

## ABHANDLUNGEN / ARTICLES

## A Case for Judicial Review of Legislative Process in India?

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**Abstract:** This paper explores the possibility of judicial review of legislative process (“JRLP”) in India. It draws on scholarship from other jurisdictions to outline a case in favour of JRLP in light of India’s particular context. It begins by critically analyzing the functioning of India’s Parliament, where we identify several fundamental weaknesses in the legislative process and demonstrate with examples how they are exploited to bypass debate and deliberation. The paper then considers several arguments advanced in favour of judicial review as a possible solution to weaknesses in the legislative process. In this regard, the paper distinguishes between two kinds of judicial review, referred to as “direct” and “indirect” JRLP. The paper considers the plausibility of employing direct and indirect JRLP in light of India’s constitutional provisions and existing doctrinal position, demonstrating that neither forms are necessarily barred, and have been employed in part. Finally, the paper outlines the case for and against the use of direct and indirect JRLP in the Indian context, and concludes by suggesting that these forms of judicial review may be a normatively desirable approach to remedying some of the fundamental weaknesses in India’s legislative process.

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### A. Introduction

This paper advances an argument in support of judicial review of legislative process in India. Drawing on a growing body of constitutional scholarship from other jurisdictions, we demonstrate how judicial review of legislative process would work under the Indian Constitution. We distinguish between two kinds of judicial review of legislative process - direct and indirect- and we show how both kinds can be used by the Indian judiciary in a manner that is consistent with existing judicial doctrine.

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This argument in favour of judicial review of legislative process is advanced keeping in mind India's specific context. We begin this paper by presenting the framework under which law-making takes place in India and an analysis of several major deficiencies in how Parliament enacts laws. This includes routine violations of constitutional provisions laying down the legislative process to be followed and a move toward a law-making process that is rushed, opaque and avoids debate on substantive issues. Despite this focus on India, we believe the argument advanced could be useful for discussions on judicial review of legislative process in other constitutional democracies where there exist fundamental deficiencies in the law-making process.<sup>1</sup>

The structure of this paper is as follows: Part B begins with a description of the structure and procedure followed by the Parliament of India. Thereafter, we put together the major deficiencies in the functioning of Parliament that have been identified by scholars over the years and analyse how these deficiencies play out through examples of how laws have recently been enacted. Our examples include the Finance Act, 2017 which introduced the electoral bonds scheme, the Jammu & Kashmir Reorganisation Act, 2019 and most recently the Produce Trade and Commerce (Promotion and Facilitation) Bill, 2020 and Farmers (Empowerment and Protection) Agreement on Price Assurance and Farm Services Bill, 2020 (collectively referred to as "the Farm laws"). We conclude Part B by analyzing how the law-making process in India deviates from the obligation upon the legislature in constitutional democracies.

In Part C, we discuss possible solutions to the problem of poor law-making and focus especially on the possibility of judicial review of the legislative process. Building on a growing body of scholarship from other jurisdictions, we lay out two approaches to judicial review of legislative process - direct and indirect. In Part D, we explain how both approaches can be applied in India keeping in mind the constitutional framework as well as judicial doctrine. Finally, in part E, we consider the normative arguments in favour of and against judicial review of legislative process in India and argue that judicial review of legislative process has the potential to improve the law-making process while also ensuring protection of fundamental rights.

## **B. Critical analysis of India's Parliament**

This Part of the paper is divided into four sections. In the first section, we provide an overview of the constitutional and legal framework establishing and governing the structure and procedure of Parliament in India. In the second section, we explain how the political executive can weaken and dilute deliberation in Parliament. In the third section, we provide examples of three recent laws that were passed by exploiting a combination of these general

1 Of course, the identification of fundamental deficiencies in the law-making process would be shaped by the legal and institutional framework under which legislative bodies operate.

weaknesses. In the final section we argue that the non-adherence to procedural rules and the absence of deliberation are a serious cause for concern in a constitutional democracy.

### *I. Overview of the structure and procedure of Parliament*

The Framers of the Indian Constitution chose a parliamentary system of government over presidential system of government.<sup>2</sup> In this respect, the framers were considerably influenced by Westminster model, which they felt functioned well.<sup>3</sup> The Parliament of India is dealt with in Part V of the Indian Constitution, that pertains to ‘The Union.’ Chapter III of Part V, titled ‘Parliament,’ ranges from Article 79 till 122. These 43 provisions deal with a broad range of issues and are further classified into ‘General’ provisions,<sup>4</sup> and provisions pertaining to ‘Officers of Parliament’<sup>5</sup>, ‘Conduct of Business’<sup>6</sup>, ‘Disqualification of Members’,<sup>7</sup> ‘Powers, Privileges and Immunities of Parliament and its Members’,<sup>8</sup> ‘Legislative Procedure’,<sup>9</sup> ‘Procedure in Financial Matters’<sup>10</sup> and ‘Procedure Generally.’<sup>11</sup>

The Indian Parliament consists of the President of India and two Houses, the Council of States (or the Rajya Sabha / Upper House) and the House of the People (or the Lok Sabha / Lower House).<sup>12</sup> The Lok Sabha is meant to consist of not more than 552 members; 530 members “chosen by direct election from territorial constituencies in the States”, and not more than 20 members “to represent the Union territories chosen in such manner as Parlia-

- 2 More accurately, it may be said that a majority of the framers were in favour of adopting parliamentary democracy. As one might expect from a body containing 389 individuals, some members of the Constituent Assembly disagreed with this view.
- 3 In the words of India’s Prime Minister, who was also a member of the Constituent Assembly: “We choose this system of parliamentary democracy deliberately; we choose it not only because, to some extent, we had always thought on these lines previously, but because we thought it was in keeping with our own old traditions also; naturally the old traditions, not as they were, but adjusted to the new conditions and new surroundings. We chose it also – let us give credit where credit is due – because we approved of its functioning in other countries, more especially the United Kingdom.” *Jawaharlal Nehru*, Lok Sabha Debates, March 28 1957, can be found in: *Jawaharlal Nehru’s Speeches: March 1953-August 1957*, Vol. 3, p. 155-156, available here: [http://ignca.gov.in/Asi\\_data/59309.pdf](http://ignca.gov.in/Asi_data/59309.pdf) (all online sources have been last accessed on Feb. 28 2021).
- 4 This includes Articles 79 to 88, Constitution of India.
- 5 This includes Articles 89 to 98.
- 6 This includes Articles 99 to 100.
- 7 This includes Articles 101 to 104.
- 8 This includes Articles 105 to 106.
- 9 This includes Articles 107 to 111.
- 10 This includes Articles 112 to 117.
- 11 This includes Articles 118 to 122.
- 12 See Article 79.

ment may for law provide”.<sup>13</sup> Unlike the Rajya Sabha, the Lok Sabha is subject to dissolution by the President.<sup>14</sup> The term of each Lok Sabha can extend up to five years,<sup>15</sup> assuming it is not dissolved before that.

The Rajya Sabha is meant to consist of 250 members; 12 nominated by the President and 238 members “elected by the elected members of the Legislative Assembly of the State(s) in accordance with the system of proportional representation by means of the single transferable vote.”<sup>16</sup> The Rajya Sabha is a permanent House that is not subject to dissolution. One third of the members of the Rajya Sabha are to retire every two years, giving each member a six-year term approximately.<sup>17</sup>

The Constitution provides certain rules of procedure in respect of the functioning of the two houses of Parliament. For instance Article 100 provides that the Constitution provides that, “all questions at any sitting of either House ... shall be determined by a majority of votes of the members present and voting”.<sup>18</sup> It further provides that the quorum required to constitute a meeting of either House of Parliament is only 10% of the total number of members of the House.<sup>19</sup> Article 105 recognises the powers and privileges “of the Houses of Parliament and of the members and committees thereof.” This provision clarifies that there shall be freedom of speech in Parliament,<sup>20</sup> and, pertinently, that “no member of Parliament shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any committee thereof ...”<sup>21</sup>

The Constitution prescribes the procedure to be followed in respect of ordinary bills as well as Money Bills. As per Article 107, ordinary bills can originate in any House of Parliament and is controlled by Article 108. Once a Bill is passed by both Houses, it shall be presented to the President, who “shall declare either that he assents to the Bill, or that he with-

13 See Article 81. The other two members may be persons from the “Anglo-Indian community” nominated by the President of India if (s)he is of the opinion that the community is not adequately represented (See Article 331).

14 See Article 85(2).

15 See Article 83(2).

16 See Article 80. The number of seats allocated to each State as per the principle of proportional representation is specified in the Fourth Schedule to the Constitution.

17 See Article 83(1).

18 See Article 100(1).

19 See Article 100(3). This provision states that the percentage for quorum may be increased by Parliament by way of ordinary legislation. This has not been done. Thus, the quorum to constitute a sitting of the Lok Sabha is 55 members.

20 See Article 105(1), which also notes that this freedom is “subject to the provisions of the Constitution and to the rules and standing orders regulating the procedure of Parliament.”

21 See Article 105(2).

holds assent therefrom.”<sup>22</sup> The power of the President to withhold assent is severely limited and can be effectively overridden by legislative majority.<sup>23</sup>

Article 110 provides an exhaustive definition of Money Bills. These are Bills that contain only provisions dealing with the imposition, abolition, remission, alteration or regulation of any tax, regulation of borrowing of money, custody and appropriation of funds out of the consolidated fund and matters incidental thereto.<sup>24</sup> A Money Bill can only be introduced on the recommendation of the Parliament and cannot be introduced in the Rajya Sabha. As per Article 109, the Rajya Sabha can only give the Lok Sabha its recommendations on a Money Bill which the Lok Sabha has the discretion to accept or reject.<sup>25</sup>

The Constitution also has a series of provisions under the heading, “Procedure Generally”, containing Articles 118 to 122. As per Article 118(1), each House of Parliament has the power to make rules regulating its procedure and conduct of its business, subject to the provisions of the Constitution. The Lok Sabha first drafted its Rules of Procedure and Conduct of Business in Lok Sabha in 1956, and has since been amended them from time to time.<sup>26</sup> Similarly, the Rajya Sabha first framed Rules under Article 118 in 1964.<sup>27</sup> Articles 121 and 122 are important in understanding the relationship between Parliament and the judiciary. Article 121 provides that “no discussion shall take place in Parliament with respect to the conduct of any judge in the discharge of his duties except upon a motion for presenting an address to the President in praying for the removal of the judge ...” Article 122 states that “the validity of any proceedings in Parliament shall not be called in question on the ground of any alleged irregularity of procedure.”<sup>28</sup>

Finally, it should be noted that in 1985 the Indian Constitution was amended to insert the Tenth Schedule, which is commonly referred to as the Anti Defection Law. Paragraph 2 of the Tenth Schedule provides that a member of a political party shall be disqualified if she

22 See Article 111.

23 Article 111 does not provide the grounds on which Presidential assent may be withheld, however, the Supreme Court has clarified that the powers of the President shall be exercised “in accordance with the advice of their Ministers save in a few well known exceptional circumstances.” *Shamsher Singh v. State of Punjab*, AIR 1974 SC 2192. For an early analysis of the limited power of the President to withhold assent under the Indian Constitution, see *Shreeram Chandra Dash*, The Power of Assent and the President’s Role in India, *The Indian Journal of Political Science* 22(4) (1961), p. 319.

24 See Article 110.

25 See Article 109.

26 The Preface of every edition of the Lok Sabha Rules of Procedure and Conduct of Business contains a summary of the developments and changes that have taken place over time. The latest Edition of the Lok Sabha Rules is the Fifteenth Edition, that was published in April 2014.

27 Since then, the Rules have been revised and modified on multiple occasions, based on Reports prepared by the Rules Committee. The Preface of every edition of the Rajya Sabha Rules of Procedure and Conduct of Business contains a summary of the developments and changes that have taken place over time.

28 The significance of these provisions is discussed in Parts D and E of this paper.

votes or abstains from voting or votes contrary to a whip or direction issued by the political party. While the Anti Defection Law was introduced to prevent the instability and loss of credibility caused due to horse-trading and frequent defections, it is overbroad and it is often invoked to demand that individual members vote on Bills according to the party interest. Several scholars have criticized this amendment for undermining the importance of legislators as representatives of their constituency.<sup>29</sup>

## II. Weaknesses in India's legislative process

Over time, certain pathologies have emerged in the way that the Legislature functions that allow a strong Political Executive to weaken the deliberative role of the Legislature. These include the reduction of duration of sessions of Parliament, frequent disruptions when the Parliament is in session, and the discretionary powers of the Speaker of the Lok Sabha and Chairman of the Rajya Sabha.

First, the number of days that Parliament sits through in a year have declined over time. It is pertinent to note that the power to summon Houses rests with the President. Article 85 of the Constitution provides “the President shall from time to time summon each House of Parliament to meet at such time and place as he thinks fit, but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session.” The President however, is bound to act on the advice of the Council of Ministers, that is the Political Executive.<sup>30</sup> A study conducted by PRS Legislative Research reveals that while in the 1960s, the Lok Sabha had around 120 sitting days each year on average, in the last ten years the average number of sitting days each year has come down to around 70.<sup>31</sup> The Rajya Sabha has almost consistently had fewer sitting days each year compared to the Lok Sabha.

Having 70 days, typically split into three sessions a year,<sup>32</sup> to frame national legislation for the largest democratic country in the world is seemingly insufficient in absolute terms.

29 *N.A. Palkhivala*, *Our Constitution Defaced and Defiled*, *The Indian Journal of Political Science* 67 (1974), p. 491-497; *A. Sethia*, *Where's the Party?: Towards a Constitutional Biography of Political Parties in India*, *Indian Law Review* 3(1) (2019), p. 1-32. Also see *Alok P Kumar*, ‘A defect called the Anti-Defection Law’ *Deccan Herald* (December 15, 2019). Available here: <<https://www.deccanherald.com/opinion/a-defect-called-the-anti-defection-law-785645.html>>. Kumar argues that the provisions have been “gamed to death by parties across the country” and this has resulted in a situation where “legislators no longer have the ability to take principled positions on party lines and stand up for their constituents.”

30 Article 74(2) of the Constitution.

31 *Trina Roy*, *If Parliament Doesn't Have the Power to Convene Itself, How Effective Can It Really Be?*, *The Wire* (22<sup>nd</sup> November, 2017), available at <<https://thewire.in/199003/parliament-doesnt-power-convene-effective-can-really/?fromNewsdog=1>>.

32 The Lok Sabha's three sessions are referred to as the Budget Session (February-May), the Monsoon Session (July-September) and the Winter Session (November-December). The Rajya Sabha's Budget Session is split into two sessions with a 3-week gap in between, so it has four sessions a year. See *Subhash Kashyap*, *Our Parliament*, Vasant Kunj 2004, p. 81.

It seems even fewer when one compares the number of average sitting days in other jurisdictions. Between 2006 and 2016, the UK's House of Commons held an average of 147 sitting days per year,<sup>33</sup> while the House of Lords held an average of 155 sitting days per year.<sup>34</sup> This is especially instructive as the Indian Parliament was modelled after the British Parliamentary system. Between 2006 and 2016, the US House of Representatives held an average of 143 sitting days each year, while the Senate held an average of 164 sitting days each year.<sup>35</sup>

Second, even during the short sessions when Parliament is convened, a significant percentage of its time is lost due to disruptions. The percentage of time spent discussing the contents and framing of laws has drastically reduced from India's early decades as an Independent republic. The Fifteenth Lok Sabha (2009-2014) lost 38% of its scheduled time to disruptions.<sup>36</sup> The Sixteenth, and most recent, Lok Sabha (2014-2019) saw a 16% loss in scheduled time to disruptions.<sup>37</sup> In the context of the Indian Parliament's short sessions and heavy workload, any time lost to disruptions is a major concern.<sup>38</sup> One of the most crucial losses caused by parliamentary disruptions is to the time allocated to for legislators to demand answers from the political executive with respect to the functioning of the Government, which is referred to as question hour. As per one study published this year, "the

- 33 Calculated on the basis of the data published on the UK Parliament's website, available at <<https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN04653>>. Notably, the UK Parliament has published data on the average number of sitting days for every year from 1945 till present. This too may be contrasted with the Indian Parliament, which does not publish data on sitting days.
- 34 Calculated on the basis of the data published on the UK Parliament's website, available at <<https://www.parliament.uk/business/publications/house-of-lords-publications/records-of-activities-and-membership/business-statistics/>>.
- 35 Calculated on the basis of the data available at <<https://www.thoughtco.com/average-number-of-legislative-days-3368250>>.
- 36 *M.R. Madhavan*, Parliament can take certain steps to reduce disruptions, *Economic Times* (14<sup>th</sup> February, 2014), available at <<https://economictimes.indiatimes.com/news/politics-and-nation/parliament-can-take-certain-steps-to-reduce-disruptions/articleshow/30363580.cms>>.
- 37 PRS, 'Functioning of the 16<sup>th</sup> Lok Sabha' (2019). Available at <<https://www.prsindia.org/parliamenttrack/vital-stats/functioning-16th-lok-sabha-2014-2019>>.
- 38 Disruptions in the Indian Parliament are a complex issue. Members of the legislative majority often blame the political opposition for disruptions, arguing that their use of them is undemocratic. On the other hand, parliamentary disruptions have been justified by the opposition "as a means to counter arrogance of the ruling dispensation" and "as a means to highlight matters of public interest." While it is difficult to identify who is to blame for parliamentary disruptions, the issue we are concerned with here is the consequence of such disruptions on the functioning of India's Parliament. For an overview of this complexity, see *Tarunabh Khaitan*, 'The real price of parliamentary obstruction' (2013) 642 *Seminar* 37. See also *Ajay Pandey*, The politics of parliamentary disruption, *LiveMint* (24<sup>th</sup> August, 2015), <<https://www.livemint.com/Opinion/Vf3anAosbfd9A6TJiYfHL/The-politics-of-parliamentary-disruption.html>>; *Anitya Katyal*, 'Disrupting Parliament is important': BJP's words from opposition days come back to haunt it, *Scroll* (24<sup>th</sup> December, 2014), available at <<https://scroll.in/article/696910/disrupting-parliament-is-important-bjps-words-from-opposition-days-come-back-to-haunt-it>>.

