DEMOCRATIZATION OF LAW-MAKING:

A CRITICAL EVALUATION OF THE EXISTING STRATEGIES WITH PARTICULAR REFERENCE TO KERALA

THESIS SUBMITTED TO

THE NATIONAL UNIVERSITY OF ADVANCED LEGAL STUDIES

FOR THE AWARD OF THE DEGREE OF

DOCTOR OF PHILOSOPHY

BY

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UNDER THE SUPERVISION OF

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APRIL 2022

DECLARATION

I do hereby declare that this thesis entitled **'Democratization of Law Making: A Critical Evaluation of the Existing Strategies with Particular Reference to Kerala'** for the award of the degree of Doctor of Philosophy is the record of work carried out by me under the guidance and supervision of Dr. Athira P.S., Assistant Professor, National University of Advanced Legal Studies. I further declare that this work has not been previously the basis for the award of any degree, diploma, associateship, fellowship, or any other title or recognition from any University/Institution.

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This is to certify that this thesis entitled 'Democratization of Law Making: A Critical Evaluation of the Existing Strategies with Particular Reference to Kerala' submitted by Malavika J. for the award of the degree of Doctor of Philosophy is to the best of my knowledge, a bonafide record of the research of work carried out by her as a part-time research scholar at the National University of Advanced Legal Studies under my guidance and supervision. I further certify that this thesis or any part thereof has not been submitted elsewhere for any degree.

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This is to certify that all the corrections and modifications suggested by the Research Committee in the Pre-submission seminar have been incorporated in the thesis entitled 'Democratization of Law Making: A Critical Evaluation of the Existing Strategies with Particular Reference to Kerala' submitted by Malavika J. for the award of the degree of Doctor of Philosophy.

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PREFACE

The desire for this research has originally come from my long-time interest in knowing the factual happenings in the working of the Kerala Legislative Assembly and the process of law-making adopted by the Kerala Legislative Assembly. Reports published in the newspapers reveal shocking data of democratic deficit in the most important job of the legislature, i.e., lawmaking. For example, the Hindu newspaper dated 11th December 2017 points out that there has been a steady reduction in parliamentary hours compared with records of the first 20 years since 1952 show. It also cites that record shows that 31% of legislations were passed in Parliament with no scrutiny or vetting by any Parliamentary Standing or Consultative Committee. A recent report published in The Times of India newspaper on February 17th in the year, 2022 points out that the number of assembly sittings went down gradually over the past few years in most of the State Assemblies. Recently, there has been a declining trend in the percentage of bills being referred to a Committee also. Though it is a well-accepted proposition in a parliamentary democracy that lawmaking is a deliberative and consultative process, important bills such as The Farmers' Produce Trade and Commerce (Promotion and Facilitation) Bill, 2020 and the Farmers' (Empowerment and Protection) Agreement of Price Assurance and Farm Services Bill, 2020, the Jammu and Kashmir Reorganisation (Amendment) Bill, 2021, which amends the Jammu and Kashmir Reorganisation Act, 2019, abrogating Jammu and Kashmir's special status, Citizenship (Amendment) Bill 2019, Muslim Women (Protection of Rights on Marriage) Bill, 2019, and Unlawful Activities (Prevention) Amendment Bill, 2019 were not referred to any of the Committees of Parliament for in-depth deliberation for inviting inputs from stakeholders. Such procedural lapse is a subversion of democracy and an icon of democratic deficit.

This thesis originated from the functioning of the Kerala Legislative Assembly and concern about the reported failure of the implementation of democratic strategies in the law-making process. Little has been written on this subject and this thesis aims to fill that gap to some extent.

This study aims to analyze the normal procedure adopted in the legislature which contains requirements to make law-making democratic. There are some built-in strategies for securing public participation in the legislative process which is intended to uphold the democratic process. They are: (i) Referring the Bill to Select Committee; (ii) Referring the Bill to Subject Committee; (iii) Circulating a Bill for public opinion; and (iii) Allowing private member Bills. A study on these elements helps in understanding the element of democracy in the process of law-making. These aspects are discussed in Chapters III, IV, and V.

A practice that significantly dilutes the democratic element in law-making is the ordinance-making power. Chapter VI examines this area to find out how the essence of democracy is whittled down in the case of ordinances. Similarly, an important question that arises in this context is to what extent judicial review constitutes a negation or dilution of the democratic element in law-making. This aspect is discussed in Chapter VII.

The researcher proposes to develop a theoretical perspective on the study of different strategies that promote democratic law-making. The empirical study, which focused on the evaluation of various strategies to promote democratic practices in law-making, was confined to Kerala. An attempt was made to suggest different strategies that can be adopted to improve democratic values in the legislative process.

ACKNOWLEDGEMENT

The work presented in this doctoral dissertation is the result of the support and encouragement of numerous people including my Guide, mentors, well-wishers, friends, colleagues, family members, and institutions.

First and foremost, I express my gratitude to Dr. Athira P.S. for her patience, guidance, and support. I have benefited greatly from her wealth of knowledge and meticulous editing. I am extremely grateful that she took me in as a student and continued to have faith in me over the years. I am sincerely grateful to her for her devoted contribution to reviewing my progress, writing, and making corrections to improve and finalize my research papers as well as the thesis. Besides my supervising Guide, I would also like to thank Prof.(Dr). Mini S., my Doctoral Committee Member, for her insightful comments with a perfect blend of insight and humor. Whenever I sought help, she was there for me and I extend my wishes to her for her continuous support and endless kindness. This thesis had been kept on track and been seen through to completion with the support of members of the research committee. I extend my sincere gratitude to all members of the research committee.

I wish to express my deep sense of gratitude to our respected Vice-Chancellor, Prof. (Dr). K. C. Sunny, who has been a source of inspiration to all research fellows. I take this opportunity to thank him for his constant encouragement and for helping to choose the right direction in completing my thesis. I also express my sincere gratitude to the former Vice-Chancellor, Prof. (Dr.) Rose Varghese, for graciously guiding me to the fascinating world of research and giving me continuous motivation all these years. I also thank the Research Committee, especially Prof. (Dr.) Anil R. Nair, Dr. Sheeba S. Dhar, Mr. Raveendrakumar, and Prof (Dr). M.C. Valson, for their encouragement,

insightful comments, and questions at the pre-submission seminar which helped to improve my thesis.

I wish to express my deep-hearted gratitude to our Registrar, Shri. Mahadev M.G. for his extended support in all matters relating to my thesis. I especially thank him for facilitating all the requirements for doing my Ph.D. work. I also thank the library staff, especially Smt. Jeeja V.T and Shri. Anil Kumar C. for helping with the required resources in carrying out my research. I also thank all the office staff of NUALS for their continuous support in keeping me updated with requirements and giving proper guidance in facilitating the research. Naming a few would do injustice to the pain each one took going beyond their routine tasks. I wholeheartedly extend my acknowledgment to every Member of the non-teaching staff of NUALS who knowingly, and unknowingly had helped me in carrying out my research. Also, I extend my thanks to all my mentors and faculty at NUALS for their continuous encouragement and support and all of my friends and colleagues from NUALS and outside for their time, advice, and moral support. I extend my special thanks to Smt. Namitha K.L. for her encouragement and support showered upon me each day.

I would like to acknowledge Dr. Anil Chandran, Head of the Department of Demography, The University of Kerala for providing me with his valuable guidance and suggestions regarding data analysis. I would like to give special thanks to Shri. P. Sreeramakrishnan, Hon’ble Speaker of the Kerala Legislative Assembly and Shri. Babu Prakash and Shri. S.V. Unnikrishnan Nair, Secretaries of the Kerala Legislative Assembly, for their keen interest in the subject and great support while conducting the study. Many thanks to all the members of the staff in Kerala Legislative Assembly for their kind support during my Ph.D. study. I am greatly indebted to all the library staff of the Kerala Legislative Assembly who provided me with the necessary guidance and helped to collect the materials needed for my

research. Distinguished personalities and other stakeholders contacted are also thankfully acknowledged.

Last, but not least, my warm and heartfelt thanks go to my family for the tremendous support and hope they had given to me. I am grateful to my parents whose constant love and support keep me motivated, and confident, and for always reminding me of the end goal. My husband who keeps me grounded reminds me of what is important in life, and endured this long process with me, always offering support and love. My accomplishments and success are because they believed in me. I also thank my two kids, especially my son, Lishan, who showed patience and support throughout my journey. Lastly, I thank the Almighty God who gave me the health and strength to carry out my research all these years.

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ABBREVIATIONS

- A&C - Arbitration & Conciliation
- Acad. of Pol. Sci. - Academy of Political Science
- Afr. J. Hum. - African Journal of Human Rights
- AIR - All India Reporter
- Am. J. Comp. L - American Journal of Comparative Law
- Am. Pol. Sci. Rev. - American Political Science Review
- Am. Soc'y Int'l l. Proc. - American Society of International Law and Process
- Am. U. Int'l l. Rev. - American University International Law Review
- Anr. - Another
- AP - Andhra Pradesh
- Apr. - April
- Art. - Article
- Ass'c - Association
- Aug. - August
- Avg. - Average
- B.C.L. Rev. - Boston College Law Review
- BOM. - Bombay
- British J. Pol. Sci. - British Journal of Political Science
- Brook. J. Int'l L. - Brook Journal of International Law
- CAD - Constituent Assembly Debates
- Calif. L. Rev. - California Law Review
- Cambridge L. J - Cambridge Law Journal

- Canadian J. Pol. Sci. - Canadian Journal of Political Science
- Chi.-Kent. L. Rev. - Chicago-Kent Law Review
- Cho. L. Rev. - University of Chicago Law Review
- CJI - Chief Justice of India
- Cl. - Clause
- Colum. L. Rev. - Columbia Law Review
- Concordia L. Rev. - Concordia Law Review
- Conn. L. Rev. - Connecticut Law Review
- Contemp. Perspectives - Contemporary Perspectives
- CPC - Civil Procedure Code
- CPI(M) - Communist Party of India (Marxist)
- CRILJ - Criminal Law Journal
- Dec. - December
- DRSC - Departmentally Related Standing Committees
- E.g. - example
- ECHR - European Convention on Human Rights
- ECI - Election Commission of India
- Eds. - editors
- ELT - Excise Law Times
- EPW - Economic and Political Weekly
- Fordham L. Rev. - Fordham Law Review
- Harv. J. On Legis. - Harvard Journal on legislation
- HC - High Court
- Hofstra L Rev. - Hofstra Law Review
- i.e. - id est

- IJLSI - International Journal of Legal Science and Innovation
- ILR - Indian Law Reports
- INDIA CONST. - Indian Constitution
- Indian J. Pol. - Indian Journal of Political Science
- Int’l l and Comp.L. - International and Comparative Law
- Int’l. J. Const. L. - International Journal of Constitutional Law
- J.P.I. - Journal of Personal Injury Law
- Jan. - January
- JILI. - Journal of the Indian Law Institute
- K.V.A.T. - Kerala Value Added Tax Act, 2003
- Ker. - Kerala
- KLA - Kerala Legislative Assembly
- KLJ. - Kerala Law Journal
- KLT - Kerala Law times
- KMFR - Kerala Marine Fishing Regulation
- Law & Contemp. Probs. - Law and Contemporary Problems
- LDF - Left Democratic Front
- LRC - Law Reform Commission
- LSG - Local Self Government
- Ltd. - Limited
- Md. L. Rev. - Maryland Law Review
- Mich. L. Rev. - Michigan Law Review
- MLA - Member of the Legislative Assembly
- Modern L. Rev. - Modern Law Review

- NHRC - National Human Rights Commission of India
- No. - Number
- Nottingham L.J. - Nottingham Law Journal
- NW. U.L. Rev. - Northwestern University Law Review
- NYU L Rev. - New York University Law Review
- O.P. - Original petition
- OBC - Other Backward Class
- Oct. - October
- Ors. - Others
- Osgoode Hall L.J. - Osgoode Hall Law Journal
- Oxford J. Legal Stud. - Oxford Journal of Legal Studies
- PIL - Public Interest Litigation
- PLS - Post-Legislative Scrutiny
- PMB - Private Members' Bills
- POTA - Prevention of Terrorism Act
- PPP - Public-Private Partnership
- RLR - Rostrum's Law review
- RTI - Right to Information
- Rutgers L.J. - Rutgers Law Journal
- SC - Supreme Court
- SCC - Supreme Court Cases
- Sec. - Section
- ST - Schedule Tribe
- Statute L. Rev. - Statute Law Review
- Tenn. L. Rev. - Tennessee Law Review
- Tex. L. Rev. - Texas Law Review

