIVES OF JUDICIAL REVIEW IN INDIA

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ABSTRACT

Judicial review is a cornerstone of India's constitutional system and is an important mechanism for maintaining the rule of law and protecting fundamental rights. It is a significant part of India's constitutional democracy. This paper explores the imperative of judicial review in India and discusses its importance, scope and impact on governance and the constitution. This paper examines the need for judicial review in the Indian democratic system and its role in safeguarding the Constitution and protecting the rights of citizens from arbitrary and capricious authorities. Suppose we see today's scenario of apex courts in that case, they are just delaying crucial matters of the country which are against our constitutional morality, ethics and principles by not using their eminent power to review the unconstitutional laws brought up by the legislature and executive. The courts had in the past done enough worst interpretation by not performing judicial review when there is a need for judicial review by courts. To assess the impact and challenges of judicial review in India, we must examine the judiciary's role and the current socio-political environment in keeping judicial review at the core of the Constitution. The objective of this study is to question the importance of judicial review in the Indian context, providing a comprehensive understanding of the mechanisms by which judicial review contributes to the balance of power and the rule of law.

Keywords: Judicial Review, principles, interpretation, governance, justice.

Introduction

The judiciary as a third pillar of democracy is responsible for working as a guardian of the Indian constitution by enhancing democratic and liberal values, acting as a competent authority to protect people's rights of the poor, minorities, disadvantaged groups, and marginalised section of society because if we see somehow India follows the checks and balances theory where judiciary keeps an eye on other organ of government. Courts are formed to provide the country's law with a prospective effect by interpreting and constructing the law based on legal principles. If there are no checks and balances or no courts in the country then the state becomes tyrannical, by having a judiciary in a democratic country the statutes have true shapes and colours for instance we can't study contract law without case laws. From the last 76 years of independence, the judiciary has acted as a protector or guardian of the constitution and upholds the rule of law in many cases but in past years the courts have performed egregious interpretation of the constitution by not performing their main duty to decide the case based on legal principle and review the laws made by the legislature and executive authority which are unconstitutional. The court is now abdicating its responsibility and repeatedly deferring its questions to parliament although they know how the legislature is enacting several unconstitutional laws.

In this study I will proceed as follows: first I will define the concept and origin, then emphasise the nature of judicial review in an independent judiciary, provide a deep insight into phases of the Indian judiciary, a critical analysis and finally a conclusion.

Concept and origin of judicial review

Judicial review is the power of the Supreme Court and High Court under articles 32 and 226 of the Constitution of India to scrutinize or examine the actions of legislative and executive both courts hold wide power to perform the review. This approach ensures that these governing bodies follow the law and operate within the limits of their jurisdiction¹. This concept holds

¹ Mohd Faiz Khan and Syed Umam Fatima Hasan, *Doctrine of Judicial Review in Indian Constitution* IJLSI 83, (2020).

an eminent position in India's democracy as we have independence of the judiciary and a well-organised judicial structure in our country. By performing this duty the third organ acts as the guardian of the Indian constitution. There are three organs of government 1. Legislature: who makes the law 2. Executive: who implements the law and 3. Judiciary: who interprets the law and is responsible for checking the arbitrariness of the law, these obligations evolved from the doctrine of separation of power which was propounded by the eminent French political philosopher Montesquieu in his book *De l'esprit des Lois* (1748; the Spirit of Laws) it refers to the distribution of power into governmental organs with separate powers and responsibilities the main objective of this doctrine is to keep checks and balances where each branch would check the actions of other branch. According to him the main belief behind this principle is that if all the powers were given in one hand then there would be arbitrariness of law there should be limitations and restrictions for each organ, although in India, this doctrine is not strictly followed however checks and balances system is followed. In the USA the doctrine is strictly followed, the roots of judicial review came from the United States of America where for the first time judicial review was exercised in the case of *Marbury v. Madison*,² by John Marshall the then Chief Justice of USA. He observed that the Constitution is Supreme and it is duty of the court to declare what the law is. This is of very essence of judicial duty. Why otherwise does it (Constitution) direct the judges to take an oath to support it?