question hour in the last four Lok Sabhas, on average, functioned for 59% of their scheduled time”, while the “question hour in Rajya Sabha functioned for a proportion of 41% of its scheduled time during the last two Parliaments.”<sup>39</sup> Crucially, unlike Parliament’s other legislative activities, the loss of time allocated to the Question Hour is not made up through extended hours and extra sittings.<sup>40</sup> Thus, disruptions have a particularly adverse effect on the ability to hold the political executive accountable.<sup>41</sup>

An obvious, but politically significant consequence of parliamentary disruptions is that it leaves less time for legislators to debate. Some scholars have suggested that the majority is not troubled by such loss of time, as “disruption is increasingly being used by the Government as a reason to pass laws without debate.”<sup>42</sup> Others have understood the norm of parliamentary disruption as having implications at a much broader level. For instance, one detailed analysis on the issue of disruptions argues that “the high incidence of disruptions together with the lack of time spent on legislative business leads to the inescapable inference that Parliament today is primarily a forum for generating publicity on issues of public importance rather than debating them.”<sup>43</sup> We might look at disruptions as undemocratic forms of legislative protest or as ways for the legislative majority to escape accountability and pass laws without debate, or both.<sup>44</sup> Whichever way we look at the issue, it is clearly indicative of a dilution in the deliberative character of India’s Parliament. Needless to say,

- 39 PRS, ‘Functioning of the 16<sup>th</sup> Lok Sabha’ (2019). Available at <<https://www.prsindia.org/parliamenttrack/vital-stats/functioning-16th-lok-sabha-2014-2019>>.
- 40 *M.R. Madhavan*, Parliament, in: Daves Kapur, Pratap Mehta, Milan Vaishnav (eds.): *Rethinking India’s Public Institutions*, Oxford, 2017, p. 81.
- 41 *Kaushiki Sanyal*, Who Gains from Parliamentary Disruption, *Economic and Political Weekly* 50(35), (2015). Available at <<https://www.epw.in/node/145764/pdf>>.
- 42 *Sachin Dhawan & John Sebastian*, Governments must be held to account, *The Hindu Business Line* (13<sup>th</sup> January, 2017), available at <<https://www.thehindubusinessline.com/opinion/governments-must-be-held-to-account/article9557590.ece>>; Also, *Roshni Sinha & Prachee Mishra*, While in Session: A Few Bills Passed Amidst Disruptions, *The Wire* (26<sup>th</sup> December, 2018), available at <<https://thewire.in/government/while-in-session-a-few-bills-passed-amidst-disruptions>>.
- 43 *Yashaswini Mittal, Medha Srivastava, Kaushiki Sanyal & Arghya Sengupta* (Vidhi Center for Legal Policy), ‘Disruptions in the Indian Parliament’ (2016), p. 24. Available at <[https://static1.squarespace.com/static/551ea026e4b0adba21a8f9df/t/5790647ab8a79bc4629180ca/1469080933324/Report\\_Disruptions+in+the+Indian+Parliament\\_Vidhi.pdf](https://static1.squarespace.com/static/551ea026e4b0adba21a8f9df/t/5790647ab8a79bc4629180ca/1469080933324/Report_Disruptions+in+the+Indian+Parliament_Vidhi.pdf)>
- This characterization of legislative debate as an exercise in generating publicity is not restricted to the Indian legislature, and has even been used to describe legislatures known to be much more deliberative and productive than the Indian legislature. As Julius Cohen argues in the American context, citing Woodrow Wilson, “Congress during debate is Congress on public exhibition, not Congress doing work.” *Julius Cohen*, Hearing on a Bill: Legislative Folklore, *Minnesota Law Review* 37, (1952), p. 34, 35.
- 44 Admittedly, it may be argued that disruptions are actually good for Indian democracy, either because they help identify the significance of certain issues, or because the ripple-effect of such disruption is a wider debate on the issue ensues. Disruption may also be a useful strategy to highlight unfairness built into certain structures or processes. We are grateful to Siddharth Narrain for bringing this perspective to our attention. It is beyond the scope of this paper to analyse the overall ef-

this is particularly problematic for a legislative institution that is traditionally understood to be a “debating parliament”.<sup>45</sup>

The Lok Sabha is presided by a Speaker elected by Parliament.<sup>46</sup> Typically, the ruling party simply chooses the Speaker from among its members,<sup>47</sup> and the Speaker is not obligated to give up membership of that party. In the history of India’s Parliament, only one person has resigned from his party while assuming the role of the Speaker.<sup>48</sup> Notably, this is in stark contrast to the British system, where, upon appointment, the Speaker is required to give up membership of his/her political party, and thereon “remain separate from political issues.”<sup>49</sup> While the Speaker is expected to be neutral in India, the partisan functioning of the Speaker gives rise to various issues in Parliament.

The first is the Speaker’s discretionary power to admit motions on matters of public interest under Rule 184<sup>50</sup> and “short duration discussions of urgent public importance” under Rules 193 and 194<sup>51</sup> of the Lok Sabha Rules. Under the Lok Sabha Rules, the Speaker also decides how much time may be allotted while admitting such motions and what type of voting can take place in the House. As mentioned above, one of the reasons provided for the high number of disruptions in the Indian Parliament is that the opposition parties often feel that they have not been allowed to raise substantial points, even with respect to urgent

fact/value of parliamentary disruptions on Indian democracy. While we cannot speak with conviction on this broader point, we seek to limit our emphasis to the narrow point that parliamentary disruptions in India are indicative of the weakness of the deliberative tradition within the legislature.

- 45 For the distinction between a “working parliament” and a “debating parliament”, see *Philipp Dann*, ‘European Parliament and Executive Federalism: Approaching a Parliament in a Semi-Parliamentary Democracy’ (2003) 9(5) *European Law Journal*, p. 549.
- 46 Rule 7 of the Lok Sabha Rules.
- 47 *M.R. Madhavan* (2017), supra note 40, p. 79. Matters get more complicated in the case of a coalition party forming the legislative majority.
- 48 *Subhash Kashyap* (2001), supra note 32, p.111. This was N. Sanjiva Reddy who held the office of Speaker in the years 1967-1969.
- 49 <<https://www.parliament.uk/business/commons/the-speaker/the-role-of-the-speaker/role-of-the-speaker/>> (“Speakers must be politically impartial. Therefore, on election the new Speaker must resign from their political party and remain separate from political issues even in retirement. However, the Speaker will deal with their constituents’ problems like a normal MP.”).
- 50 Rule 184: “Save in so far as is otherwise provided in the Constitution or in these rules, no discussion of a matter of general public interest shall take place except on a motion *with the consent of the Speaker*.” (emphasis added).
- 51 Rule 193: “Any member desirous of raising discussion on a matter of urgent public importance may give notice in writing to the Secretary-General specifying clearly and precisely the matter to be raised...”

Rule 194(1): “If the Speaker is satisfied, after calling for such information from the member who has given notice and from the Minister as the Speaker may consider necessary, that the matter is urgent and is of sufficient importance to be raised in the House at an early date, the Speaker may admit notice.”.

issues.<sup>52</sup> The manner in which the Speaker's powers are exercised under these Rules can determine whether or not the political opposition gets time for issues that require Parliament's urgent attention, and accordingly, whether or not disruptions will take place. As Madhavan points out, "when there is an issue that could cause embarrassment to the government, opposition parties – which are pressing for a debate under a particular rule – are not allowed to do so."<sup>53</sup>

The second way in which the Speaker may substantially influence the legislative process is through exercise of her constitutionally recognised power to designate a Bill as a Money Bill. Money Bills are a special category of Bills under the Constitution, which provides that "a Money Bill shall not be introduced in the Council of States". Pertinently, Article 110(3) provides that "if any question arises whether a Bill is a Money Bill or not, the decision of the Speaker of the House of the People shall be final thereon." Of late, this provision has become a matter of great controversy, with legislators and others challenging the constitutionality of several laws on the ground that the Speaker of the House of the People incorrectly certified Bills as Money Bills,<sup>54</sup> to subvert the bicameral structure of the Indian Parliament.<sup>55</sup> The Government on the other hand argues that the Speaker's decision is not subject to judicial review. Recently, in the heavily contested case on the constitutionality of the AADHAAR Act,<sup>56</sup> the Supreme Court rendered a split verdict on whether or not the judiciary could review the Speaker's certification of a Money Bill. Thereafter, in *Rojer Mathew v. South Indian Bank Ltd.*,<sup>57</sup> the Supreme Court referred the question of the

52 *Ravi Seth*, A look at parliament's falling productivity and what can be done to make it work, Economic Times (24<sup>th</sup> March, 2018), available at <<https://economictimes.indiatimes.com/news/politics-and-nation/a-look-at-parliaments-falling-productivity-and-what-can-be-done-to-make-it-work/articleshow/63446061.cms>>.

53 *M.R. Madhavan* (2017), supra note 40, p. 78-79.

54 *Asheeta Regidi*, The passing of AADHAAR as a Money Bill and its immunity from judicial review needs a thorough re-examination by the Supreme Court, Firstpost (25<sup>th</sup> September, 2018), available at <<https://www.firstpost.com/india/the-passing-of-aadhaar-as-a-money-bill-and-its-immunity-from-judicial-review-needs-a-thorough-re-examination-by-the-supreme-court-4460247.html>>. Notably, the dissenting judgment by Justice Chandrachud in the AADHAAR case held that the judiciary could review the Speaker's decision with respect to Money Bills and that the AADHAAR Act had wrongly been designated as a Money Bill. See *K.S. Puttuswamy v. Union of India* (2019) 1 SCC 1.

55 *Tarunabh Khaitan*, Killing A Constitution With A Thousand Cuts: Executive Aggrandizement And Party-State Fusion In India, Law and Ethics of Human Rights 49 (Berlin 2020) 14(1); *Arvind Datar & Rahul Unnikrishnan*, Making a money bill of it, Indian Express (12<sup>th</sup> January, 2016), available at <<https://indianexpress.com/article/opinion/columns/making-a-money-bill-of-it/>>; *Suhrith Parthasarathy*, Trickeries of the money bill, The Hindu (11<sup>th</sup> April, 2019), available at <<https://www.thehindu.com/opinion/lead/trickeries-of-the-money-bill/article26799226.ece>>.

56 *K.S. Puttuswamy* (2019), supra note 54. The Act challenged in this case is discussed in the next section of this paper.

57 2019 SCC Online SC 1456. This issue will have a bearing on the electoral bonds case, discussed in the next section of this paper.

grounds of judicial review of Speaker's certification to a seven judge bench for final determination and is unlikely to see resolution any time soon.

Finally, the Speaker and Chairman of the Lok Sabha and Rajya Sabha respectively have the discretion to decide whether to refer bills to standing committees. 17 Standing Committees were instituted during the 10<sup>th</sup> Lok Sabha in 1991.<sup>58</sup> Standing Committees are particularly valuable to the process of law-making in India. Firstly, unlike the Houses of Parliament, they meet through the year. Secondly, they enable Members of Parliament to focus on areas where they have accumulated expertise, and to develop expertise in areas over time. Thirdly, and perhaps most importantly, since proceedings in Standing Committees are not televised, they are not dominated by grandstanding and disruptions, and thus they serve as environments where Members of Parliament can scrutinize and deliberate laws in detail. In fact, it is said that these Committees are one of the only forums where one can see deliberation and consensus building in action.<sup>59</sup> All of these functions have only become more important with the passage of time, as governance has become more complex.

While the first two decades after the creation of these Standing Committees showed encouraging signs regarding the dedication to scrutinise Bills in focused groups, the last few years have seen a massive decline in that trend. In the 14<sup>th</sup> Lok Sabha (2004-2009) and 15<sup>th</sup> Lok Sabha (2009-2014), 60% and 71% of the Bills introduced in Parliament were referred to Parliamentary Standing Committees.<sup>60</sup> However, in the 16<sup>th</sup> Lok Sabha (2014-2019), a mere 27% of Bills introduced were referred to Standing Committees by the Speaker.<sup>61</sup> The trend worsened during the first session of the 17<sup>th</sup> Lok Sabha, which took oath on 30<sup>th</sup> May, 2019. During this session, which went on between June to early August 2019, the Parliamentary Standing Committees were simply not constituted by the Houses of Parliament.<sup>62</sup>

58 Prior to this there existed only 3 subject committees that were under-staffed and covered a limited range of fields. See Preface to the Rules of Procedure and Conduct of Business in Lok Sabha, 15<sup>th</sup> Edition (Lok Sabha Secretariat, 2014).

59 *Sanat Kanwar*, The Importance of Parliamentary Committees (19<sup>th</sup> September, 2019), available at <<https://www.prsindia.org/theprsblog/importance-parliamentary-committees?page=18>>. Though some scholars are more sceptical of the value of Committees as sites for deliberation. See for example, *Arun Agarwal*, The Indian Parliament, in Devesh Kapur & Pratap Bhanu Mehta (eds.), *Public Institutions in India* (New Delhi, 2005), p. 93: "... although committees are significant actors in shaping legislation, their deliberations and recommendations are influenced to a far greater degree by the majority party and the government."

60 *Nibu Pullamvilavil*, How Parliamentary Committees Came to Assume a Central Role in Facilitating Legislation, *The Wire* (14<sup>th</sup> June, 2019), available at <<https://thewire.in/law/parliament-session-committees-lok-sabha>>.

61 <https://www.prsindia.org/parliamenttrack/vital-stats/functioning-16th-lok-sabha-2014-2019>.

62 *George K. Varghese*, Why are parliamentary committees necessary?, *The Hindu* (21<sup>st</sup> July, 2019), available at <<https://www.thehindu.com/news/national/whither-house-panels/article28621493.ecce>>.

In the absence of Standing Committees and given the short length of the session, several important bills escaped rigorous scrutiny.<sup>63</sup>

The above discussion shows the various ways in which a law drafted opaquely in a Ministry can be steamrolled through Parliament without the Parliament spending any time debating the measure.

### *III. Exploiting weaknesses in India's legislative processes*

In this section, we demonstrate, through recent examples, how the weaknesses mentioned above are exploited to pass laws without any transparency or deliberation. These weaknesses include lack of notice before introducing bills, limited time granted for debate, improper exercise of the Speaker's discretionary powers, certification of Money Bills to bypass the Upper House, questionable use of voice votes and refusal to refer Bills to Standing Committees.

#### 1. The Annual Budget and the Electoral Bonds Footnote

The scheme of electoral funding through electoral bonds was introduced in the budget speech of 2017. To introduce this scheme, a range of amendments were proposed to various existing statutes as a part of the Finance Bill, 2017. Usually, Finance Bills only suggest amendments to portions of the Income Tax Act and attendant changes so as to accommodate budget announcements such as the change of tax rates and the slabs used to determine the applicability of those rates.

However, the Finance Bill, 2017 proposed to amend several other acts for the purpose of electoral bonds. First, Section 31 of the Reserve Bank of India, 1931, which pertains to the exclusive authority of the Reserve Bank of India to issue promissory notes and other instruments was amended to allow the Central Government to authorise a particular bank (State Bank of India) to issue electoral bonds.<sup>64</sup> Under the scheme, donors can purchase bonds from the State Bank of India and hand over these bonds to political parties, and parties could encash these bonds with the State Bank of India. Second, an amendment was proposed to Section 29C of the Representation of the People Act, 1951, which obligates political parties to maintain records of their donations. Through the amendment, an exception was inserted exempting political parties from being required to disclose details about donors who donate through electoral bonds.<sup>65</sup> The Bill also proposed an amendment to Sec-

63 *Preetika Khanna*, First Session of 17<sup>th</sup> Lok Sabha may be most productive under NDA, Livemint (18<sup>th</sup> July, 2019), available at <<https://www.livemint.com/politics/news/first-session-of-17th-lok-sabha-may-be-most-productive-under-nda-1563390749219.html>>.

64 As per the notification ultimately published by the Central Government, electoral bonds could be purchased by donors exclusively from the State Bank of India.

65 It may be noted that this concern was even raised by the Election Commission in an affidavit filed before the Supreme Court in a petition challenging the constitutionality of the electoral bond

tion 182 of the Companies Act, 2013 removing limits on the amount of donations a company can make to political parties.

The Finance Minister pitched the scheme as a way of reducing black money in elections by facilitating and promoting the use of official banking channels to route political donations. In his budget speech, he excoriated past governments for their failure to address the menace of black money being invested in elections, and he asserted that the Finance Bill, 2017 constitutes an effort “to cleanse the system of political funding in India.”<sup>66</sup> However, critics of the scheme have argued that the scheme would destroy the public’s right to know<sup>67</sup> under Article 19(1)(a) of the Constitution and is accordingly unconstitutional, as it would be impossible for the public to know whether donors were receiving kickbacks from the party in power for their donations.<sup>68</sup> Experts have also argued that the scheme would not achieve the objectives it set out to achieve since black money could still be routed

scheme. EC Opposes Anonymity involved in Electoral Bonds, *LiveMint* (10<sup>th</sup> April, 2019), available at <<https://www.livemint.com/news/india/ec-opposes-anonymity-involved-in-electoral-bonds-1554901750489.html>>.