- TRIPS - Trade-Related Aspects of Intellectual Property Rights
- U. Ark. Little Rock L. Rev. - University of Arkansas at Little Rock Law Review
- U. Miami Inter-Am. L. Rev.- University of Miami Inter-American Law Review
- U. of Chi. Press - University of Chicago Press
- UDF - United Democratic Front
- UK - United Kingdom
- Ukhl - United Kingdom House of Lords
- UOI - Union of India
- US - United States
- USA - United States of America
- UT - Union Territories
- Wash.U. Global Stud.L.Rev.- Washington University Global Studies Law Review
- Wellington L. Rev. - Wellington Law Review
- World Pol. - World Politics
- WTO - World Trade Organization
- Yale L.J - Yale Law Journal

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66. R.K. Jain v. UOI, AIR 1993 SC 1769.
67. Radhakrishna Kurup v. Namakkal Service Co-Operative Bank Ltd. and Ors. 2016(4) KLT 632.
68. Ram Krishna Dalmia v. Justice Tendulkar, AIR 1958 SC 538.
69. Ratna Bai v. The State of Kerala 2004 (1) KLT 632.
70. S.K.G. Sugar Ltd. v. The State of Bihar AIR 1974 SC 1533.
71. S.P. Sampath Kumar v. Union of India AIR 1987 SC 386.
72. Saghir Ahmad v. The State of U.P. AIR 1954 SC 728.
73. Seafood Exporters Association of India v. State of Kerala and Ors 2019 (1) KHC 102.
74. Shalu Menon @ Shalu Venogopal v. the State of Kerala Crl. Mc. No. 473 of 2020.
75. Sodan Singh v. New Delhi Municipal Committee AIR 1987 SC 1988.
76. State of Bombay v. Bombay Education Society AIR 1954 Bom 468.
77. State of Kerala v. T.A. Rajendran 1988 (1) KLT 305.
78. State of Madras v. V.G. Row AIR 1952 SC 196.
79. State of Maharashtra v. Indian Hotel & Restaurants Association W.P. (Civil) No. 576 of 2016.
80. State of Maharashtra v. Indian Hotel and Restaurants Association and Ors 2013 8 SCC 519.

81. State of Rajasthan v. Union of India AIR 1970 SC 564.
82. State of West Bengal & Ors. v. Committee for Protection of Democratic Rights, West Bengal & Ors. AIR 2010 SC 1476.
83. State of West Bengal &Ors. v. Committee for Protection of Democratic Rights, West Bengal &Ors. AIR 2010 SC 1476.
84. Sub Committee of Judicial Accountability v. Union of India AIR 1992 SC 320 (345).
85. Sub Committee of Judicial Accountability v. Union of India AIR 2010 SC 1476.
86. T. Venkata Reddy v. The State of Andhra Pradesh, AIR 1985 SC 724.
87. T.P. Sobhana v. Deepak Krishnan C.P.(C) No. 1 of 2012.
88. Tharamel Krishnan v. Guruvayoor Devaswom Managing Committee and Ors, AIR 2008 Ker 245.
89. United Konari Mills and Ors. v. The State of Kerala and Ors. AIR 1993 Ker 248.
90. Unnikrishnan v. The State of A.P., AIR 1993 SC 2178.
91. US v. Butler, 297 U.S.1(1936).
92. V.N. Narayanan Nair and Ors. v. The State of Kerala and Ors. AIR 1971 Ker 98.
93. Varghese v. St. Peters and Paul Syrian Orthodox Church Civil Appeal No.3674/2015
94. Vijayalakshmi Rice Mill and Ors. v. Commercial Tax Officer (201) ELT 329 (SC) (2006).
95. Walla v. Union of India and Others, WP. (c) No.754/2016.
96. Yogesh Trading Co., Kotachery v. The Intelligence Officer of Sales Tax Cannanore and Anr. WP. (c) No. 8314 of 2011(L).

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CHAPTER – I
INTRODUCTION

1.1 LAW- DEFINITION AND MEANING

> Most contemporary research on law and society suffers from its unwillingness to even consider a definition of the concept of law and hence the boundaries of investigation.
>
> Malcolm Feeley[1]

The above observation by Malcolm Feeley in 1976 is still relevant not because the sociologists, lawyers, judges, and legal aluminates are reluctant to consider the definition of the concept of law. However, it is because of the great variety of contradictory definitions of law which had been developed for ages. There are several approaches to law and several methods to understand the law. This is evident from jurisprudence's task, which analyses and unravels the confusions regarding the concept of law, its salient features, functions, and operations of law in society.

As stated, to propose one simple definition of law is inevitable. The question as to what is the law itself boils down to a question of the definition of law. Law has many theories and many facets, law is a concept that includes in itself many things, different from each other.[2] From one perspective, the law may be simply described as an abstract body of rules. From another

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[1] Alan V. Johnson, *A Definition of The Concept of Law* 2 MID-AMERICAN REVIEW OF SOCIOLOGY 47, 51-52 (1977).

[2] UMESHWAR PRASAD VARMA, LAW, LEGISLATURE, AND JUDICIARY 1 (Mittal Publications 1996).

perspective, it is a social process for compromising the conflicting interests of men. One approach to law may emphasize its coercive character, while another may lay stress on social acceptance of the law.

One can also look at law as something which emanates from society and is sustained by social acceptance. Various definitions of law reflect these various approaches.[3]

Jurists have viewed law from different angles. Kant defines "law as the total of the conditions under which the personal wishes of one man can be combined with the personal wishes of another man by the general law of freedom."[4] In Hegel's view "law is the abstract expression of the general will be existing in and for itself."[5] Henry Maine's idea of law is closely associated with two notions, i.e. the notion of order and the notion of force.[6] Savigny defines "law as the rule whereby the invisible borderline is fixed within which the being and the activity of each individual obtains a secure and free space."[7] Another jurist, Vinogradoff, "sees law as a set of rules imposed and enforced by society about the distribution and exercise of powers over persons and things."[8] Law according to Duguit, "denotes an obligatory code of human

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[3] NK JAYAKUMAR, LECTURES IN JURISPRUDENCE 5 (Lexis Nexis 2015).

[4] ALEXANDER KAUFMAN, WELFARE IN THE KANTIAN STATE (Oxford University Press 1999).

[5] Karl Marx, *Critique of Hegel's Philosophy in General, Economic and Philosophic Manuscripts of 1844*, PROGRESS PUBLISHERS 1,4(1959).

[6] Schmidt, Katharina Isabel, *Henry Maine's Modern Law: From Status to Contract And Back Again?* 65 AM. J. COMP. L.145, 148-149(Oxford University Press 2017).

[7] JAMES COOLIDGE CARTER, LAW - ITS ORIGIN, GROWTH, AND FUNCTION 34 (Read Books Ltd 2012).

[8] RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 211 (Harvard University Press 1985).

conduct designed to satisfy the social needs of the community."[9] Ihering defines "law as the form of guarantee of the conditions of life in society, assured by the state's power of constraint."[10]

Austin defines "law as the general command of the sovereign to his subjects obliging them to a course of conduct."[11] In Paton's definition law is defined "as the body of rules which are seen to operate in a community-backed by some mechanism accepted by the community using which sufficient compliance with the rules may be enabled to secured the system or set of rules to continue to be seen as binding in nature."[12] In a similar vein is the definition by Friedmann.[13] According to him, "the concept of law means a norm of conduct set for a given community and accepted by it as binding by an authority equipped with the power to lay down norms of general application to enforce them by a variety of sanctions."[14]

Law has many fascinating facets and so there are several theories and definitions of law. Chief Justice Mukherjee[15] has summed up interestingly the various facets of law in the following words:

> In the garden or forest of jurisprudence, there are many fruits: Law is natural, the law is custom. Law contracts, Law is a command of the human sovereign. Law is a social fact. Law is

[9] JAMES, supra note 7, at 18.
[10] *Id.* at 18.
[11] JOHN DEWEY, AUSTIN'S THEORY OF SOVEREIGNTY 2 Summer Publications (1984).
[12] Michael Black*, Alan Paton, and the Rule of Law* 91, OXFORD UNIVERSITY PRESS 53, 65(1992).
[13] JAMES, supra note 7, at 19.
[14] *Id.* at 19.
[15] Quoted in Justice K.S. Puttaswamy &Anr. v. Union of India &Ors., (2017) 10 SCC 1.

> the union of primary and secondary rules. Law is prediction, law is experience. Law is an unrealizable ideal. Law is a practical and realizable compromise. Law is a balance of social and individual interests. Law is morality. Law is what the judges say from the Bench.

Thus, the law, whatever its facets may be, regulates society and should serve the purpose for which it is enacted. Law is a means of social control.

The concept of law with which we began needs further solid elaboration. The definition alone does not tell us the whole story. Law in a legal system is much more intelligible and clearer. Law is all rules, of whatever nature, origin, or character which the courts of law recognize and normally enforce.

To truly encapsulate an understanding of the law, it is necessary to capture the essence of some important theoretical aspects of laws. Julius Moor, a Hungarian jurist, explains law based on legal positivism. "Legal positivism is a view according to which law is produced by the ruling power in society in a historical process."[16] In this view, the law is only that which the ruling power has commanded by this very circumstance.[17] The positivist approach insists on a strict separation of positive law from ethics and social policy and identifies justice with legality, i.e., the absence of the rules laid down by the State.[18] John Austin, an influential jurist, is considered the typical

[16] MICHAEL DA FREEMAN ET.AL., LLOYDS' INTRODUCTION ON JURISPRUDENCE 9 (Sweet & Maxwell 2001).

[17] *Id.* at 10.

[18] *Id.* at 10.

representative of the school of analytical positivism.[19] Austin defined "law as the general command of a sovereign to his subjects obliging them to a course of conduct."[20]

Hans Kelsen, who developed the pure theory of law, with great analytical refinement, belongs to the school of analytical positivism.[21] Kelsen believed that a theory of law should be uniform.[22] His theory is called the pure theory of law because he declared that a theory of law should be free from ethics, politics, sociology, history, etc.[23] In other words, it must be pure. "Kelsen did not deny the value of ethics, politics, sociology, or history in shaping the law or in understanding the law, but he asserted that a theory of laws must keep clean of them."[24]

The theory of legal realism derives from prevailing social interests and public policy.[25] "Legal realism is characterized as a type of jurisprudence by its emphasis on the law as it currently appears in reality, rather than the way it works in the books."[26] It carries the idea of being practical, down to measuring them against what is observed in the world, and dismissing theories that fail to match the recorded facts.

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[19] John Dewey, *Austin's Theory of Sovereignty,* 9 THE ACAD. OF POL. SCI. 31, 52(1984).
[20] *Id.* at 33.
[21] Neil Duxbury, *Legality and Legitimacy*, 71 THE MODERN L. REV. 647, 648(2008).
[22] *Id.* at 648.
[23] *Id.* at 649.
[24] *Id*. at 649.
[25] Shalini Dey, *Overview of Legal Realism and Realist School of Jurisprudence in India*, 3 IJLSI 950, 952(2021).
[26] *Id*. at 952.

An enumeration of jurisprudential theories is significant, as though the emphasis and focus may vary, the definitions and theories on the importance of law for the smooth functioning of a society. For achieving the purpose of the law, we need laws that respond to the changes in society and meet the aspirations of the people. It is therefore necessary that the law-making process in a democracy must reflect the causal and deliberative dimensions of a modern democratic state.

The term law is cited with different definitions since law emanates from various sources. A clear understanding of sources of law is crucial in encapsulating the nature of law.