Nature of judicial review in an independent judiciary

India's democracy is based on the rule of law which is an essential component of judicial review where the judiciary is independent which means judges have the sole authority to perform their functions without being influenced by any, be it political pressure, executive interference or other organisations, the objective principles of the independence of the judiciary is to decide a dispute in according to law by interpreting uninfluenced by any variables. In a democratic form of government, the judiciary plays a pivotal role while exercising its functions for the country's people, ensuring accountability and transparency to enhance judicial

² *Marbury v. Madison*, (1803) 5 US 137.

practicality and integrity. The term judicial review is nowhere mentioned in the constitution but the power of judicial review is expressly provided under Article 13 of the Constitution of India however, instances were seen where the third pillar of democracy was restricted and politically influenced judicial system. It was in *L. Chandra Kumar v Union of India*,³ as there was light on the short inclusive definition of the Judicial Review where the Hon'ble Supreme Court stated that, "Definition of judicial review in the American context is, subject to a few modifications, equally applicable to the concept as it is understood in Indian Constitutional Law. Broadly speaking, judicial review in India comprises three aspects: judicial review of legislative action, judicial review of judicial decisions and judicial review of administration.

The Hon'ble Supreme Court of India expressly elaborated the Judicial Review over legislative actions in *L. Chandra Kumar* case, "The constitutional Safeguards which ensure the independence of the Superior Judiciary are not available to the judges of the subordinate judiciary or to those tribunals created by ordinary legislations. Consequently, judges of the latter category can never be considered full and effective substitutes for the superior judiciary in discharging the function of constitutional interpretation. Therefore, the power of judicial review over legislative actions vested in High Courts under Art 226 and in Supreme Court under Art 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure. The power of the Supreme Court and the High Courts to check the constitutional validity of legislation can never be excluded. The remedy for the tribunals was to appeal under Article 136 of the Constitution through a Special Leave Petition. In a democratic country, the judiciary stands as a ray of hope by ensuring the principles of constitutionalism as India is a diversified country where the people of every culture live together with different religions by having different rituals and languages so we can analyse how society changes with morality in pursuit of all these factors the judiciary should stand by law by applying the constitutional morality. As Chief Justice of India DY Chandrachud had spoken in Hindustan Times Leadership Summit 2023 (4th November) that judges should decide a case by constitutional morality not by popular morality as our constitution was designed not for people as they were, but what they ought to be. We can see in many leading cases how

³ *L. Chandrakumar v. UOI*, (1997) SC 1125.

the Supreme Court decide the case based on constitutional morality in many instances such as *SP Gupta v. Union of India*⁴, *Naz Foundation v. Government of NCT of Delhi*⁵, *NCT of Delhi v. Union of India*⁶, *Navtej Singh Johar v. Union of India*⁷, *Joseph Shine v. Union of India*⁸, *Indian Young Lawyers Association & Ors v. The State of Kerala & Ors*⁹.

First Phase

It's been 76 years since India gained independence in the initial years the Supreme Court only performed textualist interpretation which means strictly follows the plain meaning of the text used in the Constitution was adopted by the Supreme Court for the first time in the case *A.K. Gopalan v. State of Madras*¹⁰ this case is about the constitutionality of prevention detention

laws were challenged, the court interpreted fundamental rights part III of the constitution. The petitioner contended that the prevention detention laws under which he was detained were violating his Article 19 (right to freedom), Article 21 (right to life) and Article 22 (the protection against arbitrary arrest and detention). Chief Justice Kania, representing the majority took a straight forward approach, interpreting the constitutional text based on its plain meaning. He asserted that the expression procedure established by law must mean, as per its ordinary interpretation. On the second question, he concluded that Art 19, 21 & 22 dealt with entirely different subjects.

In dissent opinion by Justice S. Fazl Ali and Patanjali Sastri support towards structuralism, emphasizing that the arrangements of Part III of the Constitution suggested some overlap between Art 19, 21 & 22. The Supreme Court in his judgement laid down the validity of preventive detention laws and said that these three articles formed a different subject matter and were to be read as separate.

⁴ *SP Gupta v. Union of India*, (1982) SC 149.

⁵ *Naz Foundation v. Government of NCT of Delhi*, (2009) DLT 277.