- 66 Budget Speech, 2017 delivered by the Finance Minister on February 1, 2017, available at <<https://www.indiabudget.gov.in/budget2017-2018/ub2017-18/bs/bs.pdf>>. The relevant part of the speech is as follows: “India is the world’s largest democracy. Political parties are an essential ingredient of a multi-party Parliamentary democracy. Even 70 years after Independence, the country has not been able to evolve a transparent method of funding political parties which is vital to the system of free and fair elections. An attempt was made in the past by amending the provisions of the Representation of Peoples Act, the Companies Act and the Income Tax Act to incentivise donations by individuals, partnership firms, HUFs and companies to political parties. Both the donor and the donee were granted exemption from payment of tax if the accounts were transparently maintained and returns were filed with the competent authorities. Additionally, a list of donors who contributed more than 20,000/- to any party in cash or cheque is required to be maintained. The situation has only marginally improved since these provisions were brought into force. Political parties continue to receive most of their funds through anonymous donations which are shown in cash. An effort, therefore, requires to be made to cleanse the system of political funding in India. Donors have also expressed reluctance in donating by cheque or other transparent methods as it would disclose their identity and entail adverse consequences...”
- 67 This right has been recognised through a series of judgments rendered from the 1970s till date. See for example: *State of U.P. vs. Raj Narain*, (1975)4SCC428 ; *S.P. Gupta v. Union of India*, 1981 Supp SCC 87); *Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India*, (1985) 1 SCC 641 (SC); *Reliance Petrochemicals v. Proprietors of Indian Express Newspapers Bombay (P) Ltd.*, (1988) 4 SCC 592; *Ministry of Information and Broadcasting, Govt. of India v. Cricket Association of Bengal*, (1995) 2 SCC 161, *Union of India v. Association of Democratic Reforms*, (2002) 5 SCC 294; *Onkar Lal Bajaj v. Union of India*, (2003) 2 SCC 673; *Anjali Bhardwaj v. Union of India*, 2019 SCC Online SC 205.
- 68 *Gautam Bhatia*, The electoral bonds scheme is a threat to democracy, *Hindustan Times* (18<sup>th</sup> March, 2019), available at <<https://www.hindustantimes.com/analysis/the-electoral-bonds-scheme-is-a-threat-to-democracy/story-PpSiDdUjIw5WNBuZDsSzxI.html>>; EC Opposes Anonymity involved in Electoral Bonds, *LiveMint*, supra note 65.

through shell companies, and then laundered through investments in electoral bonds.<sup>69</sup> It has been further argued that the electoral bonds scheme skews the level playing field in financing of political parties, as the political executive would have access to information on donations through the State Bank of India, effectively disincentivising donors from utilising the scheme to donate to opposition parties.<sup>70</sup>

Strikingly, none of these constitutional implications were discussed on the floor of the Lok Sabha, where the party in power had a majority. Further, since the Bill was part of the omnibus Finance Bill very little time was devoted to the discussion of the scheme.<sup>71</sup>

Meaningful debate in Rajya Sabha, where the ruling party does not have a majority, was also bypassed as the Bill was introduced as a Money Bill.<sup>72</sup> One Member of Parliament in the Lok Sabha pointed out that the Finance Bill was being used to amend forty existing statutes, something that had never been done in the history of the Indian legislature. He also specifically questioned how the electoral bonds scheme could be characterised as a part of

69 *Niranjan Sahoo & Niraj Tiwari*, How electoral bonds distort India's democracy, Observer Research Foundation, (28<sup>th</sup> March, 2019) available at <<https://www.orfonline.org/expert-speak/how-electoral-bonds-distorts-indias-democracy-49344/>>.

70 As of April 2019, 95% of the funds donated through electoral bonds have gone to the party in power. See, Ruling BJP got 95% of the funds: Why there's an Uproar over Electoral Bonds, Business Standard, (19<sup>th</sup> April, 2019), available at <[https://www.business-standard.com/article/current-affairs/ruling-bjp-bags-95-of-funds-why-there-s-an-uproar-over-electoral-bonds-119040500309\\_1.html](https://www.business-standard.com/article/current-affairs/ruling-bjp-bags-95-of-funds-why-there-s-an-uproar-over-electoral-bonds-119040500309_1.html)>.

71 The debates are available at 21-03-2017\_16\_XI.pdf (eparlib.nic.in).

72 Article 110 defines a money bill as "110. Definition of Money Bill

- (1) For the purposes of this Chapter, a Bill shall be deemed to be a Money Bill if it contains only provisions dealing with all or any of the following matters, namely
- (a) the imposition, abolition, remission, alteration or regulation of any tax;
  - (b) the regulation of the borrowing of money or the giving of any guarantee by the Government of India, or the amendment of the law with respect to any financial obligations undertaken or to be undertaken by the Government of India;
  - (c) the custody of the consolidated Fund or the Contingency Fund of India, the payment of moneys into or the withdrawal of moneys from any such Fund;
  - (d) the appropriation of moneys out of the consolidated Fund of India;
  - (e) the declaring of any expenditure to be expenditure charged on the Consolidated Fund of India or the increasing of the amount of any such expenditure; (f) the receipt of money on account of the Consolidated Fund of India or the public account of India or the custody or issue of such money or the audit of the accounts of the Union or of a State; or
  - (g) any matter incidental to any of the matters specified in sub clause (a) to (f)

On the abuse of money bills, see *T. Khaitan* (2020), supra note 55.

the Financial Bill under Rule 219(1) of the Rules of Procedure and Conduct of Business in Lok Sabha<sup>73</sup> and a Money Bill under Article 110 of the Constitution.<sup>74</sup>

The Finance Minister defended this decision on the ground that the electoral bonds was a “scheme under the Income Tax Act, 1961”.<sup>75</sup> In turn, he termed the amendments relating to the Representation of People Act and the Reserve Bank of India Act, merely “incidental.” Notably, the only amendment proposed to the Income Tax Act was to amend Section 13A, which previously stipulated that that certain income of political parties would be exempt from disclosure as long as proper books of account are maintained including names of donors. The Finance Bill 2017 proposed to amend this provision merely to clarify that no record had to be maintained for donations received through the electoral bonds scheme. The fact that this amendment was only to bring the Income Tax Act in line with the other Acts that were substantially amended to introduce the electoral bonds scheme demonstrates the weakness of the Finance Minister’s justification that the Bill was focused on amending the Income Tax Act. It may also be noted that Article 110 states that a Bill is a Money Bill if it relates to “the imposition, abolition, remission, alteration or regulation of any tax.” Through the amendment to Section 13A of the Income Tax Act no tax was being imposed, abolished, remitted, altered or regulated. However, the justification of the Finance Minister sailed through as it found support from the Speaker who has the authority under the Constitution to decide whether a Bill has been correctly certified as a Money Bill. The Speaker also agreed with the view of the Finance Minister, on the ground that there was nothing ruling out the possibility of inclusion of non-taxation provisions in Finance Bills.<sup>76</sup>

In this manner, the framework of electoral funding of the country was changed without any debate on its constitutional implications by misusing the route of passing a Money Bill. The constitutional challenge to the actions of the Government remain pending in the Supreme Court since 2017. Since then, one national election and several State elections have been held in the country with money being routed through electoral bonds and no transparency with respect to political donations.

73 Rule 219(1) provides “(1) In this rule “Finance Bill” means the Bill ordinarily introduced in each year to give effect to the financial proposals of the Government of India for the next following financial year and includes a Bill to give effect to supplementary financial proposals for any period.

74 See the speech of N.K. Premachandran, 16<sup>th</sup> Lok Sabha Debate dated 21.03.2017, available at <[https://eparlib.nic.in/bitstream/123456789/758975/1/21-03-2017\\_16\\_XI.pdf](https://eparlib.nic.in/bitstream/123456789/758975/1/21-03-2017_16_XI.pdf)> “According to me, amendments to the RBI Act, and to the Representation of the People Act are in respect of issuance of the electoral Bonds. How an issuance of the electoral Bond fall within the taxation proposals over matters incidental to the taxation proposal? That is the question which I would like to know.”

75 See the speech of Arun Jaitley, 16<sup>th</sup> Lok Sabha Debate dated 21.03.2017, available at <[https://eparlib.nic.in/bitstream/123456789/758975/1/21-03-2017\\_16\\_XI.pdf](https://eparlib.nic.in/bitstream/123456789/758975/1/21-03-2017_16_XI.pdf)>.

76 See the response of the Speaker, 16<sup>th</sup> Lok Sabha Debate dated 21.03.2017, available at <[https://eparlib.nic.in/bitstream/123456789/758975/1/21-03-2017\\_16\\_XI.pdf](https://eparlib.nic.in/bitstream/123456789/758975/1/21-03-2017_16_XI.pdf)>.

## 2. Jammu and Kashmir Reorganisation Bill - the extinguishment of a state through the extinguishment of procedure

Following the national election in May 2019, the Monsoon Session of the 17<sup>th</sup> Lok Sabha began on June 17<sup>th</sup> and was to carry on till July 25<sup>th</sup>. On the last day, it was announced that the session would be extended till August 7<sup>th</sup> 2019. On August 5<sup>th</sup> the Home Minister, without any advance notice, set in motion a series of measures to abrogate the special status of Jammu and Kashmir under Article 370 of the Constitution, and to bifurcate the State of Jammu and Kashmir into two Union Territories. For this paper, we are specifically concerned with the passage of the Jammu and Kashmir Re-organisation Bill, 2019 whereby the State was bifurcated into two Union Territories, which under the Indian Constitution would be under the control of the Central Government.

Article 3 of the Constitution gives the Parliament to pass laws to alter the boundaries of a state. The proviso to Article 3 provides certain condition precedent for this power to be exercised. It reads:

*“Provided no Bill for the purpose shall be introduced in either House of Parliament except on the recommendation of the President and unless, where the proposal contained in the Bill affects the area, boundaries or name of any of the States, the Bill has been referred by the President to the Legislature of that State for expressing its views thereon within such period as may be specified in the reference or within such further period as the President may allow and the period so specified or allowed has expired”*

Thus, no such Bill can be introduced in Parliament unless the views of the State Legislature on the Bill are received, or the time prescribed for receiving such views had expired. At the time, the State of Jammu and Kashmir was under President’s rule and the powers of the State Legislature were reportedly exercisable by Parliament.<sup>77</sup> Keeping the validity of these measures being brought during President’s rule when the State Legislature was dissolved aside for the moment,<sup>78</sup> the Parliament had to act in a sequential manner – first acting in the capacity of the State Legislature and then as the Parliament as required under Article 3. In other words, the Parliament acting in the stead of the State Legislature had to first give its views on the proposed re-organisation; only thereafter could the bill have been formally introduced in Parliament.

77 Under Article 356 of the Indian Constitution, the President, on the report of the Governor of a State, if satisfied that the Government of the State cannot be carried on in accordance with the constitution, can assume to himself the functions of the Government of the State and declare that the powers of the State Legislature shall be exercisable under or by the authority of the Parliament. See also Article 357 of the Constitution.

78 The Petitioners challenging the Re-Organisation Bill have argued that the measures affecting changes to the status of the State could not have been undertaken when the State legislature and State Government were suspended following a proclamation under Article 356 of the Constitution.

However, the proceedings on August 5<sup>th</sup> were confusing and chaotic, with little clarity on the implications and sequence of the statutory resolutions being moved in respect of Article 370 and the re-organisation of the State of Jammu and Kashmir.<sup>79</sup> The debate shows that neither the Chairman of the Rajya Sabha, Speaker of the Lok Sabha or the Minister introducing the measures made any effort to clear the confusion by considering each question separately and sequentially.

While acting as the State Legislature as required under the proviso to Article 3, Parliament only voted on a resolution approving the Reorganisation Bill, as opposed to “expressing its views”. This Resolution did not explain the consequences of the Bill and as per the record was unaccompanied by the Bill when circulated in the Lok Sabha.<sup>80</sup> Since no notice was given, it is possible that the Lok Sabha voted in favour of the resolution without being aware of its implications. Moreover, parties challenging the bill have argued that the Bill was introduced in Parliament before both the Houses of Parliament acting in capacity of the State Legislature had completed voting on the Resolution. Thus, the manner in which the proceedings appears to be inconsistent with the procedural requirements that were incorporated in Article 3 of the Constitution as a safeguard to protect the interests of States.<sup>81</sup>

### 3. The Farm laws and the unclear voice vote

The passing of the Produce Trade and Commerce (Promotion and Facilitation) Bill, 2020 and Farmers (Empowerment and Protection) Agreement on Price Assurance and Farm Services Bill, 2020 (hereinafter referred to as “the Farm laws”) in the Upper House in September 2020 provide a useful illustration of the problems posed by the discretion vested in the presiding officers of the Houses of Parliament.

The Farms laws are an attempt to change the regulatory framework of agricultural marketing in India to enable farmers, inter alia, to sell produce outside government regulated markets where traders require licenses and payment of fees. Farmers have argued that the Bills will hurt their interests by allowing the entry of private companies into the market and also take away the minimum support price guarantee (which is the minimum price set by the Government at which the Government buys the stock of farmers if it does not sell for that price in the market).<sup>82</sup> Farmers from various states began protesting before the Bills

79 The issues were debated in both Houses of Parliament on August 5<sup>th</sup> and August 6<sup>th</sup>, 2019 and are available at <https://eparlib.nic.in/> and <https://rsdebate.nic.in/>.

80 Members who pointed the same out include Shri T.R. Baalu and Adhir Ranjan Chaudhary, Lok Sabha Debate, August 5, 2019.

81 The procedure followed was also appears to be violative of several of the procedural rules provided in the conduct of business rules of the respect houses. See *M. Verma*, Diminishing the Role of Parliament: The Case of the Jammu and Kashmir Re-Organisation Bill, (November 2019) *Economic and Political Weekly* 54 (45).

82 Many experts share these concerns. See for instance, *S. Narayan*, The Three Farm Bills: Is This the Market Reform Indian Agriculture Needs?, *The India Forum*, (October 2020), available at <https://www.theindiaforum.in/article/three-farm-bills>.

were passed and after the bill was passed, sat in protest at the borders of Delhi for over two months.<sup>83</sup>

Given the far-reaching implications of the Bills on India's biggest sector and the opposition to it, the legislature was expected to deliberate its implications before voting for the same. A perusal of the uncorrected debate of the Rajya Sabha available show that the Bill was only debated for around three hours and was rushed through at the instance of the Deputy Chairman who was then presiding over the house.<sup>84</sup> Many members requested the Deputy Chairman to exercise his discretionary powers to extend the debate and to refer the bill to a Standing Committee, to no avail.<sup>85</sup> Members also objected to the way in which the Vice Chairman was speeding up the proceedings and not allowing members enough time to complete their points and proceedings turned chaotic.<sup>86</sup>

Ultimately, the Deputy Chairman called for a voice vote on the bills. A voice vote is a recognized form of voting under Rule 252 the Rules of Procedure and Conduct of Business in the Council of States.<sup>87</sup> In a voice vote, members in favour of the bill say "Aye" and those against "Nay" and the Chairman ascertains which group, being louder has the motion but the votes are not counted. This method is uncertain as it does not allow the people to ascertain whether the Bill in fact commands the majority of the House. This method is usually resorted to for adoption for simple and routine motions or when the House has a clear majority. However, the use of this method is dangerous, especially for contentious Bills which may only pass or fail by a thin margin. Moreover, it makes the legislative process uncertain and dependent on one individual.

Accordingly, the Conduct of Business rules do not provide voice votes as the only or conclusive method of voting- members may challenge the decision of the result of a voice vote. Once such a challenge is made, the Chairman is bound to either resort to a division of votes through an automatic voter recorder (Rule 253) or Division by going into lobbies (Rule 254), where the votes are counted. The structure of the Conduct of business rules which ensures that voice votes are not determinative of a majority vote but must be cross-checked through voting by division or automatic recording of votes ensures that the procedure is not violative of Article 100, which requires that all questions in the House be decid-

83 Farmer's Protest - Thousands stay put at border points, traffic disrupted on Delhi's key routes, *The Hindu* (December 17, 2020).

84 The proceedings of the Rajya Sabha are available at <http://164.100.47.7/newdebate/252/20092020/Fullday.pdf>.

85 *Id.*

86 A Blow-by-Blow Account of How the Rajya Sabha Passed the Farm Bills, *The Wire* (September 20, 2020), available at [A Blow-by-Blow Account of How the Rajya Sabha Passed the Farm Bills \(thewire.in\)](https://www.thewire.in/2020/09/20/rajya-sabha-passed-farm-bills/).

87 Rules of Procedure and Conduct of Business in the Council of States, available at [https://rajyasabha.nic.in/rsnew/rs\\_rule/rules\\_pro.pdf](https://rajyasabha.nic.in/rsnew/rs_rule/rules_pro.pdf).

ed by a majority vote. However, in the passing of the Farm laws, the Deputy-Chairman reportedly ignored calls by opposition for votes by division.<sup>88</sup>

The purpose of taking these three examples is to demonstrate how easy it is for the political executive to “game the system” when any ruling party has a clear majority. In the absence of effective checks within the legislature, the procedural rules can be bypassed to allow for laws to be passed without deliberation in Parliament. This is so even with respect to important laws that have wide ramifications on the relationship between individuals, institutions and the State.<sup>89</sup> In effect, the law-making function of Parliament is dominated by the political executive, thus endangering the system of separation of powers and the democratic functioning of the legislature. In the next section, we discuss why the ignorance of procedural rules and deliberation must be a cause for concern in a democracy.

#### IV. Why do procedural rules and deliberation matter?

While there exists strong disagreement over what principles form a part of the rule of law, rules of procedure are universally considered to be an essential component of the rule of law.<sup>90</sup> In a democracy procedural rules perform important instrumental functions, and their subversion adversely affects the salient features of a democracy that distinguish it from systems based on rule by man or simply by executive decree.<sup>91</sup>

The first feature is that the legislature must exercise a duty of care. Laws passed by the Legislature have significant consequences; they result in the creation of burdensome obligations and duties on people or a section of people and have an impact on personal autonomy.<sup>92</sup> The Legislature has vast power to pass laws *inter alia* relating to criminalisation, expropriation of property, taxation and generally create restrictions on liberty and movement and law making in haste can result in real harm to people.<sup>93</sup> Given the significant conse-

88 The Deputy Chairman claimed that no such division was sought. Interestingly, the relevant Government Department even muted the microphones of the opposition of the telecast of the debate. See *S. Daniyal*, Dubious voice vote to pass critical farm bills severely dents Indian democracy, Scroll (September 20, 2020), available at <https://scroll.in/article/973588/use-of-a-dubious-voice-vote-to-pass-critical-farm-bills-severely-dents-indian-democracy>.