Sources of law are of two types; formal and material sources law. "Salmond defines a formal source of law as that from which a rule of law derives its force and validity."[27] Law which is created by the modern state, as a formal act of legislation or by the decision of the court is categorized as a formal source of law.[28] A material source of law is that from which is derived the matter and not the validity of the law.[29] Material sources include all that influence the process of law-making. Another way of classifying sources of law is into legal and historical sources. As the name suggests, legal sources have recognized authority, whereas historical sources lack such formal recognition of the society.[30] "Legal sources of law are considered to be the

[27] FITZGERALD P. J., SALMOND ON JURISPRUDENCE 429 (Universal Law Publishing 1966).
[28] *Id.* at 430.
[29] *Id.* at 430.
[30] *Id.* at 432.

most powerful instrument of legal reform."[31] On the other hand, historical sources influence the course of legal development.

Legal sources of law are further categorized into

1. Enacted law having its source in legislation
2. Case law has its source in precedent
3. Case law has its source in custom
4. Conventional law has its source in agreements

Legislation occupies a dominant position among sources of law. That explains why the research with its focus on legislation and its democratic credentials becomes relevant and significant in a constitutional democracy.

1.2 IMPORTANCE OF LEGISLATION IN DEMOCRACY

The legislation simply means lawmaking. Authentically, it refers to all laws made by the legislature. In a wider sense, "it includes all the sources of law, any act done with the effect of adding to or altering the law."[32]

Legislation is accepted as the most powerful instrument of legal reform. According to Salmond, "legislation is that source of law that consists in the declaration of legal rules by a competent authority; while the jurists of the historical school of jurisprudence were of the view that law is a historical perception that evolves according to customs, traditions, culture, and sentiments of people."[33]

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[31] *Id*. at 433.

[32] *Id.* at 433.

[33] Bingham, Joseph W., *What Is the Law*? 11 MICH. L. REV. 1, 8-9(1912).

According to Savigny, the origin of law lies in the popular spirit of the people which Savigny termed as *volksgeist.*[34] Gustav Hugo states that "law is not the result of legislation or it is in no way command of the sovereign nor a matter of social contract but it is the outcome of the habits and traditions of the people which they follow voluntarily as the members of the community."[35]

Compared to other sources of law, legislation is considered the most effective source of law.[36] Firstly, it involves laying down legal rules by the legislature that the state recognizes as law.[37] Secondly, it has the force and authority of the state.[38] As Gray rightly points out that legislation includes formal utterances of the legislative organs of the society.[39]

The term legislation is used generally in a limited sense. It denotes the laying down of legal rules by a sovereign or subordinate legislature.[40] Legislation when most accurately termed as enacted law means that all other forms are distinguished as un-enacted law. Further, in a jurisprudential sense, the legislation includes only an expression of the will of the legislature directed to the making of the rules of law.[41] In a wider sense, it includes all the sources of law, any act done with the effect of adding to or altering the law.[42] "When a judge establishes a new principle in a judicial decision, it is

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34 *Id.* at 9.
35 *Id.* at 8.
36 Roscoe Pound, *Common Law, and Legislation*, 21 HARVARD LAW REVIEW, 383, 402(1908).
37 *Id.* at 405.
38 *Id.* at 405.
39 THOMAS ERSKINE HOLLAND, THE ELEMENTS OF JURISPRUDENCE 76 (Universal Law Publishing 2007).
40 BINGHAM, supra note 33 at 8.
41 ROSCOE POUND, supra note 36 at 390.
42 MARKBY E, ELEMENTS OF LAW 24 (Oxford Clarendon Press 1905).

legislation in a wider sense of the term and it is possible to say that he has exercised legislative power."[43]

The legislature of a state performs numerous functions other than law-making. An important question that arises about legislation is regarding the legal limits of the power to enact the law. This is complicated by the presence of fundamental rights in the Constitution, which limits the law-making power of the legislature. Different legal systems place different approaches to the legislative power. In India, the fundamental rights guaranteed in Part III of the Constitution and the distribution of legislative powers between the Union Parliament and State Legislatures in Schedule VII of the Constitution, substantially limit the law-making powers of the Parliament and the State Legislatures.[44] "Any law enacted by the legislature does not *per se* attain the quality of law and it has to satisfy a further criterion of validity, namely the test of constitutionality."[45] The test of constitutionality is applied by the judiciary and the judiciary plays a dominant role in deciding whether the law enacted by the legislature is valid or not.[46] Judiciary applies this principle by recognizing the Constitution of India as the supreme law. The supremacy of the constitution means the lower ranking of the statute and that at the same time implies the lower ranking of the legislator.[47] The power to sit in

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43 Amy Street, *Judicial Review and the Rule of Law: Who is in Control*, THE CONSTITUTION SOCIETY 1, 13(2013).
44 MP JAIN, INDIAN CONSTITUTIONAL LAW 65 (Lexis Nexis 2014).
45 *Id.* at 1352.
46 *Id*. at 6.
47 Jutta Limbach, *The Concept of the Supremacy of the Constitution* 64 MODERN L. REV.1, 3-4(2001).

judgment over laws enacted by the legislature raises two important questions, viz, firstly, the Constitution as supreme law of the land and secondly, the inter-relationship between the legislature and the judiciary.[48]

1.2.1 Constitution of India: The Supreme Law

The highest authority in a legal system is conferred on the Constitution.[49] The principle not only gives a rank order of legal norms but also concerns the institutional structure of the organs of the State.[50]

One of the most important of all provisions in the Constitution of India is that contained in the first and second paragraphs of Article 13 of the Indian Constitution, which states that all laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.[51] The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.[52]

The Constitution of India being the supreme law of the land lays down the basic objective and basic structure of the Constitution along with the basic organs of justice and its interrelationship among each other. "Judge Cooley, an eminent American Jurist said that the Constitution is the fundamental law of the State, containing the principles upon which government is founded,

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[48] *Id.* at 3.
[49] *Id.* at 4.
[50] *Id.* at 4.
[51] INDIA. CONST. art.13, cl.1.
[52] *Id.* at cl.2.

regulating the division of the sovereign powers and directing to which persons each of these powers are to be confided and how it is to be exercised."[53] The policy of the Constitution, its objective and its basic structure together embody and determine the legal character of the whole nation.[54] "As Dieter Grimm rightly emphasized, it was the firm consensus of all political forces active in the constitutional assembly to prevent the failure of representative democracy (in Germany) and to establish effective safeguards against dictatorship and disregard of human rights."[55] The Constitution should be the paramount law of the land and claim priority over any government action.[56] The Constitution is termed the supreme law of the land because it is supreme even above the law itself and governs all other laws.

The supremacy of rule of law has been closely related to the doctrine of rule of law. The origin of this doctrine was attributed to Sir Edward Coke but rule of law as a constitutional doctrine owes its exposition to Albert Venn Dicey.[57] Dicey, in his book *Law and Constitution* in the year 1885, further developed this concept given by Coke.[58] As stated by Lord Denning in the

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53 THOMAS ERSKINE, supra note 39, at 55.

54 Human Rights and Constitution Making, United Nations (2018) https://www.ohchr.org/sites/default/files/Documents/Publications/ConstitutionMaking_EN.pdf (last assessed on 12th January 2021).

55 Verena Frick, *The Justicization of Politics: Constitutionalism and Democracy in Germany after 1949*, REDESCRIPTIONS: POLITICAL THOUGHT, Conceptual History and Feminist Theory, 18,23 (2019).

56 DAVID M. BEATTY ET.AL., HUMAN RIGHTS, AND JUDICIAL REVIEW, A COMPARATIVE PERSPECTIVE 269 (Martinus Nijhoff Publishers 1994).

57 DOUGLAS EDLIN E, *The Rule of Recognition and the Rule of Law: Departmentalism and Constitutional Development in the United States and the United Kingdom*, 64, THE AM.J. OF COMP. LAW 371–418 (2016).

58 According to Dicey's theory, rule of law has three pillars based on the concept that a government should be based on principles of law and not of men, this are-supremacy of

case Gouriet v. Union of Post Office Workers,[59] for every person in the land, no matter how powerful or high in status he may be, the law will always be above them. Defining the rule of law Prof Wade expressed,[60] “the rule of law requires that the government should be subject to the law rather than the law subject to the government.” The rule of law as administered in India is not directly discussed or mentioned but is interpreted to be embodied in the provisions of the Indian Constitution.[61] From matters of protection of the rights of people, equality of treatment before the law, protection against excessive arbitrariness, the Constitution of India has provided enough mechanisms to ensure that the doctrine of rule of law is followed.[62]

1.2.2 Inter-Relationship Between the Legislature and the Judiciary

Constructive relationships between the three arms of government -the executive, the legislature and the judiciary are essential to the effective maintenance of the Constitution and the rule of law.[63] “Democracy furnishes the political framework within which reason can thrive most generously and imaginatively on the widest scale, least hampered by the accident of personal antecedents and most regardful of the intrinsic qualities of men.”[64] This framework is defined through the doctrine of separation powers which implies

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law; equality before the law; and predominance of legal spirit. RICHARD A. COSGROVE, THE RULE OF LAW 18 UNC Press (2017).

[59] [1978] AC 435.

[60] Fallon, Richard H, *The Rule of Law as a Concept in Constitutional Discourse,* 97 COLUM. L. REV. 1, 21-22(1997).

[61] DOUGLAS, supra note 57 at 380.

[62] *Id.* at 380.

[63] Alon Harel ET.AL. *Between Judicial and Legislative Supremacy: A Cautious Defense of Constrained Judicial Review* 10 INT’L J. CONST. L. 950, 962(2012).

[64] H.R. Khanna, *Rule of Law and Democracy, -Friends or Foes*, Constitutional Law 1 (1990) 1 SCC (Jour).

that each pillar of democracy, the executive, the judiciary, and the legislature, act as a separate entity and perform separate functions. The doctrine is a part of the basic structure of the Indian Constitution,[65] even though it is not specifically mentioned in its text.

Though the separation of powers is a key feature of Indian Democracy, it exists with shared powers and responsibilities and they overlap with each other.[66] Different agencies impose checks and balances upon each other but may not transgress on each other's functions.[67] Thus, the judiciary exercises judicial review over executive and legislative action, and the legislature reviews the functioning of the executive.

Law is not static and laws are in the continuous transformation to meet the requirements of society. The legislative enactments are amended to update the changing needs and the judiciary keeps a check on these to see whether it abides by the Indian Constitution. The interplay of the three pillars of democracy- legislature, judiciary, and executive- plays a special role in achieving various socio-economic goals enshrined in our Constitution.

1.3 DEMOCRATIC LEGITIMACY

As already stated, legislation is the most important and powerful source of law.[68] The laws made by the legislature are easily accepted because of two reasons. Firstly, out of coercion/sanction, the laws by the legislature are

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65 Held in Keshavananda Bharti v. State of Kerala AIR 1973 SC 1461.

66 H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA, 32 Universal Law Publishing Company (2015).

67 *Id.* at 33.

68 ROSCOE POUND, supra note 36 at 390.

complied with by the people. Secondly, if the legitimacy of the laws is observed, then the people will readily accept the laws. In other words, the laws made by the Legislature need to possess the quality of legitimacy and then only people will accept them.[69] To be fully legitimate, it must not only be adopted in a procedurally correct way but also comply with certain substantial values. "It is said that democracy not only requires designing and following the correct procedures but its laws must, in addition, comply with certain values, such as human dignity, liberty, equal concern for all, etc. to be fully legitimate."[70]

Once we confront the question of legitimacy, we should derive the meaning of legitimacy to decide whether one should obey, improve or ignore it.[71] Max Weber defined "political legitimacy as the *de facto* ability of a political regime to secure acceptance based on *belief* as opposed to securing compliance based on *coercion* alone."[72] "Rawls dismisses the sociological or descriptive concept of political legitimacy of Weber and states that there must be a benchmark of appropriate acceptance or a benchmark for when our belief that something is legitimate is appropriate."[73]

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[69] David Easton, *A Re-Assessment of the Concept of Political Support* 5 BRITISH J. POL. SCI. 435, 436(1975).
[70] Sadurski, Wojciech., *Law's Legitimacy and Democracy-Plus* 26 OXFORD J. LEGAL STUD 377, 401-403(2006).
[71] Peter G. Stillman, The Concept of Legitimacy 7 PALGRAVE MACMILLAN JOURNALS 32, 44-45, (1974).
[72] MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 34 (Oxford University Press 1947).
[73] JOHN RAWLS, 'POLITICAL LIBERALISM: REPLY TO HABERMAS', IN HIS POLITICAL LIBERALISM 372(Columbia University Press 1996).