⁶ *NCT of Delhi v. Union of India*, (2018) SC 1029.

⁷ *Navtej Singh Johar v. Union of India*, (2017) 9 SCC 1.

⁸ *Joseph Shine v. Union of India*, (2019) 3 SCC 39.

⁹ *Indian Young Lawyers Association & Ors v. The State of Kerala & Ors*, (2017) 10 SCC 689.

¹⁰ *A.K. Gopalan v. State of Madras*, (1950) SC 27.

The same question about parliament's amending power was also raised in the cases *Shankari Prasad Deo v. Union of India*¹¹ and *Sajjan Singh v. State of Rajasthan*¹², the court adopted in both the cases textualist approach and held that parliament can amend any part of the constitution there is no limitation in its amending power, also in *Golak Nath v. State of Punjab*¹³ 1967, the judges concluded that textualism was the greatest approach.

During that period the most controversial question was raised whether there are any limitations on parliament's amending power of the constitution, specifically part III fundamental rights. I had mentioned earlier that courts were interpreting by applying textualist interpretation they were reading the Constitution as a whole, so parliaments had no such limitation they could amend any part of the Constitution.

Second Phase

In the second phase of the Indian judiciary, the Supreme Court explored other methods of interpretation that went beyond the textualist interpretation, the shift from textualism to structuralism was seen in the leading case of the basic structure i.e. *Kesavananda Bharati v. State of Kerala*¹⁴ in this case Supreme court applied for judicial review and establish the concept of basic structure where a tussle between the Supreme court and parliament was seen for the validity of Land Reforms Act, a thirteen-judge bench was seated, and the court was once again tasked with the scope of amending power of parliament's power to amend the constitution. The Supreme Court by a narrow majority of 7:6 held that Art 368 of the Indian Constitution did not grant the power to parliament to amend the basic structure of the Constitution, this case overruled the *Golaknath* case¹⁵. Eleven separate opinions were delivered the majority of judges unanimously held that Parliament could amend any provision including fundamental rights without destroying the basic structure of the Constitution. In *Raj Narain v. Indira Gandhi*,¹⁶ the Supreme Court officially said that the Judicial Review is integral

¹¹ *Shankari Prasad Deo v. Union of India*, AIR 1951 SC 458.

¹² *Sajjan Singh v. State of Rajasthan*, (1965) 1 SCR 933.

¹³ *Golak Nath v. State of Punjab*, (1967) 2 SCR 762.

¹⁴ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

¹⁵ *Golak Nath v. State of Punjab*, (1967) 2 SCR 762.

¹⁶ *Raj Narain v. Indira Gandhi*, (1975) 2 SCC 159.

to the Basic Structure doctrine and cannot be removed by any amendment. While in the *Minerva Mills Case*, the Supreme Court observed that “the Constitution has created an independent judiciary which is vested with the power of judicial review to determine the legality of administrative actions and the validity of legislation. It is the sole duty of the judiciary under the Constitution to keep different organs of the state within the limits of the power conferred upon them by the Constitution by exercising power of judicial review as sentinel of *qui vie*.”

In *Maneka Gandhi v. UOI*,¹⁷ the Supreme Court rejected its textualist interpretation that was seen in *Gopalan’s case* and established a structuralist approach. The Court decided that Fundamental rights are a cohesive bill of rights rather than a miscellaneous grouping. Article 21, was gradually interpreted to include a wide range of rights such as clean air, speedy trial, and free legal aid. This paved the way for the Supreme Court to play unprecedentedly in the nation's governance. During this phase, the Supreme Court decided with the cases dealing with the appointments to the higher judiciary: *S.P Gupta v. UOI*,¹⁸ *Supreme Court Advocates on Record Association v. Union of India*¹⁹

Third phase

In the third phase, the interpretation approach by the Supreme Court becomes more outcome-oriented than ever before, frequently omitting a thorough examination of the rights involved in the cases it deals with. This progress was seen because of two factors 1) the court structure, evolving from eight judges to a strength of 31 judges which led to the formation of smaller panels of two or three judges. Irrespective of Art 145(3) deals with requiring substantial questions of law to be decided by constitutional benches, this requirement was frequently ignored in practice. 2) the court began deciding cases based on certain conceptions of its role whether as a social transformer, sentinel of democracy or protector of the market economy. In the third phase if we scrutinise how the judiciary as an interpreter of the Constitution makes

¹⁷ *Maneka Gandhi v. UOI*, (1978) SCR 2 621.