89 All three of the laws discussed in this Section are extremely significant, and unsurprisingly, their constitutional validity has been questioned before the Supreme Court of India. At the time of writing this, all three cases are still pending a substantive hearing.

90 *R. H. Fallon Jr.*, “The Rule of Law” as a Concept in Constitutional Discourse, *Columbia Law Review* 97(1), (1997), p. 1.

91 A. Daniel Oliver Lalana, writing in a similar context, recognizes three principles of law making – legislative transparency or publicity, legislative authenticity and legislative inclusiveness. See *A. Daniel Oliver Lalana*, *Legislative Deliberation and Judicial Review: Between Respect and Disrespect for Elected Lawmakers* in A. Daniel Oliver Lalana (Ed), *Conceptions and Misconceptions of Legislation*, Berlin, 2019, p. 222.

92 *J. Waldron*, *Principles of Legislation*, in Bauman & Kahana (eds.), *The Least Examined Branch, The Role of Legislatures in the Constitutional State*, Cambridge, 2006, p. 19-21.

93 *Id.*, 23.

quences of law making, there exists an obligation on the members of the legislature to exercise a duty of care to analyse laws and their implications, carefully collect information and turn to expert evidence when necessary, deliberate and analyse these laws and their implications. Accordingly, procedural rules are necessary to facilitate sufficient time for deliberation and collection of information and expert opinions.

Second, the Legislature must further the principle of inclusiveness, pluralism and political equality.<sup>94</sup> The function of law-making is entrusted to the Legislature as the Legislature is a forum where diverse opinions can be possibly represented through different elected representatives as opposed to the Executive which can easily be captured by special interests.<sup>95</sup> Law making in this forum must be committed to political equality such that diverse and rival views must not only be given equal space to be heard but must be actively engaged with and responded to.<sup>96</sup> Such respectful deliberation is necessary to earn the legitimacy of those people that otherwise disagree with the content of the laws.<sup>97</sup> Moreover, the right of participation is recognised as a right in itself and is often been referred to as the right of all rights.<sup>98</sup> The rules of procedure of the Legislature which enable all voices to be formally heard and engaged with are therefore valuable.<sup>99</sup> The ignorance of such rules results in the Legislature losing the rigour that characterises a democracy.

In a constitutional democracy, fundamental rights serve as limits on the power of the Legislature - any state action must ensure that it does not restrict fundamental rights more than necessary in a given situation.<sup>100</sup> Therefore a legislative decision, irrespective of the majoritarian support it commands, cannot be valid if it is found violative of fundamental rights recognised expressly and implicitly in a constitution. Since the second world war, there has been a growing recognition that actions of the Legislature in a constitutional democracy cannot have presumed legitimacy but instead the Legislature must justify to the electorate whether the law is violative of fundamental rights. Such constitutional democra-

94 See *A. Daniel Oliver Lalana* (2019), supra note 91; *J. Waldron*, Id at 29; *Ittai Bar-Siman-Tov*, The Puzzling Resistance to Judicial Review of the Legislative Process, *Boston University Law Review* 91 (2011), p. 1915-1975 at p. 1968.

95 *Niels Petersen*, The German Constitutional Court and legislative capture, *International Journal of Constitutional Law* 12(3), (2014), p. 650-669 at p. 652.

96 *J. Waldron*, supra note 92 at 27.

97 Id at 25.

98 As Waldron notes, there is a certain dignity in participation, and an element of insult and dishonor in exclusion, that transcends issues of outcome". *J. Waldron*, A Right-Based Critique of Constitutional Rights *Oxford Journal of Legal Studies* 13, (1993), p. 18-51 at p. 40.

99 See *Siman-Bar-Tav* (2011), supra note 94, at p. 1968.

100 See for instance the justification given by the German Constitutional Court for the recognition of the proportionality principles. *D. Grimm*, Proportionality in Canadian and German Constitutional Jurisprudence, *University of Toronto Law Journal* 57(2), (2007), p. 383, 385-6.

cies have been defined as cultures of justification.<sup>101</sup> In such cultures, scholars have argued that the duty to deliberate on the Legislature must include carrying out a rights-based analysis to analyse the impact of the law on fundamental rights.

The focus on the Legislature's obligation to deliberate has gained scholarly attention over time. For instance, in Germany where the Basic Law makes basic rights binding on the Legislature,<sup>102</sup> academics have argued that there exists a duty to deliberate on the law maker.<sup>103</sup> In other jurisdictions, scholars have made the case for evidence-based law making where the Legislature is expected to have assessed the impact of the law on the fundamental rights of persons through "appropriate investigations and studies, impact assessment and consultation procedures, and sufficient parliamentary debate and deliberation."<sup>104</sup> Indeed, in constitutional law, it has been recognised that the Legislature is the organ that has the formal structure, representation, resources and wherewithal to carry out evidence based inquiries as opposed to organs like the Judiciary.<sup>105</sup>

Elsewhere we have argued that a structural reading of the Indian Constitution along with its drafting history indicate that the Framers intended to create a culture of justification.<sup>106</sup> The obligation to ensure that laws passed by the legislature do not violate fundamental rights and accordingly to deliberate and analyse the impact of fundamental rights also finds textual support under Article 13 which provides not only that laws that abridge or take away fundamental rights will be void but require that "the State shall not make any law which takes away or abridges the rights conferred by this Part." The drafting history of the Constitution is also replete with instances where the Framers expected the Lawmakers only to make laws that could be justified as necessary.<sup>107</sup>

It is clear that the Indian legislature has deviated far from the ideals and obligations characteristic of a legislature in a constitutional democracy. As the examples discussed

- 101 *Etienne Mureinik*, A Bridge to Where – Introducing the Interim Bill of Rights, *South African Journal of Human Rights* 10 (1994), p. 31, 32; *Moshe Cohen-Eliya and Iddo Porat*, Proportionality and the Culture of Justification, *American Journal of Comparative Law* 59 (2011), p. 483. *Kai Möller*, Justifying the culture of justification, *International Journal of Constitutional Law* 17 (2019), p. 1078.
- 102 "The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law." Article 1(3), The Basic Law for the Federal Republic of Germany.
- 103 See generally, *Klaus Meßerschmidt*, The Race to Rationality Review and the Score of the German Federal Constitutional Court, *Legisprudence* 6, (2012), p. 347; See also *Aharon Barak*, Proportionality: Constitutional Rights and their Limitations, Cambridge, 2012, p. 380.
- 104 *Ittai Bar-Simon-Tov*, The dual meaning of evidence-based judicial review of legislation The Theory and Practice of Legislation 4(2), (2016), p. 107.
- 105 *P. Popelier*, Preliminary Comments on the Role of Courts as Regulatory Watchdogs, *Legisprudence* 6(2), (2012), p. 257-270, at -p. 267.
- 106 *V. Narayan & J. Sindhu*, A Historical argument for proportionality under the Indian Constitution, *Indian Law Review* 2(1), (2018), p. 51.
- 107 *Id.*

above show, laws are steamrolled through Parliament with almost no debate at all, let alone debate on their constitutional implications.

### C. Judicial review of legislative process – a possible solution?

In the previous Part, we have highlighted the problem of exploitation of legislative process and how laws are passed in the Indian Legislature without deliberation. In this Part, we discuss internal and external solutions to this problem - the former being solutions that focus on fixing the legislature from within, and latter being where actors outside the legislature are involved in identifying and addressing problems relating to the legislative process.<sup>108</sup> In the first section, we highlight the limits of internal solutions and turn our sights to judicial review of legislative process as a potential external solution. The second section explains what is meant by judicial review of legislative process, and the third lays out two approaches to judicial review of the legislative process (direct and indirect).

#### I. *Inherent limits of internal solutions*

Arguments suggesting how the legislature may improve its own functioning may take different forms.<sup>109</sup> Some may, for example, focus on how changing legislative rules or re-distributing responsibilities among office-bearers in the legislature could ensure better law-making processes. Such solutions would also be seen as less controversial than external solutions, because on the face of it they appear to be more respectful of the doctrine of separation of powers; where legislative processes are largely seen to be the exclusive province of the legislative body, arguments offering internal solutions appear to affirm this distribution of responsibilities and the principles underlying them.<sup>110</sup>

Although more ideal and seemingly less controversial in theory, the success of arguments offering internal solutions is contingent on assumptions about the political culture and the actual functioning of institutions in a system. In particular, such arguments risk taking for granted the idea that appeals to certain constitutional ideals would easily influence the behavior of legislators. Such arguments tend not to engage with the possibility that poor law-making may be a chronic feature of the functioning of a legislative body and that law-

108 Like most binaries, this is too neat. Solutions often build off a combination of internal and external factors. However, the neat binary is useful to outline the limited scope and nature of the argument we advance in this paper.

109 For an example of an argument offering internal solutions, see *David Beetham, Parliament and Democracy in the Twenty-First Century: A Guide to Good Practice*, 2006. Beetham explains how a parliament can “be truly representative, transparent, accessible, accountable and effective in its many functions.”

110 This objection based on the doctrine of separation of powers is addressed in Part E of this paper. Notably, some scholars have argued that this view is based on a “rigid”, “rusty” conception of separation of powers. See *Suzie Navot, Judicial Review of the Legislative Process*, *Israeli Law Review* 39 (2), (2006), p. 182.

makers may have little incentive for course correction. In the case of India, there are complex incentives at play that weaken the process of law-making while simultaneously making it difficult to change this. For individual legislators belonging to a legislative majority, processes that require deliberation and engaging with opposing views tend to be viewed as a hindrance.<sup>111</sup> Even if there are a few individual legislators that are motivated to encourage deliberation on a law, it may go against the interest of the party to which they belong to have an issue discussed at length. This is particularly problematic in light of India's Anti Defection Law, which is often used to prevent legislators from acting in an individual capacity, and the failure to vote with the party leads to disqualification from the House.<sup>112</sup>

In any case, legislators are rarely held accountable for the way they vote in Parliament. One could argue that this may be attributed to political culture more broadly; it may be argued for example that if society appears indifferent to poor law-making processes, then there is no reason for legislators to be concerned about this. However, it is worth noting here that there is no formal feedback mechanism through which the people's discontent with the functioning of the legislative body can make it back to the legislature.<sup>113</sup> Further, even this argument assumes a certain level of transparency in the functioning of the legislature whereby the people can identify how legislators actually frame and pass laws. In India, most decisions taken by the Houses of Parliament are done by way of a voice vote, where the Speaker or Chairman is entrusted with identifying whether the "Ayes" group or the "Noes" group consists of more members.<sup>114</sup> It is only where the result of a voice vote is challenged twice that the Speaker or Chairman will direct that votes are to be recorded on the automatic vote recorder, or using "Aye" and "No" slips.<sup>115</sup> Thus, with respect to most decisions taken in the Houses of Parliament, the electorate is left with no record to analyse how individual legislators voted.<sup>116</sup>

All these issues pertaining to the functioning of the Indian legislature point to the need for internal solutions in the form of major reform of legislative structure and process, and

111 For an argument suggesting that this is generally true of legislative bodies, see: *Ittai Bar-Siman-Tov*, The role of courts in improving the legislative process, *The Theory and Practice of Legislation* 3(3), (2015), p. 295-313 at p. 297.

112 See *infra* note 29 and accompanying text.

113 One might argue that protests should be seen as a sufficient means of demonstrating disapproval with the way in which laws are passed but this too assumes that the right to protest is meaningfully protected in a particular system. This too assumes that civil liberties such as the right to free speech, the right to assembly and the right to protest are adequately protected under a particular constitutional system.

114 *Chakshu Roy*, Parliament voting: Ayes vs noes, and road from manual to electronic recording, *Indian Express* (25<sup>th</sup> June, 2019), available at <<https://indianexpress.com/article/explained/parliament-voting-ayes-vs-noes-and-road-from-manual-to-electronic-recording-5797834/>>.

115 *Subhash Kashyap*, (2001), *supra* note 32, p. 86-87.

116 In the last fifteen years, votes have been counted less than 50 times. *Chakshu Roy* (2019), *supra* note 114.

yet, they are also reasons why arguments in favour of internal solutions are unlikely to be successful. Notably, even legislators who vehemently criticized weaknesses in the functioning of Indian Parliament while in opposition demonstrated willingness to exploit those weaknesses when they formed government.<sup>117</sup> Given the current state of political culture and distribution of incentives in India, we do not think an argument in favour of internal solutions is likely to gain traction in the near future.<sup>118</sup> Instead, this paper pushes a little further, and explores the viability and desirability of an external solution to the pathologies in the Indian approach to law-making. External arguments would differ based on the actor to whom they are directed. For example, one could direct their arguments at a constituent assembly framing a new constitution, pointing out how they can design a legislature that would function well.<sup>119</sup> Alternatively, one could direct their arguments at the people as “constitutional actors”, explaining how they could hold legislators responsible for supporting legislative processes that appear to dilute constitutional ideals or constitutional rights. This paper is concerned with a third kind of external solution – one which focuses on the possibility of checking and improving the legislative process through the exercise of judicial power.

## II. *Judicial review of the legislative process as an external solution*

There is a rapidly growing body of scholarship examining the “role of courts in improving the legislative process”.<sup>120</sup> Over the years, scholars discussing the idea that the judiciary may check and improve the legislative process have referred to this issue by phrases with minor variations, including “judicial control of the legislative process”,<sup>121</sup> “judicial review of the legislative enactment process”<sup>122</sup> and more recently, “judicial review of the legis-

117 *Anitya Katyal* (2014), *supra* note 38.

118 Of course, we do not mean to suggest that such arguments should not be made, or that they should not be acted upon if made. On the contrary, we acknowledge that such arguments may be more suited to offering long-term solutions to the pathologies in the functioning of the Indian legislature. However, partly influenced by the current political circumstances in India, our aim here is to explore other solutions that are seemingly more plausible. The solution we discuss in the subsequent Parts of this paper is responsive to the idea that internal solutions may be more effective.

119 Perhaps by including strong opposition rights in the constitution.

120 See: *Ittai Bar-Siman-Tov* (2015), *supra* note 111; and *Popelier* (2012), *supra* note 105. Also see: *Joanne Scott & Susan Sturm*, *Courts as Catalysts: Re-thinking the Judicial Role in New Governance*, *Columbia Journal of European Law* 13, (2006), p. 565. For a comparative survey of how courts can check and improve the legislative process, see: *S.R. Ackerman, Stefanie Egidy & James Fowkes*, *Due Process of Lawmaking: The United States, South Africa, Germany and the European Union*, Cambridge, 2015.

121 *J.A.C. Grant*, *Judicial Control of the Legislative Process: The Federal Rule*, *Western Political Quarterly* 3, (1950), p. 364.

122 *Elizabeth H. Cobb*, *Judicial Review of the Legislative Enactment Process: Louisiana’s Journey Entry Rule*, *Louisiana Law Review* 41(4), (1981), p. 1187.

lative process”.<sup>123</sup> Following the more recent scholarship on the issue, we adopt the term “judicial review of legislative process” for the purpose of this paper, hereinafter referred to as “JRLP”.

This term is used to describe “a form of judicial review in which courts determine the validity of statutes based on an examination of the procedures leading to their enactment.”<sup>124</sup> The central argument advanced by advocates of this kind of judicial review is that the court can and should “be able to ensure a minimal due process of lawmaking by reviewing legislative process.”<sup>125</sup> This of course raises the question: when can it be said that the requirement of due process of lawmaking is fulfilled? Or, a more focused variation may be: at what point can it be said that a particular lawmaking process passes the criteria of reflecting the “minimal due process of lawmaking”? While one may choose to answer these kinds of questions by substantiating on the concepts like participation and deliberation, the more common approach of scholars discussing judicial review of legislative process has been to examine how a particular judiciary can check and improve law-making process in a particular context.<sup>126</sup>

This approach is understandable, given that the law-making process in most constitutional democracies are governed by different kinds of legal norms, and aside from determining legality these legal norms lend criteria which guide evaluations of particular laws being passed in a non-transparent, non-participative or non-deliberative manner. For example, constitutions may differ with respect to the extent to which they entrench legislative procedures, or with respect to how they entrench opposition rights. They may also differ in how they confer power to make more detailed rules to govern the legislative process. The various constitutional and legal norms governing legislative process in a particular jurisdiction are often taken as representative of various constitutional ideals, and evaluations of the “quality” of lawmaking are influenced by how legislators navigate (and perhaps flout) these norms. In Part D of this paper, we discuss how JRLP might work in India. Before that, it is useful to distinguish between two ways in which JRLP can take place.

123 The popularisation of this particular term may be attributed to the work of *Ittai Bar-Siman-Tov* (2011), supra note 94.

124 *Id* at 1921.

125 *Suzie Navot* (2006), supra note 110. The phrase “due process of lawmaking” was first popularized by *Hans Linde*, *Due Process of Lawmaking*, *Nebraska Law Review* 55, (1976), p. 197, though Linde’s argument does not focus on judicial enforcement of the legislative process. For a discussion of the scope of Linde’s argument, see: *Stephen Gardbaum*, *Due Process of Lawmaking Revisited*, *University of Pennsylvania Journal of Constitutional Law* 21(1), (2018), p. 1.

126 For example, *Suzie Navot* (2006), supra note 110; *Chuks Okpaluba*, *Can a court review the internal affairs and process of the legislature? Contemporary developments in South Africa*, *The Comparative and International Law Journal of Southern Africa* 48 (2), (2015), p. 183; and *Santiago R. Carrillo & Mariano L. Cordeiro*, *Foundations for the development of rational law-making in Argentina*, *The Theory and Practice of Legislation* 4(2), (2016), p. 237.