A close reading of 'Reply to Habermas' shows that Rawls provides several characterizations of the general meaning of the concept of political legitimacy.[74]

Rawls emphasizes four further characteristics of legitimacy:

1. "Rawls says that political legitimacy is institutional."[75]

2. "He emphasizes that legitimacy connects to the pedigree of those who have the political authority or hold political office, i.e., whether they have come to the office by established rules and traditions."[76] Similarly, "he says that legitimacy is connected to how a law or institution came about, whether it was made by established rules and traditions."[77]

3. "He differentiates between different levels of legitimacy; between the legitimacy of political institutions and the legitimacy of decisions and laws enacted under them;"[78] and "also between accepting a constitution as legitimate and accepting as legitimate a particular statute or decision enacted by the constitution."

4. Finally, "Rawls says that higher law, as outlined in a constitution, can *confer* legitimacy on ordinary statutes and decisions."[79]

In a democratic form of regime, a citizen has a double role. On the one hand, they are the ultimate power-holders and the collective authors of the

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[74] *Id*. at 372.
[75] Id. at 427.
[76] *Id.*at 427
[77] *Id.* at 427.
[78] *Id*. at 427.
[79] *Id*. at 221.

laws.[80] On the other hand, they are subjects, and laws and decisions they do not agree with are regularly imposed on them.[81] An appropriate conception and understanding of political legitimacy in a democracy soothes the relation between the state and its citizens and also how citizens exercise political power and authority over each other.

Thus, legitimacy is summed up as the right and acceptance of a governing authority. Power becomes more effective when it is legitimate. "Robert A. Dahl writes leaders in a political system try to ensure that whenever governmental means are used to deal with conflict, the decisions arrived at are widely accepted not solely from fear of violence, punishment, or coercion but also from a belief that it is morally proper to do so."[82] According to one usage of the term, "a government is said to be 'legitimate', if the people to whom its orders are directed believe that the structure, procedures, acts, decisions, policies, officials, or leaders or government possess the quality of rightness, propriety or moral goodness- the right, in short, to make binding rules."[83] Every democratic system strives for legitimacy and it is important because the concept of democracy is based on consent.

Any democratic deficit in the process of law-making will render the law made unacceptable to the people, which in turn may result even in failure of implementation of the law. In other words, the legitimacy of a law depends

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80 Fabienne Peter, *Political Legitimacy*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY 22 (2014).

81 *Id.* at 25.

82 Robert A. Dahl *and the Study of Contemporary Democracy: A Review* Essay 71, AM. POL. SCI. REV.1070,1089(1977).

83 *Id.* at 1089.

on the consent and acceptance of the people, for which a process that satisfies democratic credentials is essential. The present study is an attempt to explore the democratic credentials of the law-making process in India, taking the Kerala Legislative Assembly as a sample for empirical analysis. Through this method, the democratic deficit in the process, if any, is sought to be brought to light.

1.4 WORKINGS OF DEMOCRACY

Democracy in simple words is a system of government in which people choose their rulers through the system of elections.[84] It is a government on behalf of all the people according to their will. Today there are as many different forms of democracy as there are democratic nations in the world.[85] There are presidential and parliamentary democracies, democracies that are federal or unitary, democracies that use a proportional voting system, ones that use a majoritarian system, democracies that are also monarchies, and so on.[86]

Historically, it is seen in a state, democracy has a natural form. It involves periodic legislative assemblies in which all citizens participate. If the city-state is truly virtuous, debates will be inclusive and respectful.[87] In this type of ancient democracy, everybody gets a chance to speak. Though the

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84 IVOR BROWN, THE MEANING OF DEMOCRACY 12 Trieste (1920).
85 MANUAL FOR HUMAN RIGHTS EDUCATION WITH YOUNG PEOPLE, Council of Europe, https://www.coe.int/en/web/compass/democracy (last visited Nov.28, 2021).
86 *Id.*
87 Christopher L. Eisgruber, *Dimensions of Democracy* 71 FORDHAM L. REV. 1723, 1726 (2003).

majority's choice prevails. The views and interests of the minority are respected. Political theorists refer to it as face-to-face democracy.[88]

This type of face-to-face democracy is impracticable in the modern era. A system of representative democracy is the norm of every modern democratic state. As said above, no system of democracy is alike. But one thing that unites modern systems of democracy is the use of representatives of the people. People select their representatives to govern on their behalf, instead of taking part directly in lawmaking. Such a system is known as representative democracy.[89]

In a representative democracy, the people are considered sovereign and all political power is derived from the people. The people are both the subjects and the bearers of the constitution-making power and are the exclusive authority that either makes political decisions themselves or allows them to be made by subordinate authorities.[90] The term representative democracy is applied when the general will of a sovereign people is formed using the political principle of representation.[91] The representative authorities may be parliamentary bodies, committees, or even a single person. “The principle of representation binds the formation of a political will and also integrates the

[88] JAMES S. FISHKIN, THE VOICE OF THE PEOPLE: PUBLIC OPINION AND DEMOCRACY 4-5 (Yale University Press 1997).

[89] Jonathan Day, Representative Democracy and Government: Definition, Functioning, Future Perspective LIBERTIES https://www.liberties.eu/en/stories/representative-democracy/43508 (last accessed on May 2021 at 8:45PM).

[90] Leibholz, Gerhard, *The Nature and Various Forms of Democracy*, SOCIAL RESEARCH, THE NEW SCHOOL 84, 88 (1938).

[91] *Id*. at 96.

community as a whole."[92] The legitimacy of representative democracy depends on electoral accountability. [93]

An amalgam of representative democracy is deliberative democracy. "Deliberative democracy, through the use of mini-publics, and the bringing together of people from different pressure groups and organizations, offers the opportunity both of extending political representation and participation."[94] Deliberative democracy extends the understanding of political representation and brings together people from different pressure groups and organizations by offering opportunities for both representation and participation.[95] The public deliberation of citizens forms the basis of legitimate decision-making. Deliberative democracy deepens the roots of democracy.

The concept of representational democracy confers legitimacy on collective choices. In other words, at some level, the majority opinion prevails. A popular account of democracy reduces the concept to one dimension: government is democratic if and only if it implements the will of the electoral majorities.[96] The theory gives unfettered importance to majorities, one question that tinkers in the one-dimensional democracy is how responsive is government to the majoritarian concept, makes the institution of

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92 Maija Setälä, Promoting Impartiality in Representative Democracy: Why, When and How? https://ecpr.eu/Events/Event/PaperDetails/38196 (last visited on Jan. 19, 2022, 3:30 PM).

93 *Id.*

94 Peter McLaverty, *Extending Representative Democracy*, https://ecpr.eu/Events/Event/PaperDetails/20379 (last visited on Jan. 19, 2022, 6:20 PM).

95 *Id.*

96 CHRISTOPHER, supra note 87, at 1723.

judicial review questionable.[97] "Judicial review constrains the power of electoral majorities, hence according to one-dimensional democratic theory, these institutions are presumptively anti-democratic."[98] However, Jed Rubenfeld and Christopher have written books linked by, among other things, shared dissatisfaction with the one-dimensional account of democracy and believe that democracy does not reduce to majority rule.[99] For them, "the people" is something different from (and better than) "an electoral majority," so "government by the people" differs in principle from "majority rule."[100] According to them, judicial review and inflexible constitutions, rather than being anti-democratic, may be pro-democratic precisely because they limit the power of electoral majorities. John Hart Ely's classic study of the judicial review included a classic statement of one -dimensional democratic theory.[101] The choosing of values is a prerogative appropriately left to the majority, wrote Ely.[102] At that time, one-dimensional democracy had at least one thing in its favor: it seemed roughly consistent with the structure of most free governments in the world.[103] But now more than two decades have passed and the world has changed. Now the Parliamentary model is a kind of the international norm. This concept and its related body of work are largely

97 *Id.* at 1723.
98 *Id.* at 1724.
99 JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 52 (Yale University Press 2001).
100 *Id.* at 53.
101 Ely published that line and the book containing it in 1980. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 179(Harvard University Press 1980).
102 *Id.*
103 CHRISTOPHER, supra note 87, at 1732.

forgotten today, associated with a time and set of circumstances that passed.[104] "Now it is vital to put the institutional architecture of democracy in place with a strong foundation of shared and applied democratic values and principles."[105] For an unstable political edifice, an institutional design, i.e., Parliament/Legislature, which promotes democratic values is emphasized.[106] This democratic element confers legitimacy on legislation.

1.4.1 Institution of Parliament and State Legislatures

The Parliament in India is not a sovereign body;[107] it functions within the bounds of a well-written Constitution. The Constitution of India is republican in character and federal in structure and it provides for a Parliament consisting of the President and the two Houses, namely, the Rajya Sabha (Council of States) and the Lok Sabha (House of the People).[108] The Union Executive is drawn from both the Houses of Parliament and collectively responsible to the Lok Sabha. Parliament occupies a pivotal position in the present day of Indian polity, and it possesses important qualifications. Such powers as Parliament possesses under the Constitution are immense and it fulfills the role which a sovereign Legislature does in any other independent country.[109] The plenitude of its powers at once becomes evident on an analysis of the extent of jurisdiction it has under the scheme of

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[104] Richard C. Box, *Marcuse Was Right: One-Dimensional Society in the Twenty-First Century* 33 Administrative Theory & Praxis, M.E. SHARPE 169–91 (2011).

[105] Mark Salter, Democracy for All? Minority Rights and Democratization, North Africa, https://www.opendemocracy.net/en/democracy-for-all-minority-rights-and-democratisation/ (2012) (last assessed on 8th Feb 2020).

[106] *Id.*

[107] In Re. Delhi Laws Act, AIR 1951 SC 322.

[108] INDIA CONST. art 79.

[109] In re. Delhi Laws Act. cit., cf. observations by Fazl Ali, J.

distribution of powers, the constituent powers it possesses, its role in emergencies, and its relationship *vis-a-vis* the Judiciary, the Executive, the State Legislatures, and other authorities under the Constitution.[110]

An important function of Parliament, although not the only function, is to make laws.[111] The Constitution assigns and distributes the legislative powers between Parliament and the State Legislatures in three lists-the Union lists, which assigns Parliament the exclusive jurisdiction; the State List, wherein the State Legislature has jurisdiction and the Concurrent list, both the Parliament and the State Legislature may legislate on the subjects.[112] While in their respective spheres Parliament, as well as the State Legislatures, enjoy plenary powers, the scheme of distribution of powers followed by the Constitution emphasizes in many ways the general predominance of Parliament in the legislative field.[113] Residuary powers of legislation vest in Parliament i.e. matters not enumerated in the Concurrent List or the State List, including the power of making any law imposing a tax not mentioned in either of those Lists, belong to Parliament.[114] Parliament, in addition, may legislate concerning any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List.[115] If an entry in the Union List and an entry in the State List appear to

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110 M.N. KAUL AND S.L. SHAKDHER, ANOOP MISHRA ED. PRACTICE AND PROCEDURE OF PARLIAMENT 110 (Lok Sabha Secretariat).
111 Subhash C. Kashyap, *Parliament as a Multi-Functional Institution,* 33 J.P.I. 3 (1987).
112 INDIA CONST. Seventh Schedule, List 1, List II, and List III.
113 *Id.*
114 INDIA CONST. art. 248 and Entry 97 of List I of the Seventh Schedule.
115 INDIA CONST. art. 264, cl.4.