¹⁸ *S.P Gupta v. UOI*, (1982) SC 149.

¹⁹ *Supreme Court Advocates on Record Association v. UOI*, 1993 2 SCR 659.

laws because the legislature failed to perform its functions that law will be binding on all courts within the territory of India under Art 141 explicitly mentioned in the Indian Constitution. The judiciary as an independent organ performed its judicial activism function to provide justice to the people, such cases are termed to be hard card cases which have only faith in the judiciary for instance *Vishaka v. State of Rajasthan*,²⁰ in this case, Supreme Court issued guidelines for the protection of women from sexual harassment at workplace because back then there was no laws for the protection of women for sexual harassment at workplace.

Third Judge's case *In re: Special Reference Case*²¹ 1 of 1998, In this case, the five-judge bench was seated in the Supreme Court on President KR Narayanan's reference under article 142(advisory jurisdiction) of the Indian Constitution expanded the Collegium to a five-member body comprising the CJI and four of his senior-most colleagues instead of two, as laid down by the verdict in the Second Judges Case. It was also held that even if two judges gave an adverse opinion, the CJI should not send the recommendation to the government.

In *I.R. Coelho v. State of Tamil Nadu*²² in this landmark judgement, the Supreme Court enhanced the doctrine of the basic structure of the Constitution. It held the significance of judicial review as a basic feature of the Constitution.

The rights of sexual minorities were also seen in this phase in how the judiciary deals with LGBTQ rights in a series of cases in the landmark judgement *Naz Foundation v. Union of India*,²³ a two-judge bench of the High Court was seated a notable decision was ruled in this case that consensual sexual intercourse between homosexual people is not a crime under section 377 of Indian Penal Code as it violates the fundamental rights art 14,15,19 & 21 provided under part III of the Constitution of India. The liberal approach was performed by the High Court of Delhi. In *Suresh Kumar Koushal & Anr. v. Naz Foundation & Ors.*²⁴ a division bench was seated in this case, the Supreme Court overruled the judgement of the High Court

²⁰ *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011.

²¹ *In re: Special Reference Case*, AIR 1999 SC 1.

²² *IR Coelho v. State of Tamil Nadu*, (1999) 7 SCC 580.

²³ *Naz Foundation v. Union of India*, (2009) DLT 277

²⁴ *Suresh Kumar Koushal & Anr. v. Naz Foundation & Ors.*, (2014) 1 SCC 1.

of Naz Foundation case and re-criminalised homosexuality and held that section 377 of IPC is not violative of fundamental rights.

Later in *National Legal Services Authority v. Union of India*,²⁵ the question was whether the right to equality required state recognition of hijras (broadly, Indian male-to-female transgender groups) and transgenders as a third gender for public health, welfare, reservation in education and employment etc. In this case, a division bench was seated; they used different methods to conclude that the Constitution supports recognizing a third gender. J. Radhakrishnan focused on the text of part III, pointing out they used gender-neutral terms like person or citizen applying equality to transgender individuals. He also rejected the ideas, expressed in *Koushal's* case, that fundamental rights have minimal importance. On the other hand, J. Sikri took a dynamic and practical approach. He argued that the Constitution should prompt changes in societal attitudes by mandating the acknowledgement of transgender as a distinct category. In his opinion, the Constitution is a living entity that responds to societal realities.

This phase can be described as Panchayati eclecticism where different benches applied distinct approaches by examining the social issues, following precedent, and enhancing fairness.