### III. *Two judicial approaches to reviewing the legislative process*

In this section, we distinguish between (i) direct JRLP; and (ii) indirect JRLP. As explained below, this distinction is primarily on the basis of the grounds on which a remedy is granted by the Court.

#### 1. Direct JRLP

Direct JRLP occurs when the ground for challenge of a law is that it was passed in an unconstitutional manner. In other words, if the judiciary were to accept the argument, it would grant remedy against legislative action purely on the ground that the procedure adopted was unconstitutional. Other scholars have referred to this mode of judicial review as “pure procedural judicial review”<sup>127</sup> and have explained that it refers to review of “legislation that was improperly enacted”, where improper enactment is a sufficient ground to invalidate a statute that might otherwise be seen to survive challenges on other grounds.<sup>128</sup>

Such challenges to the constitutionality of laws heavily depend on by the extent to which legislative procedures are entrenched in the constitution and the level of ambiguity with which they are stated. For instance, one kind of procedural rule found in most constitutions declares the percentage of votes required for law to be deemed “enacted” by a legislative body. These kinds of procedures are relatively unambiguous and clear, and usually require a simple counting of the votes to identify whether they have been violated. Some constitutions provide for multiple thresholds, where laws on certain issues may be require a wider margin of favourable votes than others. Here, disputes may arise as to whether a law said to fall under a particular category actually falls in that category, and this may become a ground for judicial review.

Constitutional provisions entrenching principles like transparency, participation and deliberation are toward the more ambiguous side of the spectrum and therefore are required to be interpreted by the judiciary. The South African Constitution contains several examples of such provisions. For example, Section 72 provides:

*“72. Public access to and involvement in National Council.*

*(1) The National Council of Provinces must -*

*(a) facilitate public involvement in the legislative and other processes of the Council and its committees; and*

*(b) conduct its business in an open manner; and hold its sittings, and those of its committees, in public, but reasonable measures may be taken -*

*(i) to regulate public access, including access of the media, to the Council and its committees; and*

127 *Ittai Bar-Siman-Tov*, Semiprocedural Judicial Review, *Legisprudence* 6 (3), (2012), p. 271.

128 *Ibid.*

(ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.

(2) The National Council of Provinces may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society."<sup>129</sup>

The South African Constitutional Court's decision in *Doctors for Life* exemplifies how a Court may carry out direct JRLP even where constitutional text does not provide a clear standard to evaluate the validity of the legislative process.<sup>130</sup> In this case, two statutes were challenged as for violating Section 118, an analogous provision to Section 72 relating to the Provincial Legislature.<sup>131</sup> Holding the statutes to violate the constitutional value of public participation, the Court explained its view as follows:

*"In determining whether Parliament has complied with its duty to facilitate public participation in any particular case, the Court will consider what Parliament has done in that case. The question will be whether what Parliament has done is reasonable in all the circumstances. And factors relevant to determining reasonableness would include rules, if any, adopted by Parliament to facilitate public participation, the nature of the legislation under consideration, and whether the legislation needed to be enacted urgently. Ultimately, what Parliament must determine in each case is what methods of facilitating public participation would be appropriate. In determining whether what Parliament has done is reasonable, this Court will pay respect to what Parliament has assessed as being the appropriate method. In determining the appropriate level of scrutiny of Parliament's duty to facilitate public involvement, the Court must balance, on the one hand, the need to respect parliamentary institutional autonomy, and on the other, the right of the public to participate in public affairs. In my view, this balance is best struck by this Court considering whether what Parliament does in each case is reasonable."*<sup>132</sup>

## 2. Indirect JRLP

Indirect JRLP is comparatively more complex. In the case of indirect JRLP, the judiciary examines the law-making process while reviewing the content of a law. While carrying out

129 For another example, one may see Section 59(1), providing that the National Assembly "may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society".

130 *S.R. Ackerman et al*, supra note 120, at p. 114.

131 *Doctors for Life International v. Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11. Though it may be noted that in light of the fact that the two statutes had already come into effect the Court stayed the operation of its verdict for a period of 18 months in order to provide the legislature an opportunity to remedy the defect in the legislative process adopted.

132 *Id*, paragraph 146, Ngcobo J. speaking for the majority.

indirect JRLP, the judiciary is more likely to speak of shortcomings in the law-making process as factors *contributing to* the unconstitutionality of the law rather than as sufficient grounds for striking down the law in themselves. Under this approach, the judiciary takes note of shortcomings in the legislative process while evaluating whether a law is unconstitutional on other grounds, such as for violating fundamental rights. Other scholars have referred to this as “semi procedural”<sup>133</sup> or “semi substantive”<sup>134</sup> and have described it in broadly similar terms. As per Bar-Siman-Tov, in this approach the judiciary begins by carrying out judicial review of the substance of the law in question but it then “complements, or even partially substitutes, these substantive judicial judgments with a procedural examination of whether the legislature devoted considered judgment”<sup>135</sup> to the balancing of the right against the restriction.<sup>136</sup>

In this paper we are particularly concerned with the proportionality test, which several scholars have argued enables the judiciary to factor in the nature and quality of the legislative process while reviewing the constitutionality of laws.<sup>137</sup> As per the dominant understanding, the proportionality test requires that a restriction on a right must pursue a legitimate aim, must be suitable to pursuing the legitimate aim, must be necessary in that there must not exist any measures that are equally effective in achieving the aim and that the loss caused to the right by the implementation must be proportionate to the loss caused to the aim if the measure is not implemented.<sup>138</sup> Various scholars have argued that the proportionality test is particularly useful because it simultaneously structures judicial reasoning and

133 *Bar-Siman-Tov* (2012), *supra* note 127.

134 *Dan T. Coenen*, *The Rehnquist Court, Structural Due Process, and Semisubstantive Constitutional Review*, *Southern California Law Review* 75(6), (2002), p. 1281.

135 *Bar-Siman-Tov* (2012), *supra* note 127, at p. 279.

136 *Id.* Notably, *Bar-Siman-Tov* describes the components of the substantive balancing tests as an inquiry into the “legitimacy of the pursued objective; the fit between the measure and that objective; and the over-all cost benefit of the infringing measure,” thus indicating that in his view substantive judicial review would involve the application of a standard that resembles the proportionality test that has grown popular under several post-World War II constitutions.

137 See *P. Popelier* (2012), *supra* note 105; *Roland Ismer & Klaus Meßerschmidt*, *Evidence-based judicial review of legislation: some introductory remarks, The Theory and Practice of Legislation* 4(2), (2016), p. 91 (explaining that the proportionality test enables “judicial control both of the establishment of facts underlying legislation and of impact assessment.”); and *Rob van Gestel and Jurgen de Poorter*, *Putting evidence-based law making to the test: judicial review of legislative rationality, The Theory and Practice of Legislation* 4(2), (2016), p. 155.

Our interest in how indirect JRLP is incorporated into the proportionality is partly because the Indian judiciary is moving in that direction as we discuss in the next Part, and partly because in our opinion proportionality should be the general standard of review for assessing rights violations under the Indian Constitution. For a substantiation of the latter view, see *Narayan & Sindhu*, (2018), *supra* note 106.

138 See *Dieter Grimm* (2007), *supra* note 100.

provides a framework for the inquiry that the legislature is obligated to undertake in a constitutional democracy while enacting law affecting constitutional rights.<sup>139</sup>

The jurisprudence of the German Federal Constitutional Court (FCC) is often cited as the paradigmatic example of how the proportionality test is used to consider facets of the legislative process while evaluating the constitutionality of law. Klaus Meßerschmidt, for example, argues that the proportionality test “has emerged as the Trojan horse of due deliberation and impact review”,<sup>140</sup> while others have explained that through its use of the proportionality test, the FCC implicitly compels “the legislature to calculate the present and future costs and benefits of legislation that will affect fundamental rights.”<sup>141</sup> This judicial approach is perhaps best seen in the reasoning of the German Federal Constitutional Court in the famous *Pharmacy Case*,<sup>142</sup> where the Court explained that the content of the law and the considerations of the legislature would be examined in detail and that the Court would call for expert evidence to evaluate the reasons of the legislature if necessary.<sup>143</sup> Crucially, the Court also emphasised that the intensity of judicial review would vary according to the severity of the intrusion,<sup>144</sup> suggesting that in cases involving significant intrusions, the Court would conduct a more exacting scrutiny of the law in question.<sup>145</sup> It is pertinent to note that the German Federal Constitutional Court has not developed a comprehensive theory of the significance of legislative process or adopted a consistent approach to examining the legislative process while determining the constitutionality of a law, and this remains an issue of academic debate.<sup>146</sup>

The German FCC is not alone in considering the legislative process while examining the constitutionality of laws. In *Hirst v. UK*,<sup>147</sup> the European Court of Human Rights appears to have considered the lack of debate in UK Parliament as a factor militating against

139 *Mattias Kumm*, Institutionalizing Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review, *European Journal of Legal Studies* 1, (2007), p. 2; *Kai Möller*, Proportionality: Challenging the critics, *International Journal of Constitutional Law* 10 (2012), p. 709; *Aharon Barak*, Proportionality: Constitutional Rights and their Limitations, Cambridge 2012, at p. 380; *Jan Sieckmann*, Rational Lawmaking, Proportionality and Balancing, in Klaus Meßerschmidt (eds.), *Rational Lawmaking under Review: Legisprudence According to the German Federal Constitutional Court*, (Berlin 2016, at p. 367.

140 *Klaus Meßerschmidt* (2012), supra note 103, at 363.

141 *Susan-Rose Ackerman et al*, supra note 120 at 176, citing 39 BVerfGE 210, 225; 50 BVerfGE 290, 333; and 65 BVerfGE 1, 55.

142 7 BVerfGE 377. In this regard, see *Klaus Meßerschmidt*, Evidence-based review of legislation in Germany, *The Theory and Practice of Legislation* 4(2), (2016), p. 209.

143 *Ibid.*

144 *Klaus Meßerschmidt*, (2012), supra note 103, at p. 366.

145 *Ibid.* Meßerschmidt explains that the German FCC employs a sliding scale of review depending on the extent of intrusion of the right, and that the Court’s propensity to examine aspects of the legislative process increases while applying higher standards of review.

146 *Ismer & Meßerschmidt*, (2016), supra note 137 (also noting that for this reason indirect JRLP remains a controversial issue).

147 *Hirst v. United Kingdom* (No. 2) 74025/01 [2005] ECHR 681 (6 October 2005).

the proportionality of the law in question. In this case, the ECHR was tasked with reviewing Section 3 of the Representation of the People Act 1983, which rendered 48,000 convicted prisoners automatically ineligible to vote. In determining whether this legal provision disproportionately curtailed the right to free elections,<sup>148</sup> the ECHR's reasoning implied that the weight given to a legislative decision would depend on whether the legislative body actually weighed the competing interests involved or assessed the proportionality of the measure in question.<sup>149</sup> The fact that "it cannot be said that there was any substantive debate by members of the legislature" appears to have influenced the Court in arriving at the view that the right to free elections had been violated.<sup>150</sup>

Interestingly, some scholars have relied on the *Hirst* decision to argue that courts in United Kingdom should also factor in the nature and quality of legislative process while determining whether and how to apply the doctrine of "due deference", which suggests that the judiciary would presume that laws are the product of legislative wisdom. Perhaps owing to the changed relationship between judicial power and parliamentary sovereignty with the enactment of the Human Rights Act, 1988,<sup>151</sup> scholars have asked whether law should continue to enjoy deference based solely on the *presumed* democratic legitimacy and institutional competence of legislative bodies. Aileen Kavanaugh argues that the lack of due deliberation of an issue in Parliament should cause the argument of democratic legitimacy to lose its potency, and accordingly less deference and heightened scrutiny must be attracted in such a case.<sup>152</sup> Similarly, Lazarus and Simonsen, argue that deference must be earned depending upon whether Parliament meaningfully engaged with the rights consideration at play.<sup>153</sup> They recommend the use of five criteria in this determination - they argue that under this approach, the judiciary can "make a prior assessment of the quality of deliberative debate" by focusing on five criteria: (1) "the representative conditions in which legislative debate takes place"; (2) "the quality of consideration given to the views of rights bearers"; (3) whether evidence was presented to the legislature of the necessity of the measure; (4) the courts' institutional role (and place in constitutional culture and system); and (5) the nature of the right.<sup>154</sup>

148 Guaranteed by Protocol 1, Article 3, which states: "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot".

149 Paragraph 79: "As to the weight to be attached to the position adopted by the legislature and judiciary in the United Kingdom, there is no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote..."

150 Ibid.

151 *Alison L Young*, *Parliamentary Sovereignty and the Human Rights Act*, London 2008.

152 *Aileen Kavanaugh*, *Proportionality and Parliamentary Debates: Exploring Some Forbidden Territory*, *Oxford Journal of Legal Studies* 34(3), (2014), p. 443.

153 *Liora Lazarus & Natasha Simonsen*, *Judicial Review and Parliamentary Debate: Enriching the Doctrine of Due Deference*, in Murray Hunt (ed.), *Parliament and Human Rights: Redressing the Democratic Deficit* Oxford, 2014.

154 Id.

The common ground between the judicial approaches discussed above is that in all of them aspects of the legislative process are considered a factor in the judicial determination of the constitutionality of a law. Beyond this common ground, indirect JRLP may take on a variety of forms.<sup>155</sup> In deriving or choosing among these forms, a court may be influenced by the nature of the constitutional system,<sup>156</sup> doctrinal particularities<sup>157</sup> and the overall political or legal culture. Aside from these, the form of indirect JRLP would depend on the way that a Court identifies weaknesses in the legislative process, the way in which it explains the weight it gives to such weaknesses, and the way in which it explains the effect of such a weakness on its overall decision in the case – in other words, how the Court chooses to reason. Sometimes we may find that the Court appears to have been influenced by weaknesses in the legislative process while acknowledging the factual background in which a law is passed, even where it does not explicitly cite such weaknesses as a ground for striking down a law. Alternatively, a Court could expressly state that particular weaknesses in the legislative process are crucial factors *contributing* to its decision to declare the law unconstitutional. In such a case, one may understand the judiciary’s reasoning as *signalling* that if the legislature should improve its law-making process.<sup>158</sup>

With this understanding of what JRLP means and the different forms it may take within the two broad types of direct and indirect JRLP, we may now move to analysing whether and how this might work in the Indian context.

#### D. Judicial review of legislative process in India – a plausible solution?

The case for JRLP generally and the case for particular kinds of JRLP may differ in strength based on the provisions of a particular Constitution. Keeping that in mind, this Part examines the plausibility of employing JRLP in India in light of constitutional text and judicial doctrine. Given the crucial differences between direct and indirect JRLP, we consider their plausibility separately below.

- 155 Arguably these varied forms are worthy of differentiation, however for the purpose of this paper it is sufficient for us to emphasise the common ground among these approaches.
- 156 Whether it is “monist” like the UK or “rights foundationalist” like Germany, to use Ackerman’s terms. *Bruce Ackerman, We The People: Foundations*, Cambridge, 1991.
- 157 Whether its jurisprudence include doctrines like that of “parliamentary sovereignty” or “due deference”, and what tests it has developed to evaluate fundamental rights violations (assuming the constitutional text is not explicit about the test applicable).
- 158 Depending on how the Court reasons, the law-making process may be tied to a particular issue – for example, a Court may hold that a law needs to be produced through a more fair, participative or deliberative in light of the significance of the right affected. In this way, the Court may refrain from authoritatively laying down what a good law must look like in general.

### I. Direct JRLP in India

The question here is whether the Indian judiciary can check for adherence to rules governing the legislative process, and if so, what those rules would be. We argue that it is plausible to apply direct JRLP in India in respect of procedural provisions entrenched in the Constitution, as doing so would be consistent with constitutional drafting history and constitutional text, as well as with judicial doctrine.

The Indian Constitution is one of the most detailed constitutions of the world. As noted in Part B., the Constitution lays down clear rules governing some aspects of the legislative process (including the manner of introduction of bills, manner of voting, quorum requirements, definition and procedure of money bills, qualifications and disqualifications of members of Parliament) while leaving certain aspects of the legislative process to be determined by the legislative bodies themselves. Upon being asked why the Indian Constitution was fraught with extensive details on how each constitutional organ should function, Dr. B.R. Ambedkar (the Chairman of the Drafting Committee)<sup>159</sup> responded that the Constituent Assembly could not risk leaving it to the legislature to prescribe such details as officials were likely to lack constitutional morality.<sup>160</sup> Dr. Ambedkar was concerned that in the absence of constitutional entrenchment, the political executive would disregard the spirit of the Constitution and use the forms of administration to subvert that spirit.<sup>161</sup> This fear of lack of constitutional morality, and the accompanying idea that legal norms ought to be entrenched to govern even the legislature are repeatedly invoked by the Constituent Assembly.<sup>162</sup>

This leaves open the question as to who can or should enforce constitutional provisions relating to the procedure to be followed by legislative bodies. A collective reading of the provisions of the Indian Constitution imply that the judiciary is empowered to perform this role.<sup>163</sup> Crucial in this regard is the provision conferring upon High Courts the power to grant constitutional remedies, where it is clarified that the Courts' jurisdiction may be in-

159 Dr. B.R. Ambedkar is commonly referred to as the chief architect of the Indian Constitution. His role in giving shape to the Indian Constitution is well documented and may be gleaned from comprehensive account by *B. Shiva Rao*, *The Framing of India's Constitution*, Bombay 1968.

160 Constituent Assembly Debates, 4 November 1948.

161 *Ibid.*

162 See *Narayan & Sindhu*, *supra* note 106 for an interpretation of the Indian Constitution drawing heavily on the Constituent Assembly Debates. Also see *Madhav Khosla*, *India's Founding Moment: The Constitution of a Most Surprising Democracy*, Cambridge 2020 (analyzing the reasons for the extensive entrenchment of constitutional norms in India).