overlap, the power of the State Legislature will be considered to be curtailed.[116] Parliament may thus legislate on any specified matter in the State List, whenever the Rajya Sabha, by a resolution supported by not less than two-thirds of the members present and voting, declares it necessary or expedient in the national interest to do so.[117] Further, when a Proclamation of Emergency is in operation, the legislative competence of Parliament becomes widened to extend to any matter in the State List.[118] Although any power so exercised by Parliament in the national interest or during an emergency does not restrict the normal legislative power of a State Legislature, in case of conflict the law by Parliament prevails and, so long as it remains in force, the State law to the extent of its repugnancy remains inoperative.[119]

In the first place, while a state law cannot operate beyond the limits of the State, a law by Parliament may extend to the whole of India and may even have extraterritorial operations.[120] These apart, if any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by the Parliament which it is competent to enact, the law made by the Parliament prevails and the State law to the extent of the repugnancy becomes void.[121]

If at any time, when both Houses of Parliament are not in session, and circumstances warrant immediate action, the President is empowered to

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[116] L.B. Paradise Lottery Centre v. The State of Andhra Pradesh, A.I.R. 1975 AP 50.
[117] Art. 249. Such legislation in its very nature is temporary inasmuch as the resolution initially remains in force for a period not exceeding one year and has to be renewed for period of one year every time.
[118] INDIA CONST art. 250, cl 1.
[119] INDIA CONST art. 251.
[120] INDIA CONST art. 245.
[121] INDIA CONST art. 254, cl 1.

promulgate ordinances[122] that have the same force and effect as Acts of Parliament but are of temporary duration. Every such Ordinance is required to be laid before both Houses of Parliament and ceases to operate at the expiration of six weeks from the re-assembly of Parliament unless earlier withdrawn by the President, or disapproved by Parliament.[123] The ambit of this power of the President is co-extensive with the legislative competence of Parliament[124] and the courts have no power to question the jurisdiction either as to the occasion or purpose or the subject matter of an ordinance except on the justiciable ground of exceeding the legislative powers conferred on the Union by the Constitution.[125] If the ordinance is intended to be permanent or have a longer life, then it must be replaced by regular legislation by Parliament.

Law-making by the legislature on a wide variety of subjects makes it the most powerful branch. Moreover, it is closest to the people because of its representational character. State legislatures are historical, the fountainheads of representative government.[126] Legislative power at the state level is, after all, central to how we govern ourselves as state politics.[127] The study and

[122] INDIA CONST art. 123. Governors enjoy similar powers in the States vide Art. 213. For details regarding legislation by Ordinance, see Chapter VI.

[123] The disapproval is expressed by resolutions passed by both the Houses of Parliament and the Ordinance ceases to operate on the passing of the second of these resolutions—Art. 123(2)(a) of INDIA. CONST.

[124] INDIA CONST. art.123, cl.3.

[125] Jnan Prasanna v. West Bengal, 1949 Cri. L.J. 1.

[126] Richard S. Kay, *The Jurisprudence of the Connecticut Constitution,* 16 CONN.L.REV, 667(1984).

[127] Daniel J. Elazar, *A Response to Professor Gardner's The Failed Discourse of State Constitutionalism* 24 RUTGERS L.J. 975(1993).

practice and procedure of the State legislature is an important area of research. However, academic work/research generally ignores the legislative process.

1.5 RELEVANCE OF LEGISPRUDENCE

The inquiries of jurisprudence mainly focus on the judicial side of legal order i.e., it concentrates on the conceptual analysis of judge-made laws, historical development of precedents and behavioural pattern of courts, logical reasoning of decisions, ethical standards the court needs to strive to reach the emporium of justice and finally, critical analysis and evaluation of case laws. Literature studies on account of the legal order are plenty and one could find the theoretical study easily. However, jurisprudence in sense is not limited to the study of the legal order, the ambit is vast. Jurisprudence is a theoretical account of the legal order, in both its positive and normative aspects, one would logically expect the legislative side of the legal order also to be within its inquiring ambit.[128] "Jurisprudence in practice has been primarily court-oriented, addressing only a part - albeit a significant part, of the legal order."[129]

Legisprudence is the counterpart of the legislative side of a legal order. It is defined as a rational theory of legislation.[130] Legisprudence is necessarily a theoretical discipline, concerned with general and abstract issues

[128] Julius Cohen, *Legisprudence: Problems and Agenda,* 11 HOFSTRA L REV. 1163 (1983).
[129] *Id.* at 1163.
[130] Wintgens, Luc., *Legisprudence as a New Theory of Legislation,* RATIO JURIS. 19(2006).

of more immediate interest to the philosophical analyst or critic than to the legal practitioner or legislator.[131]

The terrain of Legisprudence is considerably more difficult to interpret than its judicative prudence, which is considered as the study of the judiciary alone. “This is because, the legislative arm of the legal order conjures up images of bias, emotionalism, wheeling and dealing, manoeuvring for power, compromise, etc.”[132] “The judicial arm, at its best, is thought of as reflective, deliberative, objective, and, above all, rational.”[133]

Though a coordinate branch of jurisprudence, both are significantly different.[134] Legisprudence is a theoretical discipline concerned with abstract issues of more immediate interest. In the case of the judiciary, the general policy is dealt with later when the need for interpretation arises and the law is applied and refined when it is presented for coherence and validity. “Realism in legisprudence calls for a smoother arrangement with legislative law.”[135] “Both are facets of a single purpose-the illumination of the pathways of policymaking with the best that human knowledge and experience can provide.”[136] Both assume that law can properly be understood only by a constant examination of the nature of its impact upon those whom it affects.[137]

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[131] JULIUS COHEN, supra note 128, at 1164.
[132] NEIL DUXBURY, supra note 21, at 649.
[133] *Id.* at 649.
[134] JULIUS COHEN, supra note 128 at 1164.
[135] Julius Cohen, *Towards Realism in Jurisprudence* 59 YALE L.J. 886(1950).
[136] *Id.* at 886.
[137] *Id.* at 887.

1.6 SIGNIFICANCE OF THE STUDY

Legislation is the most important source of law. Law as the expression of the will of the people has to respond to the changing conditions of society. Lawmaking, which falls within the legitimate domain of the legislature, has to be exercised with great care and caution. It must also satisfy the requirements of participatory democracy.

Lawmaking, which satisfies the test of democratic participation, is not happening today. The whole law-making process has become a routine exercise with no effective deliberations. The study aims to analyze the normal procedure adopted in the legislature which contains requirements to make law-making democratic. There are some built-in strategies for securing public participation in the legislative process which are intended to uphold the democratic process. They are: (i) Referring the Bill to the Select Committee; (ii) Referring the Bill to the Subject Committee; (iii) Circulating a Bill for public opinion; and (iii) Allowing private member Bills. A study on these elements helps in understanding the element of democracy in the process of law-making.

The power to promulgate ordinances is conferred on the President[138] and the Governor[139] in special circumstances which require immediate action. Unless this power is exercised very cautiously in tune with intention of Constitutional makers, it may degenerate into an abuse of power and dilution

[138] Article 123 of the INDIA. CONST.
[139] Article 213 of the INDIA CONST.

of democratic principles. It is necessary to find out how the essence of democracy is whittled down in the case of ordinances.

When a law enacted by the legislature is declared ultra-virus the Constitution by the Judiciary, it may appear to be act against the will of the people expressed through legislation. The question whether judicial review of the legislation itself is anti-democratic or whether excessive or activistic expression of power of judicial review may become a negation of democratic element in law making assumes significance and is discussed in chapter VII.

The researcher proposes to explore the theoretical perspective on the study of different strategies that promote democratic lawmaking. An attempt was made to evaluate different strategies that can be adopted to improve democratic values in the legislative process.

There has been no study so far to analyze how democratic in practice is the law-making function of the legislature, using the research questions and methodology proposed.

1.7 SCOPE OF STUDY

The study of the process of law-making in the Legislature of Kerala forms the core of the research. In order to understand the element of democratization in the process of law-making, the role and performance of Subject Committees and Select Committees are also studied. The study will further on some areas such as election manifestos, the role of Law Reform Commission, placing of Private Members' Bill etc. which opens the

possibility of democratization of law making in general. The empirical study, focused on the evaluation of various strategies of democratization, is limited to Kerala because the Kerala Legislative Assembly is credited with many pioneering moves, both in the content of laws as well as in innovative procedural reforms. Another reason for confining the empirical study to Kerala is the availability of and access to data. The research attempts to analyze all the original bills of the Kerala Legislative Assembly as well as the ordinances promulgated in Kerala over a period of 65 years.

1.8 OBJECTIVES OF STUDY

1. To understand the current law-making system and to identify democratic deficit, if any.
2. To analyze the performance of the subject committees and select committees in democratizing the law-making process.
3. To find out the extent and role of non-official categories in democratizing the process of law-making.
4. To analyze the use of ordinance making power by the President and Governors.
5. To examine the extent of judicial scrutiny over the laws enacted by the legislature.
6. To suggest measures to improve the quality of law-making and thereby democratization of lawmaking.

1.9 HYPOTHESIS

There is a democratic deficit in the present system of law-making practised in Kerala.

1.10 RESEARCH QUESTIONS

1. Whether active discussions and deliberations are taking place while presenting Bills?
2. What is the mandate of the legislature to refer bills to subject /select committees and whether such mandate is effectively carried out to obtain wide deliberations and evolve public involvement in legislative scrutiny?
3. Do Private Members Bills get due importance and deliberations which they ought to get?
4. What are the roles of The Law Reform Commission and Election Manifestos in democratizing the process of law-making?
5. Whether the present practice of ordinance making power violates the spirit of the Constitution?
6. Whether the judiciary by overreach in exercising the power of judicial review, dilute the democratic principle?

1.11 RESEARCH METHODOLOGY

The methodology adopted for the present study is a combination of doctrinal and empirical research. The presentation of this study is descriptive, explanatory, and analytical in nature. The study adopts the descriptive method

in analyzing the process of law making, to describe the inherent strategies which are intended to promote democratization of law making. The empirical study concentrates on law making in the Legislative Assembly and ordinance making in Kerala during a period of 64 years (1957- 2021).

The researcher proposes to examine the scope of law-making on democratic lines. For the purpose of this study, both descriptive and empirical methods have been used.

The research analyzes the functioning of the present law-making system in Legislature to figure out instances where democratic values are undermined. The scope of public involvement as a constitutional obligation of the legislature is ascertained. The same is attempted by referring to relevant literature, the provisions in the Constitution of India, judicial decisions, and also by referring to the rules of procedure and conduct of business in the Kerala Legislative Assembly. The study further proceeds to analyze the fate of private bills introduced in the legislature. The study scrutinizes the procedures adopted in passing different Bills in Parliament and various State legislatures as well as case studies that analyze the ambit of important bills that were passed as a result of public initiatives.

An empirical study of these undemocratic practices in Kerala, and suggestions to do away with them, to make the legislative process more democratic, form the core of the research. The study concentrates on the Legislative Assembly of Kerala during the period 1957- 2021. The study

analyzes the scope and ambit of Private Member bill to find out whether the recommendations in private bills were subsequently adopted or made into enactments. The other major areas of the study will be concerned with the quality of debate on important legislative proposals, the time spent on each legislation including the participatory role played by select committees, whether the recommendations made by these committees were approved in principle, or whether it was to fulfil mere procedural requirements. The exercise of the ordinance making power of President and Governor will be analyzed with a national outlook and an empirical study of its practice in Kerala will be conducted. An attempt will also be made to suggest different strategies that can be adopted to improve democratic values in the legislative process.

1.12 REVIEW OF LITERATURE

Several authoritative books and treatises, in addition to articles, reports, official publications, and judicial decisions were consulted during the process of research on democratization of law making. These sources are enlisted in the Bibliography.

The materials were used in attaining more clarity on concepts and also for understanding the deeper dimensions of some practices which are crucially relevant to the research. Care has been taken to ensure that the use of materials had been acknowledged at appropriate places and the research practices, analysis, and conclusions always maintained their distinctive

identity, without being an echo of what has already been stated in the materials cited.