Fourth Phase

The fourth phase of the judiciary is outlining the purpose of the constitution. It started in 2014 when a new government, the Bharatiya Janata Party, came to power and is still ongoing. In the initial years, the judiciary had performed well by protecting the basic structure of the Constitution, performing the judicial review, ruling on law and deciding the cases based on legal principles. Back then, a body was set up by parliament for replacing the collegium system of judiciary by 99th constitutional amendment National Judicial Appointment Commission, which recommended the appointment of Chief Justices, Supreme Court judges, and High Court judges by having transparency and accountability. Then this amendment was challenged in Supreme Court by various petitions filed by Supreme Court on Record Association and several

²⁵ *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438.

persons in the case *Supreme Court Advocates on Record Association v. Union of India*²⁶ 2015 this case is also known as fourth judge case where the Constitution bench was seated by 4:1 majority upheld the collegium system and struck down the NJAC 99th constitutional amendment and a statute enacted to change the judicial appointment process, the court declared the amendment unconstitutional for violating the basic structure of Constitution that is independence of the judiciary, here Supreme Court also referred to drafting assembly debates to uphold the judiciary as independent. In *Navtej Singh Johar v. Union of India*²⁷ 2018 a constitutional bench of five judges was seated they overruled the decision of *Suresh Kumar Koushal* judgement and all the five judges unanimously struck down section 377 of the Indian Penal Code as it is violative of Art 14, 15, 19 and 21 of the Constitution, and they decriminalise consensual homosexual relations between adults. In these two landmark judgements, the Supreme Court played a pivotal role by enhancing the independent judiciary and developing a progressive society by giving rights to sexual minorities class.

Over the past 10 years if we critically examine the Indian judiciary then it has not performed well even lawyers, former judges, and legal scholars are publicly making statements about the courts that they are not doing well in upholding the rule of law and protecting citizens rights today in end number of cases and issues we can see how the courts are ignoring its set precedents in today's era, the independence of the judiciary is no longer independent.

Law is becoming an instrument of politics due to unconstitutional enactments by the parliament which are apparently destroying the basic structure doctrine, violating constitutional morality, ethics and principles. As we can see by scrutinising new criminal laws passed by the union government in 2023 they were introduced in Lok Sabha 2023 that aimed to replace or repeal the Indian Penal Code, 1860, Code of Criminal Procedure 1973, and the Indian Evidence Act, 1872. In Parliament's winter session, three bills namely the *Bharatiya Nyaya (Second) Sanhita*, 2023 ("BNS"), *Bharatiya Sakshya (Second) Bill*, 2023 ("BSB"), and *Bharatiya Nagarik Suraksha (Second) Sanhita*, 2023 ("BNSS") that had been passed in the Lok Sabha on

²⁶ *Supreme Court Advocates on Record Association v. UOI*, (1993) 2 SCR 659.

²⁷ *Navtej Singh Johar v. Union of India*, (2017) 9 SCC 1.

December 12, 2023, and in Rajya Sabha on December 20, 2023. The bills received the President's assent on December 25, 2023. These bills were passed without having opposition presented in Parliament as they were suspended by Home Minister Amit Shah for breaching the security of the Lok Sabha chamber by protestors, by suspending the opposition the majority government hurriedly passed these three new criminal laws bills and also many other major bills without following due process, no opposition views were there, no public participation without any debate and discussion, now we can see how the government uses the law as an instrument of politics in a democratic country like India. Many significant changes were made in these bills briefly I will outline the laws that are explicitly pointless, in The Bhartiya Nagarik Suraksha (second) Sanhita Act, 2023 which replaced The Code of Criminal Procedure 1973 the act extended the duration of police custody surpassing the initial 15 days up to 90 days which will surely result in custodial torture in The Bhartiya Nyaya (Second) Sanhita Act, 2023 which replaces the Indian Penal Code 1860 the word terrorism was introduced in this act despite having separate terrorism act i.e. UAPA (Unlawful Activities Prevention Act) 1967. One such instance is the crime of "causing death by rash and negligent driving of a vehicle, not amounting to culpable homicide," which carries a ten-year enhanced sentence if the driver neglects to notify the police or a magistrate within a reasonable amount of time following the incident. Truck drivers have protested²⁸ this specific hit-and-run rule nationwide, including through state bandhs, forcing the union administration to acquiesce to their demand that the new provision be enforced only after consultation. Although the Act's punitive provisions continue to uphold the antiquated and mediaeval notion of severe punishment, it has also instituted a new punishment of community service in the absence of public debate or participation.