163 Here, by "judiciary", we are referring to the Indian higher judiciary including the High Courts and the Supreme Court. As of now, these are the only Courts empowered to review all forms of State action for consistency with the constitution.

voked for the enforcement of fundamental rights “or for any other purpose.”<sup>164</sup> In addition to this particular provision, a structural reading of the Constitution indicates that the availability of judicial review is meant to be the rule, and immunity from judicial review the exception. This may be gleaned from the fact that the framers of the Indian Constitution were careful to expressly bar judicial review with respect to certain kinds of disputes that they deemed exceptional.<sup>165</sup>

This reading of the role of the judiciary under the Indian Constitution has been affirmed by the Indian Supreme Court in numerous cases. With respect to the power to enforce the provisions of the Constitution, the Supreme Court has explained that it is “the ultimate interpreter of the Constitution” and that it is the judiciary’s “constitutional obligation” to determine “whether an authority under the constitution has acted within the limits of its power or exceeded it.”<sup>166</sup> In reasoning resembling that of the American Supreme Court in *Marbury v. Madison*,<sup>167</sup> the Court has held that its authority to enforce all constitutional provisions flow from the notion of “constitutional supremacy” at the heart of the Indian system.<sup>168</sup> In recent years, the Supreme Court has also affirmed the view that judicial review is barred only in exceptional circumstances, and that judicial review should not be deemed barred unless one can show specific intent to this extent.<sup>169</sup>

One might rely on Article 122 of the Indian Constitution as representative of such specific intent to bar judicial review of the legislative process. Article 122 reads:

- 164 Article 226, Constitution of India. Here, one may argue that this power only vests with the High Court and not the Supreme Court since the corresponding provision conferring writ jurisdiction on the Supreme Court (Article 32) is focused on the enforcement of fundamental rights and does not include the phrase, “or for any other purpose.” The strength of this objection appears to be blunted by the fact that the Supreme Court could still exercise jurisdiction over such a dispute through its broadly framed appellate jurisdiction (which constitute the bulk of its workload). In light of this, one could respond to this objection by arguing that this simply implies that a proceeding seeking direct JRLP must first be instituted in a High Court under Article 226. In any case, the Indian Supreme Court has previously suggested that its jurisdiction under Article 32 goes beyond the enforcement of fundamental rights and extends as far as Article 226 (*Special Reference No. 1 of 1964*, AIR 1965 SC 745). Thus, one need not be detained by this objection.
- 165 For examples of judicial review being expressly barred, see Article 262 and Article 363 of the Constitution.
- 166 *State of Rajasthan v. Union of India*, AIR 1977 SC 1361. The Court went on to hold: “It is for this Court to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the rule of law.”
- 167 Though arguably with a more concrete foundation given that the power of the judiciary to question all forms of State action is expressly recognised in the Indian Constitution.
- 168 See for example *Raja Ram Pal v. Hon’ble Speaker, Lok Sabha*, AIR 2007 SC (Supp) 1448.
- 169 Justice D.Y. Chandrachud’s judgment in *K.S. Puttuswamy v. Union of India*, (2017) 10 SCC 1. Justice Chandrachud cites the example of Article 329A, which declares that “the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies ... shall not be called into question in any court.” (emphasis added).

*“122. Courts not to inquire into proceedings of Parliament*

*(1) The validity of any proceedings in Parliament shall not be called in question on the ground of any alleged irregularity of procedure.*

*(2) No officer or member of Parliament in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in Parliament shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers.”*

On the face of it, this provision appears to erect a hurdle in the path of direct JRLP. However, a close reading of the Constitution suggests otherwise. Article 122 is situated in a section in Part V of the Constitution under the heading “Procedure Generally”, and this section appears to cover narrower ground than that covered by the preceding constitutional provisions governing the legislative process. The first Article under the heading “Procedure Generally” is Article 118 of the Constitution, which provides that “Each House can make rules for regulating, subject to the provisions of this Constitution, its procedure and the conduct of its business.” The manner in which the provisions are structured suggests that the limits on judicial power provided for in Article 122 apply in respect of rules devised by the Houses themselves and not in respect of procedural rules entrenched in the Constitution or with respect to constitutional values. This interpretation too is supported by judicial doctrine. Since the 1960s, the Supreme Court of India has distinguished two kinds of grounds upon which the legislative process may be questioned: illegality and irregularity.<sup>170</sup> The contours of this distinction has been explained in *Raja Ram Pal v. Hon'ble Speaker, Lok Sabha*<sup>171</sup> as follows:

*“Any attempt to read a limitation into Article 122 so as to restrict the court's jurisdiction to examination of the Parliament's procedure in case of unconstitutionality, as opposed to illegality would amount to doing violence to the constitutional text. Applying the principle of —expressio unius est exclusio alterius (whatever has not been included has by implication been excluded), it is plain and clear that prohibition against examination on the touchstone of “irregularity of procedure” does not make taboo judicial review on findings of illegality or unconstitutionality ... the court will decline to interfere if the grievance brought before it is restricted to allegations of —irregularity of procedure. But in case gross illegality or violation of constitutional provisions is shown, the judicial review will not be inhibited in any manner ... The fundamental constitutional basis for the distinction between an irregularity of procedure and an illegality is that unlike in the United Kingdom where Parliamentary sovereignty governs, India is governed by constitutional supremacy.”*

170 The Court is commonly understood to have first made this distinction in *Special Reference No. 1 of 1964*, AIR 1965 SC 745, though its roots may be seen in *Babulal Parate v. The State of Bombay*, AIR 1960 SC 51.

171 *Supra* note 168.

The Supreme Court has repeatedly relied on this distinction to hold that Article 122 precludes the judiciary from enforcing the rules made by the Houses of Parliament under Article 118, but does not affect the power of the Court to check violations of norms relating to the legislative process that may be traced back directly to the Constitution.<sup>172</sup> This begs the question as to how the Court would determine when a ground constitutes an “illegality” and “irregularity”. The Supreme Court has largely refrained from fleshing out this distinction, although in certain recent judgments it has engaged with this distinction in more detail.<sup>173</sup> For our current purpose, what is important is that the doctrine does not stand in the way of direct JRLP in respect of constitutionally entrenched procedural provisions. In our view, the doctrine is consistent with direct JRLP insofar as the constitution is taken to be the source of grounds questioning the legislative process,<sup>174</sup> thus empowering the judiciary to enforce constitutional provisions governing the legislative process as well as constitutional values that may be derived from the Constitution.

Here, it is worth noting that the Indian Constitution does not explicitly recognise a set of constitutional values or principles governing the legislative process. In this regard, the Indian Constitution may be contrasted with constitutions like that of South Africa, which, as discussed in Part C above, recognises that the legislative process must be consistent with values like participative democracy<sup>175</sup> and openness.<sup>176</sup> In light of this, the Indian judiciary would have to engage in more interpretive activity to identify and apply constitutional values/principles as grounds to directly review the legislative process.<sup>177</sup> Perhaps this can be legitimately achieved if the judiciary were to develop a sound method of supplementing its interpretation of the constitutional text with historical, structural and ethical interpretations

172 See *Special Reference No. 1 of 1964*, AIR 1965 SC 745 and *Ramdas Athawale v. Union of India*, (2010) 4 SCC 1.

173 The more detailed analysis may be found in judgments by Justice D.Y. Chandrachud in the series of cases on the justiciability of classifying Bills as Money Bills. See his judgments in *K.S. Puttuswamy*, supra note 54 and *Rojer Mathew*, supra note 57. Nevertheless, a critical analysis of Indian jurisprudence on the illegality/irregularity distinction requires more specialized focus and is beyond the scope of this paper.

174 This does not necessarily mean that violations of procedural rules not entrenched in the Constitution (such as those laid down by the Houses of Parliament under Article 118) can never be taken judicial cognizance of. It means that non-constitutional rules cannot be the sole basis upon a law is challenged. One could still assert the relevance of violations of such rules as factors contributing to the view that a law is unconstitutional. However, this would then be a form of indirect JRLP.

175 Section 57(2)(b), Constitution of South Africa.

176 Section 59(1)(b) and 59(2).

177 Perhaps by supplementing textual interpretations of the Constitution with historical, structural and ethical interpretations.

that lead to the recognition of such constitutional values/principles.<sup>178</sup> How exactly this might develop in India would depend on the kind of cases that come up.

We can try to better understand how direct JRLP might fit within India's constitutional framework and doctrine by imagining how it might work in two of the instances we discussed in Part B of this paper: the passing of the Jammu & Kashmir Reorganisation Act, 2019 and the passing of the three Acts reforming India's agricultural markets ("the Farm laws").

The Jammu and Kashmir Re-organisation Act, 2019 was passed under Article 3, which grants Parliament the power to make laws to reorganise States. The proviso to Article 3 provides that no such Bill can be introduced without a recommendation of the President and unless the Bill has been referred by the President to the concerned State Legislature to express its views within a certain period and that period has expired. As may be recalled in Part B, owing to the imposition of President's rule in Jammu and Kashmir when the bills were passed, the Parliament was exercising the functions of the State Legislature. Thus, the Parliament acting in the capacity of the State Legislature had to *first* express its views on the Bill and only thereafter could the Bill have been introduced in Parliament. In the present case, this procedure was reportedly not followed.<sup>179</sup> Moreover, instead of "expressing its views" in the capacity of the State Legislature, the Houses simply voted on Resolutions approving the reorganisation of the State. Further, the Lower House allegedly did not even have a copy of the Bill while voting on this resolution.<sup>180</sup> If the Court were to approach this issue as one where direct JRLP is warranted, it would begin by analysing the import of Article 3 as reflecting the constitutional value of federalism,<sup>181</sup> and it could factor this in while determining the significance of non-adherence to the constitutional provision. Approached in this way, the Court could strike down the law if it were to find that the procedural limitation of Article 3 outlined above was not complied with.

The Farm Laws discussed in Part B also help imagine how direct JRLP might work in a slightly different way. It may be recalled that the Deputy chairman presiding over the Rajya Sabha session conducted voting on the Bills through a voice vote, and no actual counting of votes took place. Voice votes are clearly an unreliable method of determining whether a law is actually carried by the majority and to this extent it appears inconsistent with the requirements set out under Article 100 of the Constitution.<sup>182</sup> Yet, this method finds place in the Rajya Sabha's Conduct of Business Rules enacted pursuant to Article 118 of the Constitution, where the tension with Article 100 is sought to be resolved by providing that if the result

178 One may, for example, adopt a method similar to that adopted by the Indian Supreme Court in fleshing out the basic structure doctrine, to identify values such as "democracy", "federalism" and "rule of law" as grounds to evaluate the legislative process.

179 See *infra* part B.

180 See *infra* part B.

181 Which, notably, the Indian Supreme Court has repeatedly held to be a part of the Constitution's basic structure. *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461.

182 See *infra* part B.

of the voice vote is challenged, actual counting of votes would take place (this actual counting of votes is referred to as “division”).<sup>183</sup> In the case of the Farm Laws, numerous members of opposition claimed that they sought division as there was no clear majority in the voice vote, but members of the ruling party deny that division was sought. Notably, these laws have been challenged before the Courts on procedural and substantive grounds. If the Court were to apply direct JRLP, it would begin its analysis by examining whether the requirements of Article 100 were actually met, perhaps even by calling for the record of the legislative proceedings (both written and audio-visual) to determine whether a division was called for.<sup>184</sup> In such a scenario, the Court would not be examining compliance with the Conduct of Business Rules, but whether the rules were applied in a manner consistent with Article 100.

## II. Indirect JRLP in India

As discussed in Part C, under indirect JRLP the judiciary considers aspects of the legislative process as relevant factors in its determination of the constitutionality of a law, usually challenged on numerous grounds. In this section, we focus specially on whether and how indirect JRLP can be integrated into the Indian judiciary’s approach to determining rights violations. We argue that such an approach fits with and could add depth to two aspects of the Court’s rights jurisprudence: (1.) how it chooses among standards of review; and (2.) how it applies the proportionality test.

### 1. Choosing standards of review

The Indian judiciary has struggled with evolving and applying uniform standards of review consistently to evaluate when legislation violates fundamental rights.<sup>185</sup> India’s rights jurisprudence is dominated by deferential standards of review, where few questions are put to the State in evaluating the constitutionality of laws.<sup>186</sup> Unlike in the English context, where such deference was attributed to the continuing hold of the doctrine of parliamentary

183 See Rules 253-5 of the Rajya Sabha Rules of Procedure and Conduct of Business in the Council of States.

184 The Court could also seek an explanation from the Government on why microphones of members and the telecast was muted and assess the soundness of this explanation. See CPWD blames Opposition leaders for muted microphones in RS during farm Bills’ passage, *Hindustan Times* (November 30, 2020, available at <https://www.hindustantimes.com/india-news/cpwd-blames-opposition-leaders-for-muted-microphones-in-rs-during-farm-bills-passage/story-EQmOkCyFoHgpiYjvbMXXVM.html>).

185 *Pratap Bhanu Mehta*, *The Indian Supreme Court and the Art of Democratic Positioning*, in: Mark Tushnet & Madhav Khosla (eds.), *Unstable Constitutionalism: Law and Politics in South Asia*, Cambridge 2015; and *Chintan Chandrachud*, *Constitutional Interpretation*, in: Sujit Choudhry et al (eds.), *The Oxford Handbook of the Indian Constitution*, Oxford 2016.

186 *Narayan & Sindhu* (2018), *supra* note 106.

sovereignty, justifications were rarely offered for the use of deferential standards of review in India.<sup>187</sup> For the most part, when the Court takes a deferential approach it simply asserts that it is imperative to defer to legislative wisdom. In some exceptional cases, the judiciary has adopted and applied strict standards of review, but even in these cases it does not typically engage with the rest of its rights jurisprudence, thus leaving future judges relatively unguided in choosing whether to apply deferential or strict standards and also whether to apply standards deferentially.<sup>188</sup>

This dominance of deference and general lack of clarity is most clearly visible in India's jurisprudence on the general right to equality,<sup>189</sup> which we discuss below with the aim of illustrating how JRLP could add depth to the Indian judicial approach and help in resolving the uncertainty it entails. We begin in 1958 with the landmark case of *Ram Krishna Dalmia v. Justice Tendolkar*,<sup>190</sup> where the Indian Supreme Court held that the test applicable to evaluate violations of the right to equality would be that of "reasonable classification", as per which the Court would simply evaluate whether a law creates a classification that has an intelligible differentia and whether the differential has a rational nexus to the object of the act. Crucially, under this test a Court may not examine the legitimacy of a legislative purpose or whether there exist less restrictive alternatives or narrowly tailored alternatives to achieve the same purpose.<sup>191</sup> While adopting this test, the Court also laid down several accompanying legal fictions that were meant to facilitate the application of this two-step test. Key among these was the view that "it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds", that "the legislature is free to recognize degrees of harm" and that "in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation."<sup>192</sup> These legal fictions pervaded India's equality jurisprudence, rendering the actual legislative process irrelevant for the purpose of evaluating rights violations.

187 Though some have attributed it to the English influence on the early Indian judiciary, and the failure on the part of the judiciary to appreciate the significance of the Indian Constitution. See for example, *K.G. Kannabiran*, *Wages of Impunity: Power, Justice and Human Rights*, Hyderabad 2004.

188 See *Tarunabh Khaitan*, *Beyond Reasonableness*, *Journal of India Law Institute* 50(2), (2008), p. 177 (where Khaitan explains how the Indian Supreme Court's jurisprudence on the right to equality is riddled by inconsistency in the application of standards of review and the fact that even seemingly strict standards of review are applied deferentially).

189 Recognised under Article 14, which reads "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

190 AIR 1958 SC 538.

191 *Ibid.* Also see *P.K. Tripathi*, *Some Insights into Fundamental Rights*, Bombay 1972.

192 *Supra* note 190. Also see *Chiranjit Lal Choudhouri v. Union of India*, AIR 1951 SC 41.