A brief review of the literature which formed the source of the present research is presented below. In the legal literature, the democratization of the law-making process is one of the less examined areas. The researcher has not been able to locate any article or book, elaborately or exclusively dealing with the subject. The most fundamental book on the law-making process written by Professor M. Zander, "Law-Making Process"[140] though devoted to the position in Great Britain, was very helpful in gaining a clear understanding of the law-making process in general. The origin, growth, and development of law are analyzed in the works of Professor James Coolidge Carter[141] and Markby.[142]

The element of democracy is examined in detail with a special focus on the importance of legislation in a democracy. Several authoritative books were studied to analyze the concept of democracy and its relevance in the legislative process.[143] Articles such as "Dimensions of Democracy"[144], "The

[140] M ZANDER, THE LAW-MAKING PROCESS (Cambridge University Press Cambridge 2004).
[141] JAMES COOLIDGE CARTER, LAW - ITS ORIGIN, GROWTH, AND FUNCTION (Read Books Ltd 2012).
[142] MARK BY E, ELEMENTS OF LAW (Oxford Clarendon Press 1905).
[143] AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT (Belknap Press 1996), ANDRE BETEILLE, DEMOCRACY AND ITS INSTITUTIONS (Oxford University Press 2012), ANNE PHILIPS, THE POLITICS OF PRESENT (Oxford: Clarendon, 1995), BIDYUT CHAKRABARTY, CONSTITUTIONAL DEMOCRACY IN INDIA (Routledge 2018), IVOR BROWN, THE MEANING OF DEMOCRACY 12 Trieste (1920).
[144] Christopher L. Eisgruber, *Dimensions of Democracy* 71 FORDHAM L. REV. (2003).

Nature and Various Forms of Democracy”[145] etc. were also used for this purpose.

The jurisprudential aspect of the subject was examined with the help of reference books such as “Austin's Theory of Sovereignty”[146], “Salmond on Jurisprudence”[147], and “Lloyds’ Introduction on Jurisprudence”[148]etc. The innovative theory of legisprudence, considered relevant in placing the research in a proper theoretical framework, is explained with the help of some articles.[149]

The subject of the research is the evaluation of various strategies which promote democratic practices in law-making, especially in the Kerala Legislature. From a broader perspective, the institutions of Parliament and State Legislature, the idea of representation, and the elements of accountability and collective responsibility are discussed after analyzing the works of John Rawls,[150] Hannah F. Pitkin,[151] etc.

The legislative procedure adopted by the Parliament and State Legislatures in the process of law-making is the core theme of the research.

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145 Leibholz, Gerhard, *The Nature and Various Forms of Democracy* 84, 88(Social Research, THE NEW SCHOO1 (1938).

146 JOHN DEWEY, AUSTIN'S THEORY OF SOVEREIGNTY Summer Publications (1984).

147 FITZGERALD P. J., SALMOND ON JURISPRUDENCE (Universal Law Publishing 1966).

148 MICHAEL D A FREEMAN ET.AL., LLOYDS’ INTRODUCTION ON JURISPRUDENCE (Sweet & Maxwell 2001). etc.

149 Julius Cohen, *Legisprudence: Problems and Agenda* 11 HOFSTRA L REV. (1983), Wintgens, Luc., *Legisprudence as a New Theory of Legislation*, RATIO JURIS. (2006) etc.

150 POLITICAL LIBERALISM: REPLY TO HABERMAS’, IN HIS POLITICAL LIBERALISM (Columbia University Press 1996).

151 THE CONCEPT OF REPRESENTATION (Berkeley: University of California Press 1967).

Highly authoritative books of M.N. Kaul and S.L. Shakdher[152] and Erskine May[153] were referred to in this regard. There are authoritative publications of the Kerala Legislature Secretariat, which include the proceedings of the legislative assembly as well as an assessment of the role played by the Kerala Legislative Assembly as a lawmaker. The data collected from the authoritative source materials collected from the Kerala Legislature Secretariat was analysed and used for constructing the Tables and Figures given in various chapters.

To examine the constitutional aspects of the power of ordinance making, standard books on constitutional law including “Constitutional Law of India” by H.M. Seervai and MP Jain’s “Indian Constitution Law” were used. Further some exclusive books on the subject such as “Re-Promulgation of Ordinances”,[154] A Fraud on The Constitution of India”,[155]“Powers of The President and Governors in India, With Special Reference to Legislative and Ordinance-Making” and “Presidential Legislation in India: The Law and Practice Of Ordinances”[156]were used as dependable sources.

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[152] ANOOP MISHRA ED. PRACTICE AND PROCEDURE OF PARLIAMENT (Lok Sabha Secretariat).

[153] PARLIAMENTARY PRACTICE (Lexis Nexis 1844)..

[154] D. C. WADHWA, RE-PROMULGATION OF ORDINANCES, A FRAUD ON THE CONSTITUTION OF INDIA (Gokhale Institute of Politics and Economics 1983.

[155] RAGHUNATH PATNAIK, POWERS OF THE PRESIDENT AND GOVERNORS IN INDIA, With Special Reference to Legislative and Ordinance-Making (Deep & Deep Publications 1996).

[156] SHUBHANKAR DAM, PRESIDENTIAL LEGISLATION IN INDIA: THE LAW AND PRACTICE OF ORDINANCES (Cambridge University Press 2014).

For examining the democratic process, books of high authenticity such as S.P Sathe's Judicial and Constitutional Democracy In India[157], "Jeremy Waldron's Rights And Majorities"[158], "The Least Dangerous Branch: The Supreme Court At The Bar Of Politics"[159] and Ely's "Democracy, and Distrust: A Theory Of Judicial Review"[160] etc were used as references. Many articles of great value were found on the topic of judicial review and a few, on the concept of counter majoritarianism. These include, "Constitutional Democracy and the Legitimacy of Judicial Review",[161] "Democracy And Judicial Review, Will And Reason, Amendment And Interpretation: A Review Of Barry Friedman's The Will Of The People"[162], "Legislative Branch and The Supreme Court,"[163] "The Core of the Case against Judicial Review"[164], "The Antidemocratic Character of Judicial Review."[165] The materials were mainly used to attain conceptual clarity; but the analysis and empirical study are purely products of original research.

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[157] S.P SATHE'S JUDICIAL AND CONSTITUTIONAL DEMOCRACY IN INDIA (N M Tripathi 1992).,

[158] ROUSSEAU REVISITED. IN LIBERAL RIGHTS: COLLECTED PAPERS Cambridge University Press (1991).

[159] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (Indianapolis, New York 1962).

[160] ELY, J.H., DEMOCRACY, AND DISTRUST: A THEORY OF JUDICIAL REVIEW (Harvard University Press 1980).

[161] Samuel Freeman, *Constitutional Democracy and the Legitimacy of Judicial Review* 9 LAW AND PHILOSOPHY (1990).

[162] Vicki C. Jackson, *Democracy and Judicial Review, Will and Reason, Amendment and Interpretation: A Review of Barry Friedman's The Will of The People* 13 PENN LAW (2010).

[163] James Willard Hurst, *The Legislative Branch, and The Supreme Court,* U. ARK. LITTLE ROCK L. REV. (1982).

[164] Jeremy Waldron, *The Core of the Case against Judicial Review* 115 YALE L.J. (2006).

[165] George Mace, *The Antidemocratic Character of Judicial Review* 60 CALIF. L. REV. (1972).

1.13 SCHEME OF RESEARCH

The researcher here undertakes a study of the legislative process and attempts to understand the different strategies that promote democratic law-making. It falls, to a great extent, within the domain of legisprudence. The empirical study, which evaluates various strategies that promote democratic practices, was confined to Kerala. There has been no study so far to analyze how democratic the practice of law-making function in the legislature, using the research questions and methodology proposed.

A key question that arises in the study of the legislature is the extent of democratization of law-making in the legislature. Democratization should not be viewed as a simple black and white transition from a non-democracy to a democracy. Democratization of lawmaking is a transition to a more democratic regime in the lawmaking process by including substantive changes in the process itself. Chapter II deals with the conceptual and constitutional perspectives of democracy and the legislative process.

The normal procedure adopted in the legislature by itself contains requirements to make a law-making a democratic process. How the minimum necessities for a democratic process are carried out by the legislature as a body is studied in Chapter III of the thesis. The chapter examines the core question of our research i.e., whether law-making in Kerala Legislative Assembly (hereinafter referred to as KLA) is truly democratic or to what extent it is democratic. Based on certain indicators democratic elements in law-making are analyzed over the period from 1st to 14th KLA. The most

important issue that arises in this context is to what extent the procedure so adopted is democratic; whether the discussions are fully participatory; whether fruitful amendments are presented by the members, how much time is devoted to discussing the provisions of the bill, how supportive and participatory are the members while the Government presents a bill, are some of the basic queries that remain elusive. One of the major objectives of the study is to measure the extent of democratization in law-making by framing some ascertainable and dependable criteria in the absence of any dependable parameters. This area which has seldom been academically explored will form an important part of the study.

Apart from the analysis of the law-making process in the legislature, the study focuses on the contribution of legislative committees in a qualitative improvement of the legislative proposal. Chapter IV deals with the study of subject committees and select committees. Scrutiny of a bill by the subject committee in which all political parties in the House are represented is also intended for a more democratic process of lawmaking. Another pertinent question that arises is how a small body-like committee helps in democratizing lawmaking. Subject Committee, unlike select committees, is an internal working body with only a very few selected members. In this context, the importance and relevance of the routine use of the subject committee are to be examined in detail. During the period of initial KLAs, bills that needed evidence were directly referred to the select committee. But with the advent of subject committees, as a routine, the bills are referred to

respective subject committees. Only a detailed study of both subject committees and select committees will figure out the significance of both. The changes that underwent with the adoption of the subject committee as a routine are examined in detail.

Another area of focus is how responsive is the Government in democratizing lawmaking. An important question is what tool does the Government adopt to collect the evidence of changing needs and attitudes of people in a legislative setup? The appointment of the Law Reform Commission and the placing of manifestos at the time of elections are two different mechanisms that bring people closer to the law-making process. Another question is how far the Private Members' Bills help in democratizing law-making? This will be examined in detail in Chapter V with a focus on bills introduced by private members in different legislative assemblies.

Apart from the factors that strengthen democracy, the study also dwells on the ordinance making power conferred on the President under Art.123 and the Governor under Art.213 of the Constitution. Chapter VI deals with this concept. A pertinent question that arises in this context is how far the ordinance-making power dilutes the democratic element of law-making. This will be examined by referring to the re-promulgation of ordinances and also ordinances promulgated immediately after a session of Parliament/ State Legislature is adjourned.

Another important area that dilutes the law-making power of the legislature is the possibility of the legislation being nullified by the judiciary in the exercise of its power of judicial review. The key question that arises is whether this amounts to a democratic deficit. The judicial review must hold a democratic justification or else the power of judicial review of legislation will be undemocratic. This significant area is analyzed in detail in Chapter VII.

Conclusions with suggestions and recommendations to make the law-making process more democratic are summarised in Chapter VIII.

To conclude, the focus of the present research is to find out how democratic is the present system of law-making in India, with Kerala as an example, based on an empirical study of 1st to 14th KLA (1957 to 2021) covering a period of 65 years.

CHAPTER – II
DEMOCRACY AND THE LEGISLATIVE PROCESS: CONCEPTUAL AND CONSTITUTIONAL PERSPECTIVES

2.1 INDIAN DEMOCRACY AT WORK

2.1.1 Origin of the Indian Democracy

The concepts of democracy and democratic institutions were by no means entirely alien to India.[1] Republican forms of Government and representative deliberative bodies governed the life of the people, right from the Vedic age and there was ample evidence of the functioning of the republic during the post–Vedic period of Indian history.[2] It was after the great war of Mahabharata that the number of republican States began to grow. During the period, people's representatives were elected in an open assembly. The salient features of these republics have been described as:

> the genius of the people for the corporate action expressed itself in a variety of self-governing institutions with the highly developed constitution, rules of procedure, and machinery of administration which challenge comparison with modern parliamentary institutions.[3]

[1] SUBHASH C. KASHYAP, HISTORY OF PARLIAMENTARY DEMOCRACY 1(Shipra Publications 1991).

[2] *Id.* at 2. During the Rig Veda period, the 'Sabha' and the 'Samiti' were the highly prestigious assemblies and centers of the democratic faith of the people.