Critical Analysis

Waldron commences in his work²⁹ against judicial supremacy on how a country can work without exercising judicial review and should rely on democratic institutions such as the

²⁸ CITIZENS FOR JUSTICE AND PEACE, <https://cjp.org.in/2023-indias-bad-laws-what-a-weaponised-state-means-for-individual-freedoms-and-indigenous-rights/> (last visited July 2, 2024).

²⁹ Jeremy Waldron, *The Core of the Case Against Judicial Review*, 6 YLJ 1346 (2006).

legislature. His four conditions are based on the constitutional and political culture of the country he explained four assumptions where there is no need for judicial review if those assumptions are fulfilled.

1. Democratic Institutions in reasonably good working order: Jeremy Waldron says democratic institutions are strong as the people elect them by having universal adult suffrage where elections are held on a fair and regular basis. Hence, people should rely on the legislature, it is a large deliberative body that handles different issues of justice and social policy which elaborates and is responsible for law-making procedures. Therefore, people hope for a legislature where representatives are elected by the choices of citizens of a country and not by the unelected judicial bodies. His main contention was that in democratic institutions which are in reasonably good working order, there is no need for judicial review due to having a strong initial structure.

If we examine this assumption of democratic institutions in the Indian context presently the assumption fails as we can see in this contemporary era the laws made by the legislature are prejudiced, biased and unconstitutional for instance the Citizenship Amendment Act, 2019, explicitly violates the secular principles of the constitution and discriminated based on religion. Various draconian laws like the UAPA and PMLA have been enacted by the legislature which are prone to misuse. The constitutionality of various provisions of the PMLA was challenged before the Supreme Court because the conditions for bail were disproportionately stringent, the power conferred on the ED to issue summons, record statements, make arrests, and search and seize property was wide and open to misuse, and that there was a total lack of procedural safeguards.³⁰ The main objective of the Unlawful Activities (Prevention) Act was to make powers available for dealing with activities directed against the integrity and sovereignty of India. UAPA has one of the worst records for prosecution success. According to a PUCL report in 2022, less than 3 per cent of arrests made under the UAPA resulted in convictions between

³⁰ Amit Anand Tiwari, *Glaring flaws transform PMLA into deadly arsenal against fundamental rights*, D.H., Mar. 31, 2024, <https://www.deccanherald.com/india/glaring-flaws-transform-pmla-into-deadly-arsenal-against-fundamental-rights-2958645> (last visited June 30, 2024).

2015 and 2020.³¹ Only 1,080 of the 4,690 people detained under the UAPA between 2018 and 2020 received bail, according to the report.³² Unlike TADA and POTA, UAPA has never been constitutionally reviewed. Its repeated abuse is a blot on our democracy. In a ruling, the Apex court held that in cases of UAPA bail is an exception and jail is a rule. This violates the basic criminal law rule which is bail is a rule and jail is an exception.³³

2. Judicial institutions: According to him judiciary should uphold the rule of law and it is far away from political influence. This is not true in the Indian scenario as the judiciary's role is not only upholding the rule of law but also interpreting the law. In India, judicial review is broad in scope and deals with various issues. The Supreme Court has the power of Judicial Review in various ways, including when there is a conflict between the Centre and States, or when there is a violation of the jurisdiction exercised by the Legislature and Executive. Most importantly, the Supreme Court is the guardian of Fundamental Rights. It protects the fundamental rights of Indian citizens, through issuing various writs provided under Article 32. No doubt judicial review is very important and in many notable cases,³⁴ it was used by the judiciary wisely. But today the decision of the judiciary can be politically influenced³⁵ and a decision can be changed with political power.³⁶

The pre-2014 apex court was not hesitant in going against the Central executive in matters involving high political stakes. This was evident in the 2G license cancellation cases³⁷ and coal scam cases. In the coal-gate case, the court passed several oral remarks including the now famous “CBI is a caged parrot” remark, badly stinging the government.³⁸ The interventions

³¹PUCL Reports, <https://pucl.org/manage-reports/uapa-criminalising-dissent-and-state-terror-study-of-uapa-abuse-in-india-2009-2022/> (last visited June 28, 2024).