Two decades later, the Court adopted a seemingly stronger standard referred to as the arbitrariness test, enabling it to evaluate the overall arbitrariness of a law.<sup>193</sup> While this test is more amenable to accounting for the actual legislative process, it has been applied very deferentially.<sup>194</sup> Further, for four decades thereafter, the Indian judiciary rendered conflicting judgments on whether the arbitrariness of law could be tested and how this could be done.<sup>195</sup>

At present, when a law is challenged under Article 14 the judiciary usually engages with both its deferential jurisprudence and its jurisprudence where it has emphasized the need to conduct rigorous judicial scrutiny. In built in the Court's jurisprudence is a tension between its general observations on the need to assume that laws are always the product of legislative wisdom and specific instances where it has put searching questions to the State to test the wisdom behind particular laws. The Indian judiciary has struggled to develop tools to mediate this tension, and it is in this context that indirect JRLP holds promise. As discussed in Part C, several scholars have explained how the judiciary can account for the actual legislative process followed so as to "enrich" the doctrine of deference, and to toggle the level of deference granted depending on the rigor of the legislative process. By applying this version of indirect JRLP, the judiciary could take into consideration whether a law was actually debated, whether opposition voices were heard, whether the legislature relied on expert evidence and whether it scrutinized the impact of the law on fundamental rights. This sensitivity to the actual legislative process could help the Court distinguish between a law that has been enacted through a highly participative, open and deliberative process involving experts and one that has been rushed through by the political executive by flouting (non-constitutional) procedural rules that facilitate minimal deliberation. While the judiciary may not strike down a law solely on the ground that it was produced through a secretive,

- 193 *E.P. Royappa v. State of Tamil Nadu*, AIR 1974 SC 555; Although some challenge this periodization and argue that even the arbitrariness test can be traced back to the 1950s, for example, see: *Shankar Narayanan*, Rethinking "Non-Arbitrariness", *NLUD Student Law Journal* 4, (2017), p. 133.
- 194 *Khaitan* (2008), supra note 188. Interestingly, while the Court initially spoke of equality as requiring non-arbitrariness, the standard of review it applied to determine violations of equality was that law that was "manifestly arbitrary" would be struck down.
- 195 Compare, for example, *State of Andhra Pradesh v. McDowell*, AIR 1966 SC 1627 with *Malpe Vishwanath Acharya v. State of Maharashtra*, (1998) 2 SCC 1 and *Mardia Chemicals v. Union of India*, (2004) 4 SCC 311. On this issue, see *Abhinav Chandrachud*, How Legitimate is Non-Arbitrariness? Constitutional Invalidation in Light of *Mardia Chemicals v. Union of India*, *Indian Journal of Constitutional Law* 2, (2008), p. 179. Notably, the uncertainty over this issue was sought to be resolved in the case of *Shayara Bano v. Union of India*, (2017) 9 SCC 1 where the Supreme Court affirmed that Article 14 violations would be evaluated using the arbitrariness test, and it overruled conflicting decisions. Notably, the recent judgment explained that under the arbitrariness test a law could be struck down if it is "something done by the legislature capriciously, irrationally and/or without adequate determining principle" or "when something is done which is excessive and disproportionate".

rushed, non-participative and non-deliberative process, it may use these circumstances to explain why it is not presuming that such a law is representative of the “wisdom of Parliament” and therefore worthy of deferring to. In cases where the Court finds that the doctrine of deference would not attract, it would then have a clear basis to employ stricter standards of review.<sup>196</sup>

In 2013, in *State of Maharashtra v. Indian Hotel & Restaurants Association*,<sup>197</sup> the Indian Supreme Court in fact demonstrated how this version of indirect JRLP could work in the Indian context. This case dealt with a challenge to an amendment to the Bombay Police Act, 1951 that prohibited dance performances in bars designated as less than three star hotels – a law that put 75,000 bar dancers out of work.<sup>198</sup> This amendment was challenged by owners of adversely affected bars and by trade unions representing the bar dancers. Pertinently, one of the arguments raised by the petitioners was that the amendment took away their livelihood not on the basis of any evidence of exploitation of dancers but instead on the basis of the Government’s narrow understanding of morality. According to the State, the amendment was justified because it represented the legislature’s concern over the “ill effects of dance bars on youth and dignity of women.”

In evaluating the justification for the law, the Court factored in the way in which it had been debated, focusing in particular on the fact that the law did not appear to be based on any empirical findings. The Court noted that the proposal for the ban had originated from the Home Ministry and the Maharashtra State Commission for Women through resolutions merely containing assertions without any studies backing them. The Court found that the classification of hotels appeared to be on the basis of stereotypes associated with socio-economic background rather than on factual foundation, and that such a classification goes against the egalitarian promise of the Constitution.<sup>199</sup> While the State relied heavily on India’s deferential equality rights jurisprudence to argue that the legislature is free to “pick

196 To be clear, we are not suggesting that the actual legislative process should be the only factor determining the standard of review applicable. Following Lazarus and Simonsen, we believe that it is one among several factors, including the nature and extent of the right curtailed.

197 (2013) 8 SCC 519.

198 The prohibition was sought to be justified on several grounds, including that the bar dancers were victims of physical and financial exploitation and that the dance forms were “horrid and obscene”.

199 “... Our judicial conscience would not permit us to presume that the class to which an individual or the audience belongs brings with him as a necessary concomitant a particular kind of morality or decency. We are unable to accept the presumption which runs through Sections 33A and 33B that the enjoyment of same kind of entertainment by the upper classes leads only to mere enjoyment and in the case of poor classes; it would lead to immorality, decadence and depravity. Morality and depravity cannot be pigeon-holed by degrees depending upon the classes of the audience. The aforesaid presumption is also perplexing on the ground that in the banned establishments even a non-obscene dance would be treated as vulgar. On the other hand, it would be presumed that in the exempted establishments any dance is non-obscene. The underlying presumption at once puts the prohibited establishments in a precarious position, in comparison to the exempted class for the grant of a licence to hold a dance performance. Yet at the same time, both

and choose degrees of harm”, the Court rejected the State’s contention on the ground that no material had been provided for the judiciary to defer to.<sup>200</sup> Finally, addressing the State’s contention that the law was justified because it was meant to protect vulnerable women who had been trafficked into bad dancing, the Court held:

*“A perusal of the Objects and the Reasons would show that the impugned legislation proceeds on a hypothesis that different dance bars are being used as meeting points of criminals and pick up points of the girls. But the Objects and Reasons say nothing about any evidence having been presented to the Government that these dance bars are actively involved in trafficking of women. In fact, this plea with regard to trafficking of women was projected for the first time in the affidavit filed before the High Court. The aforesaid plea seems to have been raised only on the basis of the reports which were submitted after the ban was imposed.”*

In this way, by taking account of the actual law-making process, the Court was able to address the contentions raised in more depth, and also offer a clear justification for its decision to not defer to legislative judgment.

This method of indirect JRLP would also be relevant for the challenge to the Farm laws now pending in the Supreme Court.<sup>201</sup> The Government may cite precedent referred to above to argue that the Court’s scope of judicial review is limited and the Court must defer to the legislature and experts in matters of economic policy which has the resources and wherewithal to consult stakeholders and make complex decision. If the Court were to apply indirect JRLP, it would have analyse whether the measure and its implications were in fact debated in Parliament and whether stakeholders and experts were consulted for the legislation to merit any deference.<sup>202</sup>

kinds of establishments are to be granted licenses and regulated by the same restrictions, regulations and standing provisions.”

200 “The next justification given by the learned counsel for the appellants is on the basis of degree of harm which is being caused to the atmosphere in the banned establishments and the surrounding areas. Undoubtedly as held by this Court in the Ram Krishna Dalmia’s case, the legislature is free to recognize the degrees of harm and may confine its restrictions to those cases where the need is deemed to be clearest. We also agree with the observations of the U.S. Court in Joseph Patson’s case that the state may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, but such conclusion have to be reached either on the basis of general consensus shared by the majority of the population or on the basis of empirical data. In our opinion, the State neither had the empirical data to conclude that dancing in the prohibited establishment necessarily leads to depravity and corruption of public morals nor was there general consensus that such was the situation.”

201 Writ Petition no. 1152 of 2020.

202 Interestingly, the Government of India filed an affidavit in the Supreme Court on January 10, 2021 detailing the consultation undertook before passing the laws. However, the affidavit refers to meetings and committees constituted between 2000 and 2002 and then 2010 and refers to only one meeting that took place in May 2020 before the passing of the laws and does not specify which stakeholders were consulted. The Counter Affidavit is available at <https://www.livelaw.in/t>

This discussion illustrates how indirect JRLP could be used to add depth to the doctrine on deference in the Indian context. This approach could help the Court produce a more coherent rights jurisprudence by enabling it to base its decision on the standard of review applicable upon a combination of a variety of factors *including* the actual process by which a law was produced. Before concluding this section, it is important to note that the judicial approach outlined here is only relevant insofar as the Indian judiciary continues to employ the general doctrine of deference and continues to apply multiple standards of review simultaneously to determine rights violations under particular provisions. As we have argued elsewhere, there are good reasons to question whether this doctrine of deference ought to have emerged at all under the Indian Constitution, where the associated doctrine of parliamentary sovereignty was emphatically rejected.<sup>203</sup> Further, a historical, textual and structural reading of the Indian Constitution suggests that the default test for determining rights violations ought to have been a strict one like the proportionality test.<sup>204</sup> In the next section, we discuss how indirect JRLP may be integrated into the proportionality test.

## 2. Applying the proportionality test

The Indian courts have in fact recognized the proportionality test as being the appropriate test in respect of freedoms under Article 19 such as the freedom of speech, movement, association, and trade and business, although they have applied it in an unstructured and partial manner.<sup>205</sup> Gradually, the use of the proportionality test has been expanded to fundamental rights generally.<sup>206</sup> Most recently, the Court clarified that the proportionality test would be used to evaluate the constitutionality of restrictions on the right to personal liberty recognised under Article 21 and on unenumerated rights like the right to privacy.<sup>207</sup>

As noted in Part C, the proportionality test is compatible with indirect JRLP particularly with respect to evaluations of the necessity and proportionality of measures curtailing rights.<sup>208</sup> The Electoral Bonds case discussed in Part B provides an important illustration of how the Court can integrate process review into the proportionality test. The electoral bonds scheme passed as a part of the Annual Budget allows for anonymity of corporate and individual donors of political parties. The petitioners have challenged the scheme as being

op-stories/farm-laws-supreme-court-farmers-protest-central-government-affidavit-168272#.X\_yIcZtC\_VA.twitter.

203 *Narayan & Sindhu*, (2018), *supra* note 106.

204 *Ibid.*

205 *Ashwita Ambast*, Where's Waldo? Looking for the Doctrine of Proportionality in Indian Free Speech Jurisprudence, *Vienna Journal on International Constitutional Law* 9(3), (2017), p. 344.

206 *Om Kumar v. Union of India*, (2001) 2 SCC 386. In *Shayara Bano v. Union of India*, (2017) 9 SCC 1, the Court appears to have synthesized the proportionality test and the arbitrariness test to some extent.

207 *K.S. Puttaswamy v. Union of India*, (2019) 1 SCC 1.

208 See *infra* notes 137 to 150 and accompanying text.

violative of the right to know<sup>209</sup> and as arbitrary for encouraging kickbacks in the form of secret political donations as well as skewing the level playing field between political parties as the scheme by design benefits the party that is in power and has access to information about who is purchasing electoral bonds through the bank issuing them. In the case pending before the Supreme Court, the State has submitted that the electoral bonds scheme is a reasonable restriction of the right to know as it ensures that there is transparency in electoral politics by preventing the circulation of black money and second that it respects the right to privacy of political donors. Opponents of the scheme have argued and demonstrated that scheme has the counter effect of enabling money laundering through shell companies and corruption through kickbacks as the source of donations is unknown.<sup>210</sup>

To imagine how indirect JRLP might play out in this case, we can examine the first line of argument developed by the State to defend the constitutionality of the law; that it is efficacious in removing black money from electoral funding. Under the proportionality test, the burden would be on the State to establish that the scheme is in fact suitable in achieving the aim of reducing black money in electoral funding. The Court, while evaluating the evidence brought on record by the Government, could analyse the law-making process to determine whether the legislature in fact deliberated and concluded that the scheme would result in transparency of finances. The Court could also analyse what material was available with the Legislature in respect of advice from expert bodies such as the Reserve Bank of India and Election Commission. Notably, subsequent investigation has revealed that Reserve Bank had in fact expressed concerns about the scheme for it being an enabler of money laundering.<sup>211</sup> As noted in Part B, the debate in the legislature was replete with assertions that the scheme would increase transparency, but this assertion was never substantiated with arguments explaining how this would work. There was absolutely no discussion on the efficacy of the scheme, its susceptibility to misuse, how it could increase corruption through kickbacks, and there was no mention of the impact of the law on the fundamental right to know. The Court may give weight to the fact that the scheme was rushed through Parliament through by designating it as a Money Bill to bypass the Rajya Sabha, and specifically, incorporating it within the Annual Budget so that there would be less attention on it and less time to debate it. Under indirect JRLP, all of these factors could contribute to the Court's

209 The right to know has been recognised under Articles 19(1)(a) and 21 of the Indian Constitution. See *State of U.P. vs. Raj Narain*, (1975) 4 SCC 428; *S. P. Gupta v. Union of India*, 1981 Supp SCC 87; *Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India*, (1985) 1 SCC 641 (SC).

210 *Milan Vaishnav*, Electoral Bonds: The Safeguards of Indian Democracy Are Crumbling, November 2019, available at <<https://carnegieendowment.org/2019/11/25/electoral-bonds-safeguards-of-indian-democracy-are-crumbling-pub-80428>>.

211 Electoral bonds: Govt ignored red flags raised by Reserve Bank, Election Commission, Indian Express, November 22, 2019, available at <https://indianexpress.com/article/india/electoral-bonds-govt-ignored-red-flags-raised-by-reserve-bank-election-commission/>.

determination of whether the State has discharged its burden that the restriction is in fact suitable, necessary and proportionate.

While courts in India have increasingly invoked the proportionality test in the last few years, they are yet to evolve a consistent approach toward applying it, particularly when it comes to applying the third and fourth step of the test.<sup>212</sup> As discussed in Part C, integrating indirect JRLP into strict judicial tests could function well to nudge the legislature to debate laws and consider their implications on rights while enacting them. As with the jurisdictions discussed in Part C, the exact manner in which the judiciary can develop indirect JRLP within the proportionality test may be best explained by examining how it might work in a set of particular cases.<sup>213</sup> Our emphasis here is on the point that the integration of indirect JRLP into the proportionality test would not be inconsistent with Indian doctrine, and in fact might equip the judiciary to reason more clearly while determining rights violations.

### **E. JRLP in India – A desirable solution?**

Having explained how JRLP can apply in India, we are left with the question as to whether or not it is normatively desirable. In this Part, we outline several arguments supporting and against JRLP while also keeping in mind the specific context in India discussed in Parts I and III above.

#### *I. Arguments supporting JRLP in India*

While some of the arguments are common for direct and indirect JRLP, they are also supported by distinct arguments. We have dealt with these separate arguments under the sub-headings below.

##### 1. Enforcing a written constitution

The strongest argument in favour of direct JRLP is that judicial enforcement of procedural guarantees mentioned in the Constitution is necessary to ensure that the requirements expressed or implied in the constitution are fulfilled. It is now well accepted across the world that it is the role of the judiciary to check State action for inconsistency with the Constitution. This understanding of the judicial role was the premise for the recognition of judicial review in the United States in the landmark case of *Marbury v. Madison*, where Chief Justice Marshall reasoned:

212 *A. Chandra*, Proportionality in India: A Bridge to Nowhere?, *University of Oxford Human Rights Hub Journal* 3(2), (2020), p. 55.

213 This kind of analysis is beyond the scope of this paper.

*“The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written Constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable. Certainly, all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the Legislature repugnant to the Constitution is void”<sup>214</sup>*

Over the last century, there has been a conscious and gradual effort among constitutional draftsmen to detail more restrictions on the legislature, to ensure that it does not violate rights, procedural restrictions and obligations of deliberation.<sup>215</sup> The argument in favour of direct JRLP is that such express and implicit procedural restrictions must be enforced like substantive restrictions so as to uphold the supremacy of a written constitution.<sup>216</sup> Admittedly, this argument attracts the same objection that *Marbury v. Madison* has traditionally attracted – even assuming that the legislature can be found to act unconstitutionally, what authorises the judiciary to be the organ to enforce the constitution?<sup>217</sup> As we have argued in Part D of this paper, a structural reading of the Indian Constitution points to the judiciary having the authority to review violations of all constitutional provisions unless expressly prohibited.<sup>218</sup> The Supreme Court of India has favoured this structural reading, deriving its power to enforce constitutional provisions from the notion of “constitutional supremacy”, except where its jurisdiction has been specifically barred. In light of the express recognition of judicial review of all State action<sup>219</sup> and the persuasive structural interpretation in favour of judicial enforcement of the Constitution, this argument supporting direct JRLP is a particularly strong one in the Indian context.

## 2. Culture of justification

As we have discussed in Part C of this paper, one of the reasons that violations of procedural rules become pathological is because of the absence of any effective check on such vio-

214 *Marbury v. Madison*, 5 US 137 (1803) at p. 177.

215 Important examples include the Indian Constitution and the South African Constitution. On the significance of extensive constitutional entrenchment in India, see *Khosla*, (2020), supra note 162.

216 *Ittai Bar-Siman-Tov*, (2011), supra note 94, at p. 1937-8.

217 *Barry Friedman*, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, *New York University Law Review* 73(2), (1998), p. 333. To the extent that this objection is premised on the doctrine of separation of powers more generally, it is addressed in a later section in this Part.

218 See infra notes 163-165 and accompanying text.

219 See *Narayan & Sindhu*, (2018), supra note 106.

lations. In this context, enforcement of the constitutional provisions on legislative process through direct JRLP can ensure that the principles of transparency, participation and deliberation underlying these provisions are protected.<sup>220</sup>

Similarly, scholars have sought to explain the importance of indirect JRLP through what it signifies and what it can achieve. As noted by Lalana, the decision to refrain from judicial review of legislative process indicates that the quality of legislative reasoning and justifications are insignificant and thus sits uncomfortably in a culture of justification.<sup>221</sup> Further, several scholars have argued that where the Court adjusts deference accorded to the decision of the legislature on the basis of the quality of deliberation and reasons offered by the legislature, this can have a disciplining<sup>222</sup> and catalyzing<sup>223</sup> effect on deliberation in the legislature. Mattias Kumm, for instance, notes that the use of the proportionality test by the legislature and the judiciary as the framework to assess deliberation shifts the focus in the legislature from merely ideological or political reasons or rhetoric to legal justifications based on suitability, necessity and proportionate impact.<sup>224</sup> Similarly, Kavanaugh notes that the Court's consideration of legislative debate is likely to stimulate and encourage deliberation.<sup>225</sup> Thus, through the use of JRLP, the judiciary can encourage the legislature to fulfil its obligations under a constitution that seeks to foster a culture of justification.

### 3. Dialogic judicial review

As we have explained above, courts may consider flaws in the legislative process by making them sole grounds to strike down law (direct JRLP) or by making them a factor in their determination of the constitutionality of a law (indirect JRLP). In this way, by focusing wholly or partially on procedural grounds, courts can strike down a law without entirely displacing the substantive norms upon which legislative judgment is based and allow the Legislature another attempt to pass the law after complying with procedural requirements. This approach to judicial review whereby legislatures are given more room to maneuver in response to judicial determinations of unconstitutionality exhibit some of the qualities of what has been termed "dialogic judicial review".<sup>226</sup>

In India, the use of indirect JRLP appears to hold immense promise in realising this advantage. By examining whether the legislative process is worthy of deferring to, the Indian judiciary could send a signal to the legislature that its laws are less likely to be struck down if they are supported by a transparent, participative and deliberative process that adequately

220 For a review of scholarship that has examined the influence of judicial review on legislative exercise of power see *Ittai Bar-Siman-Tov*, (2015), *supra* note 111.