[3] GIRIRAJ SHAH, GLIMPSES OF ANCIENT INDIAN CULTURE 85(Trishul Publications 1989).

The democratic institutions like *Sabha* and the *Samiti*, republican states, elective kingship later disappeared but *Gram Sanghas, Gram Sabhas,* and Panchayats survived and flourished the rule of many Hindu and Muslim dynasties till the advent of British rule. [4]

The idea of an institutionalized democracy came to India with the colonial rule.[5] The British era witnessed Parliamentary Government and other democratic institutions in their modern form introduced in India. Under the various Acts of the British Parliament and through domestic legislative reforms, the British Government introduced institutions of democracy. In the beginning, the institutions could hardly be called representative or democratic.[6] Nevertheless, they were responsible for laying the foundations of parliamentary democracy in India.[7] In 1947, when India gained its independence from colonial rule, the choice of parliamentary democracy was a distant dream.[8] Jawaharlal Nehru looked upon the Constitution not only as a political, administrative, and legal instrument to ensure the political governance of the country, which was not unimportant but also as an effective and positive instrument pervaded by the considerations of the welfare state to achieve the goals of social justice, which have come to be engrafted on the

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[4] K.P. Mishra, *Participatory Democracy Through Gram Sabha In Madhya Pradesh* 70 THE INDIAN J. POL. SCI. 801, 803-804 (2009).

[5] ANDRE BETEILLE, DEMOCRACY AND ITS INSTITUTIONS 32(Oxford University Press 2012).

[6] Sumit Ganguly, *The Story of Indian Democracy*, FOREIGN POLICY RESEARCH INSTITUTEhttps://www.fpri.org/article/2011/06/the-story-of-indian-democracy/. (December 21, 2021, 9:30 PM).

[7] SUBHASH C. KASHYAP, supra note 1, at 6.

[8] K.P. MISHRA, supra note 4, at 801.

constitutional document.[9] There emerged a broad consensus in India that the Parliament would be the most important institution around which the nation would build its public life.[10]In the Constituent Assembly Debates (hereinafter referred as CAD), there were strong debates on whether India should opt for a Presidential or Parliamentary form of Government or a customized version with essential elements drawn from both these models. However, the debate settled in favor of the parliamentary form of Government, and the Indian Constitution adopted by the Constituent Assembly consisting of 299 members, who represented the substantial class, religious and linguistic diversity of India's population, set out the framework for India's future as a republic and parliamentary democracy.[11]

The Constitution of India was adopted on 26th November 1949 after 11 long, hectic sessions from 9th December 1946 to 26th November 1949.[12] The Constituent Assembly had 167 sittings over 2 years, 11 months and 9 days.[13]

The Constitution is an integrating instrument as it integrated over 600 principalities with the Union of India. While commenting on the Draft Constitution, Dr. Ambedkar said:[14]

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[9] A.G. Noorani, *Nehru as an Architect of the Constitution* 1 CONTEMP. PERSPECTIVES 4, 8(2007).

[10] GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION 26 Oxford (1999).

[11] *Id.* at 34.

[12] DURGA DAS BASU, INDIAN CONSTITUTIONAL LAW 3 Kamal Law House (2015).

[13] *Id.* at 6.

[14] Cited in RAMACHANDRA GUHA ed., MAKERS OF MODERN INDIA 288 Harvard University Press (2013).

> "One likes to see whether there can be anything new in a Constitution framed at this hour in the history of the world……. Fundamentals of the Constitution are recognized all over the world. The only new thing, if there can be any, in a Constitution framed so late in the day are variations made to remove the faults and to accommodate them to the needs of the country."

A new era dawned with the adoption of the Indian Constitution and Jawaharlal Nehru captured that historic moment in his famous *tryst with destiny* speech which runs as follows[15]:

> "Long years ago, we made a tryst with destiny, and now the time comes when we shall redeem our pledge, not wholly or in full measure, but very substantially. At the stroke of the midnight hour, when the world sleeps, India will awake to life and freedom. A moment comes, which comes out rarely in history when we step out from the old to the new when an age ends, and when the soul of a nation, long suppressed, finds utterance. The future [of India] is not one of ease or resting but of incessant striving so that we might fulfill the pledges we have so often taken and the one we shall take today. The service of India means the service of the millions who suffer. It means the ending of poverty and ignorance and disease and inequality of opportunity. The ambition of the greatest man of our generation [Mahatma Gandhi] has been to wipe every tear from every eye. That may be beyond us but as long as there are tears and suffering, our work will not be over."

India became a free nation in 1947. The post-Independence period demanded a culmination of three major ideologies i.e., colonialism,

[15] Stuart Roberts, A Tryst with Destiny, University of Cambridge, cam.ac.uk/trsy_with destiny (last accessed on Jan. 4, 2022)

nationalism, and democracy.[16] Two points need to be kept in mind. First, although colonialism and nationalism are surely antagonistic to each other there is no doubt that the former provoked circumstances in which nationalism emerged as a powerful ideology to articulate the voices of the colonized.[17] Second, colonialism also led to a slow process of democratization by gradually involving people who were favorably disposed towards the alien administration.[18] These three forces provided 'the foundational values on which the Indian democracy was built. There is no doubt that colonialism distorted the evolution of India, which followed neither 'the pure' capitalist path of development nor any routes that do not draw on capitalism.[19] "Yet, colonialism, *inter alia*, contributes to a critical space for forces that are opposed to colonialism and inspired by nationalism and democratization." [20]

The 1935 Government of India Act was a powerful constitutional intervention that legitimized the growing democratic aspirations of India.[21] The concept of 'decentralization' and 'federalism' from the 1920s provided several inputs to the founding fathers of the Constitution, which helped India in charting out a distinctive path in underlining the ideologies of colonialism,

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16 MAJUMDAR, MARGARET A., POST COLONIALITY: THE FRENCH DIMENSION 201 (Berghahn Book 2007).
17 *Id.* at 202.
18 *Id.* at 203.
19 BIDYUT CHAKRABARTY, INDIAN POLITICS, AND SOCIETY SINCE INDEPENDENCE: EVENTS, PROCESSES AND IDEOLOGY 40 (Routledge, Taylor & Francis Group 2008).
20 *Id.* at 42.
21 RAMACHANDRA GUHA, supra note 14 at 124.

nationalism, and democratization.[22] The changing socio-economic profiles of the legislative assemblies and national parliament is the most indicative trend of a genuine interest in the institution of democracy. The introduction of adult suffrage in independent India strengthened the impact of the processes of democratization.[23] "The making of free India's Constitution by the Constituent Assembly over a period of little more than three years is reflective of the efforts that the founding fathers undertook to translate the nationalist and democratic aspirations of an independent polity following decolonization."[24]

History shows that the concept of democratization has decisively shaped the search for identity in India. The unity required for democratizing the polity was echoed all over. It led to a staple of liberal discourse. For instance, J.S. Mill commented that democracy does not flourish in multi-ethnic societies.[25] The forces of democratization appeared to have played a decisive role in communal harmony in post-independent India. The ideals of democracy, equality, and justice which were intimately associated with social struggles in India since the nineteenth century became the tenets of the Indian Constitution.

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[22] Tarunabh Khaitan, *Directive Principles and The Expressive Accommodation of Ideological Dissenters*, INT'L J. CONST. L 389, 389–420(2018).

[23] *Id.* at 389.

[24] *Id.* at 390.

[25] J. S. Mill on *Freedom and Power Bruce Baum Polity* 31, THE U. OF CHI. PRESS 187, 187-216 (1998).

2.1.2 Concept of Democracy

The word democracy is of Greek origin.[26] It comprises *demos* and *kratia*, which means common people and rule.[27] Democracy, therefore, means rule by common people.[28] It means a government by the people, a government in which supreme power is vested in the people and exercised by them directly or indirectly through a system of representation involving periodically held elections.

Democracy is a way of life that embodies the right of people to be directly involved in determining common well-being. Democracy stands for the people's participation in the exercise of power, as well as the people's freedom from decisions in which they take no part.[29] So perceived, democracy is a symbol of liberty, an expression of the people's power over the government and the ability to dictate governmental objectives and procedures compatible with the people's needs and wishes.[30] "As one observes, the diverse expressions of democracy throughout the world, one becomes aware of the great differences in the contents and style of governance permitted under one comprehensive and tolerant democratic umbrella."[31] Democracy stands primarily and exclusively for political liberty and equality. The

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26 DEVENDER SINGH, THE INDIAN PARLIAMENT, BEYOND THE SEAL AND SIGNATURE OF DEMOCRACY 1(Universal Law Publishing, Lexis Nexis 2016).

27 *Id.* at 1.

28 *Id.* at 2.

29 Christopher H. Schroeder, *Deliberative Democracy's Attempt to Turn Politics into Law* 65, LAW & CONTEMP. PROBS. 95, 95-132(2002).

30 This was the primary meaning of democracy when it was first instituted in Athens. Nicholas N Kittrie, Democracy: An Institution Whose Time Has Come--From Classical Greece to the Modern Pluralistic Society 8 AM. U. INT'L L. REV.383 (1993).

31 *Id.* at 375, 383.

distinctiveness of democracy is that the people can choose and change their government. It is characterized by free elections, free expression, and free parties.[32] In a recent debate on human rights, Professor Claudio Grossman argued the right to participate in government includes diverse but interrelated components such as free elections, freedom of assembly, freedom of association, economic, social, and cultural rights.[33]

Democracy is inspired by the ideas of liberty, equality, and fraternity.[34] These were the ideals of the French Revolution which inspired people in many countries to challenge the absolutist monarchies of the past.[35] The Constituent Assembly, inspired by the very same ideals, inscribed them in the Preamble, the very heart, and soul of the Constitution. "The virtues of democracy stand as an ideal of social and political life and provide the touchstone by which political actions and processes are judged as beneficial or otherwise."[36]

The Constituent Assembly in response to needs, and aspirations of the people framed the Constitution into a sovereign, democratic, republic.[37] A republic recognizes the inalienable rights of individuals, puts a check on the tyranny of the majority, and is founded on the principles of fair administration

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32 ROY C. MACRIDIS ET.AL., COMPARATIVE POLITICS: NOTES AND READINGS145 (Macridis and Brown 1964).
33 Claudio Grossman, *The Human Right to Participate in Government: Toward an Operational Definitio*n, 82, AM. SOC'Y INT'L L. PROC., 505, 510(1988).
34 See Preamble, Constitution of India, 1949.
35 WEYLAND, KURT, THE DIFFUSION OF REVOLUTION: '1848' IN EUROPE AND LATIN AMERICA 63 Cambridge University Press 417 (2009).
36 *Id*. at 418.
37 See Preamble, Constitution of India, 1949.

of justice, liberty, and reasoning.[38] The principles characterized by India's democratic republic are the principles of separation of powers between the organs of the State, the Executive, Legislature, and the Judiciary; the Constitutional guarantee of fundamental freedoms and human rights; rule of law; holding periodic free and fair elections by universal suffrage; existence of political parties; transparency and accountability and independent media.[39]

2.2 CONSTITUTIONAL DEMOCRACY

The term constitutional democracy can be interpreted as "either an oxymoron or a tautology."[40] Whereas the first term refers to 'restrained and divided' power, the second implies its ultimately 'unified and unconstrained' exercise.[41] "Constitutions can be presented as codifying the rules of the democratic game, indicating who can vote, how, when, and why."[42] The democratic ideals in the Constitution entrench the rights that are inherent to the democratic process and prevent abrogation by elected politicians.

A constitutional democracy is a structure of governance and a way of providing an ideological perspective on governance.[43] Indian Constitution establishes a constitutional democracy that is founded on a rule of law wherein the majority will and rule are controlled and directed by

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[38] DEVENDER SINGH, supra note 26 at 27.

[39] H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA, 32 Universal Law Publishing Company 73 (2015).

[40] Bellamy Richard, *Constitutionalism and Democracy – Political Theory and the American Constitution,* BRITISH J. POL SCI. 595, 595– 618(1997).

[41] Murkens, Jo Eric Khushal, *The Quest for Constitutionalism in UK Public Law Discourse*,29, OXFORD JO. LEGAL STUD. 427, 427–55(2009).