³²*Ibid.*

³³ Gulwinder Singh v. State of Punjab, (2024) 2 SCR 134.

³⁴ Keshavananda Bharati v. State of Kerala, (1973), Indira Gandhi v. Raj Narain, (1975), Maneka Gandhi v. Union India, (1978), Vishakha v. State of Rajasthan, (1997), Union of India v. Navtej Singh Johar, (2018).

³⁵ ADM Jabalpur v. Shivkant Shukla, AIR (1976) SC 1207, Mohd Ahmad Khan v. Shah Bano Begum, (1985) 3 SCR 844.

³⁶ Omar Rashid, Babri masjid demolition case TW, Jan 21, 2024, <https://thewire.in/communalism/the-babri-masjid-demolition-went-unpunished-and-the-fight-for-justice-died> (last visited June 29, 2024).

³⁷ Subramanian Swamy v. A Raja, (2012) 11 S CR 873.

³⁸ TNN, CBI a caged parrot heart of coalgate report changed: Supreme Court TOI, May 08, 2013 <https://timesofindia.indiatimes.com/india/cbi-a-caged-parrot-heart-of-coalgate-report-changed-supreme-court/articleshow/19952260.cms> (last visited June 15, 2024).

of the court drew a lot of cheers from the media and public, which hailed the judiciary as a crusader against corruption and misgovernance.

But post-2014, the SC presented a meeker version when it came to dealing with cases which could prick the political interests of the ruling party. The verdicts in politically charged cases such as Sahara-Birla³⁹, Bhima-Koregaon⁴⁰, Rafale⁴¹, Aadhaar⁴² etc have invited a lot of criticism that when it comes to taking on the system, the Court acts hesitant. Moreover, recently the centre had filed an application to modify the 2G spectrum case.⁴³

3. Commitment to rights: According to him members of society are committed to individual and minority rights. And there is deep respect for both individual and minority rights. Sadly, this is not true in our country as almost every day there is a case of mob lynching⁴⁴, hate speech⁴⁵ and hate crimes⁴⁶ against minority communities. Regarding the concerns of minority communities apparently, we can see how the constitutional courts of the country are following judicial deference in a marriage equality case⁴⁷ where the community had somehow hope lying to the Supreme Court decision but here court abdicated its responsibility and deferred the⁴⁷ question of queer couples' marriage to Parliament.

4. Disagreement about rights: It should be settled by its democratic institutions, particularly the legislature. The Constitution of India under Art. 32 gives citizens the right to approach the Supreme Court for constitutional remedies when their fundamental rights are violated. In a country like India with a population of more than 1.44 billion people, it is impossible to

³⁹ Rajeshwar Singh v. Subrata Roy Sahara & Ors., AIR (2014) SC 3241.

⁴⁰ Romila Thapar v. UOI, (2018) 10 SCC 753.

⁴¹ Manoharl Lal Sharma v. Narendra Damodardas Modi & Ors., AIR (2018) SC 1376.

⁴² Justice K.S. Puttaswamy (Retd) v. UOI, (2017) 10 SCC 1.

⁴³ Ajoy Sinha Karpuram, Why Centre filed an application to modify 2G spectrum scam judgement EX, Apr. 25, 2024 <https://indianexpress.com/article/explained/explained-law/application-modify-2g-spectrum-scam-judgement-9288254/> (last visited July 01, 2024).

⁴⁴ Tanvi Yadav & Nagendra Ambedkar Sole, Mob Lynching in India: Sine Qua Non of Legal intervention, 4 ALPPR 298, (2019).

⁴⁵ 75% of hate speech events in BJP-ruled States: Report, TH, Feb. 26, 2024 <https://www.thehindu.com/news/national/75-of-hate-speech-events-in-bjp-ruled-states-report/article67888978.ece> (last visited July 01, 2024).

⁴⁶ Parth MN, Hate crimes and hate speech are on the rise in India meet the trackers LAT, Oct. 30, 2023, <https://www.latimes.com/world-nation/story/2023-10-30/india-anti-muslim-hate-crimes-speech-rising> (last visited June 30, 2024).

⁴⁷ Supriyo @ Supriya Chakraborty & Anr. v. Union of India, (2023) INSC 920.

approach the legislature every time, if there is any rights disagreement between people.