221 *Lalana*, (2019), *supra* note 91, at p. 216.

222 *Kumm*, (2007), *supra* note 139, at p. 21.

223 *Kavanaugh*, (2014), *supra* note 152 at p. 466.

224 *Kumm*, (2007), *supra* note 139, at p. 18-19.

225 *Kavanaugh*, (2014), *supra* note 152 at p. 466.

226 *Kent Roach*, *Dialogic Review and its Critics*, *Supreme Court Law Review* 23, (2004), p. 49.

considers the constitutional implications of its laws. In this fashion, indirect JRLP holds the potential to enhance the democratic functioning of India's legislature. In deciding the constitutionality of laws partly based on the extent to which the legislature carried out a rights-based analysis, the judiciary also would grant the legislature a wider opportunity to pass a law on the same issue through a more legitimate process. Assuming that it is necessary for the legislature to enact a law in furtherance of a clear and attainable gain, a judicial decision striking down a first attempt at that law purely on substantive grounds is likely to be more difficult to overcome than one that partially strikes down the first attempt law on the ground that the legislature (and correspondingly the State) failed to justify the necessity of its measure.

The strategy of factoring in aspects of the legislative process while carrying out rights-based judicial review<sup>227</sup> could therefore be effective in preventing the over-entrenchment of substantive norms in constitutional law. Highlighting this advantage of indirect JRLP, Oliver-Lalana argues that a partial focus on process-grounds can “soften the tension between democracy and juristocracy.”<sup>228</sup> By placing fewer issues out of the reach of the democratically elected body, indirect JRLP can enforce the Indian Constitution in a manner that is respectful of the constitutional value of democracy.<sup>229</sup> Thus, perhaps somewhat counter-intuitively, the expansion of judicial power to factor in the actual legislative process could function to preserve the legitimacy of judicial power in the long term by simultaneously reinforcing the democratic quality of legislative proceedings and granting legislative bodies more opportunities to enact law on particular issues.

## II. *Objections to JRLP in India*

Like the advantages of JRLP, the strength of the objections would be grounded in the particular context in which they are raised. That said, in this section of the paper we outline several objections to JRLP that might be raised in the Indian context by building off well accepted concepts in constitutional theory that also find place in Indian constitutional discourse.

### 1. Separation of powers

The foremost objection to JRLP is that it violates the doctrine of separation of powers. As per this view, “separation of powers concerns ... [and c]oncerns regarding judicial activism

227 *Ittai Bar-Siman-Tov*, (2012), *supra* note 127, at p. 274 (arguing that JRLP “supplements the traditional balancing tests and is integrated into them.”).

228 *A. Daniel Oliver-Lalana*, *On the (judicial) method to review the (legislative) method*, *The Theory and Practice of Legislation* 4(2), (2016), p.135-153 at p.152.

229 Yet, this would not necessarily mean that the judiciary only focuses on procedural aspects of law-making and abandons its power to review the substantive content of laws. This point is addressed below.

and the counter majoritarian difficulty are at their zenith when courts invalidate the work of elected branches based on perceived differences in the lawmaking process.<sup>230</sup> Bar-Siman-Tov points out that advocates of this view see JRLP as “an interference with the internal workings of the legislature and as an intrusion into the most holy-of-holies of the legislature’s prerogatives.”<sup>231</sup>

With respect to direct JRLP, the strength of this argument depends on how “internal workings” of the legislature are identified. Some may argue that procedures relating to the legislature ought to be the prerogative of the legislature alone. However, this kind of argument fails to appreciate the distinction that may be made between constitutional provisions meant to control legislative activity and provisions conferring power on the legislature to frame procedures to govern their activity. In the Indian context, the separation of powers objection may apply to judicial review of rules laid down in exercise of Article 118. As discussed in Part D, the Indian judiciary has taken note of this while distinguishing between illegality and irregularity and holding that it may not strike down law purely on the basis that there were irregularities in enacting it.

With respect to indirect JRLP, it is argued that the doctrine of separation of powers requires the judiciary to focus exclusively on the final legislative product and to refrain from looking at how a law was actually made. Supporters of JRLP have sought to rebut this objection by arguing that it is premised on a “rigid” and “rusty” conception of separation of powers that sits awkwardly with modern constitutional systems where all State action is expected to be products of reason.<sup>232</sup> Given that constitutions can entrench the doctrine of separation of powers in different ways, there appear to be inherent limits on attempts to answer this question in a generalized manner. As noted in Part B, constitutions that seek to create cultures of justification require the legislature to analyse the impact of their measures on fundamental rights and the judiciary to evaluate the quality of State’s justifications. In such a case, the judiciary turns to legislative process as a key component of the justification of the State and treating this as a violation of separation of powers would then act as a hindrance in the way of the creation of a culture of justification.<sup>233</sup>

230 *Staszewski* quoted in *Ittai Bar-Siman-Tov* (2011), supra note 94 at p. 1927. Also see Justice Scalia’s dissenting opinion in *Thompson v. Oklahoma*, 487 US 815 (1988), where he sought to distinguish JRLP from judicial review of content of laws, and argued that judicial review of legislative processes strikes at “the heart of their sovereignty.” In the German context, Philipp Dann argues that the use of the concept of rationality in German constitutional jurisprudence to test the legislative process is questionable as it appears to be a placeholder for political encroachments by the court. See: *Phillipp Dann*, *Verfassungsgerichtliche Kontrolle Gesetzgeberischer Rationalität*. *Der Staat* 49, (2010), p. 630 [translated copy on file with authors].

231 *Ittai Bar-Siman-Tov*, (2011), supra note 94.

232 *Navot*, (2006), supra note 110.

233 *Lalana*, (2019), supra note 91, at p. 217.

## 2. Unclear standard of review

Another objection against JRLP concerns the lack of clarity of standard of review which promotes judicial arbitrariness and uncertainty. In the context of direct JRLP, this objection would apply in context of vague and open-ended constitutional provisions or principles implied in the constitution. The objection goes that these provisions are capable of more than one interpretation and in this context the judiciary's interpretation should not override that of the legislature. This objection tends to ignore the fact that courts frequently grapple with the task of interpreting ambiguous provisions and with reading provisions together to explain the meaning of a constitution. Thus, in a sense, courts are already equipped to carry out this task. The strength of this objection may grow in a jurisdiction where Courts fail to offer sufficient justificatory reasons for striking down laws on process grounds. In the Indian context, we would argue that this objection can be mitigated if the judiciary were to focus on the more explicit procedural requirements set out in the Constitution while carrying out direct JRLP.

This objection, when raised in context of indirect judicial review, questions whether the judiciary can develop "judicially manageable standards"<sup>234</sup> as criteria to evaluate the legislative process.<sup>235</sup> For example, one may inquire how much deliberation is enough deliberation and how much evidence is enough evidence for the Legislature to discharge its burden? This is no doubt a powerful objection that any judiciary would have to be alive to. However, there are several countervailing reasons that dilute this objection.

First, as seen from the instances of legislative deliberation outlined in Part B, the Indian legislature often altogether ignores deliberating and assessing the suitability, necessity and proportionality of a measure owing to either less time devoted for debate, constant disruptions or appeals to rhetoric or political reasons. Therefore, in most cases the judiciary is dealing with cases of a complete absence of deliberation as opposed to adjudging the sufficiency of deliberation. Scholars have identified such cases as cases that make the job of the judiciary much easier.<sup>236</sup> While these might be exceptions in other jurisdictions they are largely the rule in India.<sup>237</sup> As seen in the case of electoral bonds, for example, there was no debate in Parliament about the implications of enabling anonymous political donations. Further, the opinion of experts on the suitability of the scheme was either not sought or ignored altogether.

Second, in indirect judicial review, insufficient legislative deliberation in and of itself is not an automatic or isolated ground to strike down a legislation. As we have discussed in

234 *Richard H. Fallon*, Judicially Manageable Standards and Constitutional Meaning, *Harvard Law Review* 119, (2006), p. 1275.

235 *A. Christopher Bryant & Timothy J. Simeone*, Remanding to Congress: The Supreme Court's New on the Record Constitutional Review of Federal Statutes, *Cornell Law Review* 86(2), (2001), p. 328 (raising such an objection in the American context).

236 *Lalana*, (2019), supra note 91.

237 See Part B of this paper.

Part C generally and Part D in the context of India, under indirect JRLP a weak legislative process becomes one among several grounds resulting in the determination of unconstitutionality, perhaps even indirectly by influencing the degree of deference the judiciary chooses to show toward the law in question.<sup>238</sup>

Third, it is worth noting that this objection is attracted to most methods of judicial review such as balancing and determining reasonableness which are inherently open ended and are likely to raise disagreements about how they are applied.<sup>239</sup> These problems however do not imply that judicial review must be abandoned but instead methods of mitigation of judicial arbitrariness must be identified. For instance, the judiciary must be expected to be transparent and give clear reasons for why and what aspects of the deliberation of the Legislature or the evidence considered by it was considered lacking.<sup>240</sup> This clear identification of the problem would in turn guide the Legislature in rectifying the deficiencies observed. In turn, the Legislature can engage with and point out the inadequacies of the reasoning provided by the Judiciary by explaining and also reiterating its observations and findings. Academics and the public can also equally engage with the reasons of the judiciary that would be publicly available. Different scholars have come to different conclusions of the standard. As Lalana notes, that the standard in order to be effective must be one that is intensive enough to identify manipulations of the law making process and bogus justifications.<sup>241</sup>

Finally, the strength of this objection is relative to the certainty of the Court's other doctrines. As Linde points out, clarity in doctrine is important because "lawmakers must in practice be able to comply with the demands of the doctrines of constitutional law if they are to make laws that can survive review under these doctrines." Often the more complete version of the argument that indirect JRLP is unclear is that it is unclear as compared to judicial review of the content and impact of a law. However, the strength of this argument depends on the extent to which the doctrines used for substantive judicial review are clear. If the principles on which they are based are either unclear or inconsistently applied, this might weaken the case for resisting indirect JRLP. In this situation, the overall case for indirect JRLP may be finally swayed by the other factors rather than this factor alone.

238 In this regard, one may still respond that combining process-based grounds with substance-based grounds is more problematic because it implies an even more unclear standard of review. This argument is premised on the view that water-tight doctrines are always preferable to partially flexible ones, and this is susceptible to challenge, as *Dan Coenen* shows in: *The Pros and Cons of Politically Reversible Semisubstantive Constitutional Rules*, *Fordham Law Review* 77, (2009), p. 2835-2392, at p. 2862-2863. Coenen also notes how this objection overlooks the fact that doctrines often concretise over time "in keeping with the common law tradition". This, of course, is equally applicable, if not more, in the Indian context.

239 *Lalana*, (2016), supra note 228, at p. 145 and 151.

240 *Lazarus and Simonsen*, (2014), supra note 153.

241 *Lalana*, (2016), supra note 228, at p. 147.

### 3. Weakening judicial review

While the first and second objections are concerned over the increase in judicial power that JRLP entails, one may also object that JRLP could make the power of judicial review weaker. One such objection is that JRLP would entail a shift in focus from the impact of the law to whether the legislature complies with procedures in passing laws. It is feared that this shift in focus from substance to procedure would weaken judicial review by disempowering the judiciary from rigorously scrutinizing the impact of a law. This objection can be rebutted as being based on a flawed premise. With respect to direct JRLP, the premise is flawed because the use of direct JRLP does not necessarily mean that other forms of judicial review would have to be abandoned. For example, in the electoral bonds case, the fact that it is possible to question the process followed in enacting the laws does not mean that the Indian judiciary will not examine whether the law violates the right to know. The judiciary may well strike down the law on the ground that it was incorrectly passed as a Money Bill, or it may find that the law was correctly passed as a Money Bill but still strike it down for violating the right to know.

In respect of indirect JRLP, the strength of the objection is largely determined by how well the judiciary is able to weave together process-review into its review of substance. Again, it is wrong to assume the availability of process-grounds would exclude the reliance on substance-grounds to strike down laws. Indeed, as the Maharashtra Bar Dancers case<sup>242</sup> discussed in Part D demonstrates, the Indian Supreme Court is perfectly capable of applying indirect JRLP in a manner that is sensitive to procedural aspects of a law even while carefully scrutinizing how a law results in a severe curtailment of fundamental rights.<sup>243</sup> This is also consistent with how scholars have understood indirect JRLP to operate in other jurisdictions such as Israel<sup>244</sup> and Germany.<sup>245</sup>

In any case, this objection is partly premised on the view that judicial review of substance is strong and effective in protecting fundamental rights. This presumption is difficult to sustain in the Indian context, where constitutional jurisprudence on judicial review of legislative action has been shown to be rather weak<sup>246</sup> and inconsistent.<sup>247</sup> In our view, the incorporation of process-based grounds into Indian constitutional jurisprudence appears to hold more promise than risk in light of the approaches that presently dominate Indian ju-

242 *Supra* note 197.

243 See *infra* notes 197 to 200 and accompanying text.

244 *Ittai Bar-Siman-Tov*, (2012), *supra* note 127.

245 *Meßerschmidt*, (2012), *supra* note 103.

246 *Kannabiran*, (2004), *supra* note 187 (demonstrating the Indian judiciary's poor track record in protecting fundamental rights); also see *Gautam Bhatia*, *The Transformative Constitution*, New York 2019, (pointing out that conservative approaches to interpreting the Indian Constitution resulting in weak protection of rights have dominated Indian constitutional jurisprudence).

247 See *supra* note 185.

risprudence.<sup>248</sup> To be clear, we are not suggesting that JRLP would be preferable to judicial review of substance because the current approach is weak and should be abandoned. However, the fact that the current approach is weak is a relevant factor in addressing the objection that *incorporating* process-review into the current approach would necessarily weaken judicial review. In this regard, one might even go a step further and speculate that the reason that pure substance review is so weak in India is because the judiciary is apprehensive that the consistent use of strict standards of review would imply that most laws enacted by the judiciary would have to be struck down since many of them would then be seen to violate rights. If this is true, integrating process-based grounds into its reasons for striking down law could serve as a useful judicial strategy to provide the legislature another opportunity to enact laws on an issue without the judiciary having to embrace a deferential standard of review.<sup>249</sup>

A related objection is that a focus on JRLP would enable the legislature to escape the rigors of judicial scrutiny simply by showing that the law-making process satisfies minimal procedural requirements and requirements of transparency, participation and deliberation. In other words, it is feared that JRLP would encourage the legislature to engage in “box-ticking”, where it focuses on appearing as if it has met the procedural requirements recognised as important by the judiciary.<sup>250</sup> This objection too is not fatal for two reasons.

First, it may not be an altogether undesirable outcome if the legislature’s reaction to the use of JRLP was to attempt to tick boxes indicating that the legislative process is transparent, participative and deliberative. As emphasised in Part B of the paper, the Indian legislature rarely attempts to tick these boxes, and in recent years it has even frequently sought to avoid the minimal procedural guarantees laid down in the Indian Constitution. In this context, even if the legislature began to conduct legislative proceedings so as to appear to satisfy minimal procedural requirements this could actually create more opportunities for other actors such as opposition parties and members civil society to put pressure on the political executive to meaningfully debate the issues raised by particular laws. If, for example, while performing indirect JRLP the judiciary paid attention to matters like whether the process followed was open, participative and deliberative, this might influence the legislative body to follow processes that minimally satisfy these values, which may actually result in a better law-making process than that currently followed by India’s Parliament.

248 It is beyond the scope of this paper to identify and list out the weaknesses that presently afflict Indian constitutional jurisprudence. For a sample of these weaknesses, see *supra* notes 185 and 246.

249 Or apply a “strict” standard deferentially, as it has taken to doing in more recent years. See *Aparna Chandra*, *Proportionality in India: A Bridge to Nowhere?*, University of Oxford Human Rights Hub Journal 3(2), (2020).

250 *James Fowkes* explains how this concern arose in the South African context after the Constitutional Court held that it was empowered to strike down law on procedural grounds, noting that “deciding whether officials are just going through the motions requires the court to make judgments about the mental state and intentions of individual legislators, something the justices understandably resist doing.” *Susan Rose Ackerman et al*, *supra* note 120, p. 117.

Second, one may argue that this objection wrongly presumes that the judiciary would be easily misled by the appearance of participation and deliberation. This would depend on how carefully the judiciary examines the justifications put forth. For instance, while considering whether there exist less restrictive alternatives to achieve a particular goal, it is not enough for the legislature to simply assert that “alternatives have been considered and were not found suitable”. In such a case, the judiciary could look beyond the assertion and ask whether such statements were backed by evidence. As discussed in Part C of the paper, courts can and do carry out such forms of “evidence-based review”.<sup>251</sup>

## F. Conclusion

In this paper, we offer a bird’s eye view of the numerous deficiencies in law-making in India that enables Parliament to enact laws with little scrutiny and debate, and we argue that this requires scholarly attention. Drawing on scholarship from other jurisdictions, we outline judicial approaches meant to improve the law-making process, and we assess the viability of employing these approaches in India. We also contend with objections to JRLP, and explain how they are mitigated to a great extent in light of the existing weaknesses in Indian judicial doctrine. Against this backdrop, we argue that JRLP merits further consideration and it is hoped that this paper can serve as a starting point for further discussion on the issue.<sup>252</sup> As emphasized in Part E, JRLP could be helpful in improving the law-making process while also ensuring the protection of fundamental rights, and we are of the view that this would be particularly valuable in the Indian context.

251 *Infra* notes 104 and 105 and accompanying text.

252 It may be clarified that the aim of this paper is not comprehensively present the debate over JRLP across jurisdictions, but to make a case for further exploration of the possibilities of JRLP in India.