At present, in the Indian context, all four conditions are failing as I have mentioned above in several instances.

Waldron's paper is against Ronald Dworkin's paper on how to interpret hard cases⁴⁸ as Dworkin supported judicial authorities for deciding cases based on legal principles his approach asserted that courts reflected the principles of justice, fairness and due process by enhancing the democratic standards of a country. The courts should decide cases based on moral principles and rules, the judges must act in a legislative capacity. The judges should decide the hard cases by taking into account the underlying principles that justify those legal rules, they should scrutinise the principles closely on which the legal rule has been made must be looked at before deciding on the hard cases. In hard cases where the law is not clear, the judges need to go beyond the text because there is no law in that case so judges have to decide by applying policy and principles their discretion will decide the case. According to him, the integrity principle is mandated to be applied in judicial practice by the precept of intention and this intention must be sincere while applied in legal interpretation for setting goals of legal principles.

This process consists of three distinct stages. First, the pre-interpretative stage involves identifying the fundamental rules and standards. Second, the interpretative stage entails formulating a general justification, where various meanings and purposes are analyzed to determine the best fit and appeal. Third, the post-interpretative stage involves prioritizing the relevant rules and standards and revising previously held notions and practices to align more closely with the new interpretation. In the pre-interpretative stage, there is a straightforward recognition and consensus on basic practices without proposing specific criteria. During the interpretative stage, there is a dynamic movement between identifying the most fitting and appealing interpretations and engaging in debates over the different meanings and purposes. In the post-interpretative stage, prior notions and practices are reassessed and modified to more accurately reflect the newly established interpretation.

⁴⁸ Ronald Dworkin, *Hard Cases*, 88 HLR 1057 (1975).

He also explains the hypothetical judge (Hercules') role in his work, where he identifies Hercules judge as a super-judge with high skills in analysis, adjudication and deduction who would be using the principles in hard cases by interpreting the best theory of law as possible. Such analysis will evidently show that by having codified laws and rules at present but they are not fully competent to resolve the disputes then judges use their best theory for reaching a correct decision and providing justice.

Dworkin's theory suggests that judicial decisions are based on what the law requires. That means even if there is a statute, then the judicial decisions can be given based on interpretation as well as what the law requires in the current case. For instance, in the recent past Indian constitutional courts pronounced certain judgements which are binding on all subordinate courts and became precedent in *Joseph Shine v. Union of India*⁴⁹ where the Hon'ble Supreme Court held section 497 of the Indian Penal Code unconstitutional and struck down the same section as it violates Art 14, 15 and 21 of the Constitution. Despite, section 497 being a penal offence before this judgement, however, now it has become a set precedent and now section 497 is no longer an offence. In *Navtej Singh Johar v. Union of India*, the Hon'ble Supreme Court struck down section 377 of the Indian Penal Code which criminalises consensual sex between same-sex adults and held it unconstitutional as it was violative of Art 14, 15, 19 and 21 of the Constitution. Here, we can see how the courts applied the principles which I have described above while deciding a case.

Conclusion

Judicial review serves as an efficient deterrent to the abuse of power and fosters enhanced deliberation in Parliament. In the initial years, the Supreme Court was a robust institution where the court passed judgements and decided disputes without any influence and enhanced just, reasonableness and fairness in society but in today's contemporary era the most powerful court of the world, it is holding an independent position. In this paper every phase of judiciary is being discussed, how they are interpreting by applying various approaches indeed in many

⁴⁹ Joseph Shine v. Union of India, (2019) 3 SCC 39.

cases the courts are performing well in forming judicial review as a basic structure of Indian constitution but now the Constitutional courts are only following judicial deference, constitutional avoidance and are failing to consider the set precedents despite having a status of an independent institution as we can see in various instances such as unconstitutional amendments, LGBTQ rights, minority rights, social and economic rights. Our constitution is a binding legal document and not a political document which enhances democratic governance rule however today's NDA ruling party is authoritarian where courts are weak although independent judiciary is there. It's a high time for judges to understand their power and work according to the constitutional principles by ensuring transparency and accountability while performing a review.