[42] BELLAMY RICHARD, supra note 40 at 613.

[43] BIDYUT CHAKRABARTY, CONSTITUTIONAL DEMOCRACY IN INDIA 226(Routledge 2018).

constitutional principle. In a constitutional democracy, the authority of the majority is limited by legal and institutional means so that the basic rights of the people and the minorities are respected.[44] “Constitutional democracy is the antithesis of arbitrary rule” and it is characterized by popular government, majority rule respecting minority rights, limited government wherein the powers of the government are limited by a written constitution, institutional and procedural limitations on powers such as separation of powers, checks, and balances which included the power of judicial review and ensuring leadership succession through elections.[45] Protection of fundamental rights enshrined in the Constitution is the primary goal of the Government. Constitutional democracy promotes justice and equality.

2.2.1 Juristic Aspect of Constitutional Democracy

In the study of constitutional democracy, it is imperative to analyze the theories and theoretical justifications for democratic governance. At the outset, a democracy is constitutive of three core elements-individual sovereignty, equality among citizens, and democratic norms and values.[46] The first element gives the idea that political sovereignty resides at the level of the individual.[47] “Democracy is the idea that political sovereignty resides at the level of the individual and the community as a whole derives its supreme

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[44] Stepan, Alfred and Cindy Skach, *Constitutional Frameworks and Democratic Consolidation: Parliamentarianism versus Presidentialism* 46 CAMBRIDGE UNIVERSITY PRESS 1, 1–22(1993).

[45] RUCHI TYAGI, CONSTITUTIONAL DEMOCRACY AND GOVERNMENT IN INDIA 45 Mayur (2012).

[46] *Id.* at 46.

[47] ROBERT DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 47 (Yale University Press 2003).

power and authority with the consent of the people."[48] It is a shared public right, wherein, for example, in a representative government, the political power is wielded by the representatives of the citizens in a community.[49]

The second element of democracy provides that there should be political equality among citizens. Political equality is conferred upon an individual through the status of citizenship, which provides for a legal status of formal recognition that he is a member of a sovereign state.[50] "Citizens in non-democratic societies may still have rights, particularly compared to non-citizens in those societies, but political rights are generally very limited or absent."[51]

The third element of democracy constitutes ideas that strengthen and reinforce the elements above: norms, values, and rules that affirm and solidify individual sovereignty and political equality amongst citizens.[52] The last element suggests that democracy requires a set of norms and values apart from the concepts of sovereignty and equality.[53] A democratic society must develop positive norms regarding the rule of the people. "Civic engagement and civic participation are not just about voting or formal democratic processes, but rather include a wide range of political and non-political activities in which

[48] *Id.* at 47.
[49] *Id.* at 48.
[50] Samved Iyer, *An Essay on Political Equality in India*, THE TIMES OF INDIA, April.14, 2020 at 6.
[51] BELLAMY RICHARD, supra note 40, at 595.
[52] *Id.* at 595.
[53] *Id.* at 596.

individuals or groups come together to solve problems and better their community."[54]

"Democracy is about the competitive selection of elites, and thus much democratic theory is oriented toward theorizing how this process operates,[55] as well as the related concepts that form the bases of its legitimacy, such as accountability, representation, and legitimate coercion."[56] Theorists have offered two main accounts of why democracy should be viewed as pre-constituted. The first theory by Ronald Dworkin and John Rawls claims that democracy assumes certain moral values – notably that all citizens deserve equal concern and respect as autonomous rights-bearers and that we need a constitution to ensure that even democratically made laws adhere to them.[57] The second theory by John Ely's essay merely observes that democracy involves certain rules and practices, such as majority vote and free speech, and that these alone deserve special protection.[58]

The responses to core questions of democracy by classic theorists, including Aristotle, John Locke, Jean-Jacques Rousseau, Alexis de Tocqueville, John Stuart Mill, and Joseph Schumpeter, are surveyed by way

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[54] GAUTHIER, CONSTITUTING DEMOCRACY in D. Copp, J. Hampton and J. Roemer (eds), The Idea of Democracy 316(Cambridge University Press 1993).

[55] *Id*. at 318.

[56] *Id*. at 319.

[57] George Klosko, *Rawls's Political Philosophy and American Democracy* 87 AM.POL.SC REV. 348, 348-359 (1993).

[58] ELY, J.H., DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 49 (Harvard University Press 1980).

of introduction to contemporary theories that draw on them.[59] "These include participatory democracy, cataplexy, and collective choice theories, deliberative democracy, power-political pluralism, and radical-democratic pluralism."[60]

"The theory of deliberative democracy has been preoccupied with how democratic societies ought to deal with the fact that citizens often bring to bear conflicting perspectives on fundamental values when debating what laws should govern us all."[61] It provides an area for discussion, compromise, and consensus. "The idea of deliberative democracy is not that a majority number of votes will determine an answer, but that through transparent and fair deliberation, we should arrive at something close to a unanimous consensus, even if that consensus is a compromise in which no one individual gets everything they want."[62] An initial aim of deliberation is to achieve as much consensus as possible, but deliberativists have already conceded that disagreement on the actual decision will often persist in an environment of reasonable pluralism.[63] The evolution of deliberative institutions in India and their role of deliberation in democratic ways are clear signs of deliberative democracy in India.

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[59] Frank Cunningham, Democratic Theory, INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 90, 90-96(2015).

[60] *Id*. at 95.

[61] CHRISTOPHER H., supra note 29, at 100.

[62] Ramya Parthasarathy, DELIBERATIVE DEMOCRACY IN INDIA, Policy Research Working Paper; No. 799 (2017) https://openknowledge.worldbank.org/handle/10986/26245. (last accessed July 9, 2020, 2:00 PM)

[63] GAUTHIER, supra note 54, at 10.

2.2.2 Models of Constitutional Democracies

Unitary and federal systems are the most common models of constitutional democracies.[64] In a government with two levels, distinctions can be made based on the greater or lesser autonomy granted to the local level.[65] In a unitary government, all the powers of the government are vested in the central government whereas, in a federal government, the powers of government are divided between the center and the units.[66]

India is a federal system but with more tilt towards a unitary system of government. It is also called a quasi-federal system as it has features of both a federal and a unitary system.[67] The word federation is not mentioned in the Constitution; instead, Article 1 of the Indian Constitution states that 'India, that is Bharat, shall be a Union of States'.[68] The Union is called the Republic of India, also known as Bharat.[69]

The Indian Union executive consists of the President, the Vice-President, and the Council of Ministers with the Prime Minister as the head to aid and advise the President.[70] There shall be a Parliament for the Union which shall consist of the President and two Houses to be known respectively as the Council of States and the House of the People.[71] Lok Sabha (the lower house) and Rajya Sabha (the upper house) form the legislative branch. The

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64 MP JAIN, INDIAN CONSTITUTIONAL LAW 19 Lexis Nexis (2014).
65 *Id.* at 19.
66 *Id.* at 20.
67 *Id* at 19.
68 INDIA CONST. art. 1.
69 *Id.*
70 INDIA CONST. art. 53.
71 INDIA CONST. art.79.

Supreme Court, 21 High Courts, and many civil, criminal, and family courts at the district level form the Judiciary.[72]

2.3 PARLIAMENT-THE EMBODIMENT OF PEOPLE'S WILL

2.3.1 Constitution of the Parliament

In any democracy, the paramount function of law-making is entrusted to the legislature, which represents the people. Thus, Parliament enjoys the pride of place among the institutions of democracy.[73] It is acclaimed that India's parliamentary democracy is one of the most vibrant in the world.[74]

Parliament is the axis of India's democratic polity.[75] India's Parliament is bicameral and consists of two Houses, the lower house which is designated as the 'House of the People' or Lok Sabha, and the Upper House as the 'Council of States' or Rajya Sabha. The two Houses along with the President constitute Parliament.[76] The two Houses of Parliament in India differ from each other in many respects. They are constituted on entirely different principles, and from a functional point of view, they do not enjoy a co-equal status. [77]

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72 MP JAIN, supra note 64 at 18.

73 ANDRE BETEILLE, DEMOCRACY AND ITS INSTITUTIONS 13 (Oxford University Press 2012).

74 Deepak Nayyar, Vibrant Democracy, Dormant Parliament, LIVEMINT, July 14, 2017. https://www.livemint.com/Opinion/Bcy9Eg4aDIqGY8Kw7dKKMK/Vibrant-democracy-dormant-Parliament.html (Last accessed on 8 June, 2019).

75 DEVENDER SINGH, supra note 26, at 28.

76 INDIA CONST. art. 79.

77 MP JAIN, INDIAN CONSTITUTIONAL LAW 34 (Lexis Nexis 2014).

2.3.2 House of the People: The Lok Sabha

Lok Sabha is a democratic chamber elected directly by the people based on adult suffrage.[78] It reflects the popular will of the people. The members of Lok Sabha are the representatives of the people who are elected by direct elections from Parliamentary Constituencies and are deemed to be the foundation of the fabric of the liberty of the people.[79] Every citizen of India who is not less than 18 years of age on a date fixed by Parliament and does not suffer from any disqualification as laid down by the Constitution, or in any law on the ground of non-residence, unsoundness of mind, crime, or corrupt or illegal practice, is entitled to vote at an election for the Lok Sabha.[80]

The House of the People or the Lok Sabha consists of not more than five hundred and thirty members chosen by direct election from territorial constituencies in the States, and not more than twenty members to represent the Union Territories(UT) chosen in such manner as Parliament may by law provide.[81] Seats in the House are allotted to each State in such a way that, as far as practicable, the ratio between the number of seats at a State and its population is the same for all the States.[82] It is for the Parliament to prescribe by law how the members to the Lok Sabha are to be chosen from the Union Territories.[83] Two members of the Anglo-Indian Community may be

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[78] *Id.* at 34.
[79] *Id.* at 34.
[80] INDIA CONST. art. 326.
[81] INDIA CONST. art.81.
[82] INDIA CONST. art.81, cl.2 and art.81, cl.3.of the Indian Constitution. Up to the year 2026, for purposes of art. 81. cl.2., the 1971 census figures will be used to ascertain the population of a State. The Parliament has enacted Delimitation Act, 2002 for this purpose.
[83] INDIA CONST. art.81, cl.1.

appointed by the President if the community is not adequately represented in the House of the People.[84] The members are elected for 5years and are responsible to their constituents and the Council of Ministers is collectively and individually responsible to the Lok Sabha.

The leader, who commands a popular majority in the chamber often becomes the Chief Executive, i.e., the Prime Minister. The Prime Minister forms Government by choosing his Council of Ministers. Both the Prime Minister and Council of Ministers have to enjoy the confidence of the legislature, otherwise, the House of the People can remove the Prime Minister and topple the government through a vote of no confidence. [85]

2.3.3 Membership of Parliament

Only a citizen of India is qualified to be chosen a member of the House of Parliament.[86] He should not be less than 30 years of age for Rajya Sabha and 25 years for Lok Sabha.[87] He should make and subscribe an oath or affirmation, according to the form set out in the third schedule before the Election Commission or the officer designated by the Commission expressing his true faith and allegiance to the Constitution and for upholding the sovereignty and integrity of India.[88] He must not suffer any disqualification prescribed by the constitution and must possess such other qualifications as

84 INDIA CONST. art. 331.
85 John D. Huber, *The Vote of Confidence in Parliamentary Democracies*, THE AM. POL. SCI. REV. 269–82 (1996).
86 INDIA CONST. art.84.
87 INDIA CONST. art.84.
88 INDIA CONST. art. 99.

may be prescribed by a law made by Parliament.[89] Parliament has prescribed the necessary qualifications and disqualifications for parliamentary membership in the Representation of People Act, 1951.

2.3.4 The Prime Minister

In the mechanism of the parliamentary form of government, the Prime Minister occupies a crucial position. Jennings describes him as the 'keystone of the Constitution in Parliamentary Democracies.'.[90] In India, the Prime Minister is the leader of the majority in the Lok Sabha. He is the head of the Council of Ministers. The Prime Minister is the principal spokesman of the cabinet and its defender in Parliament.[91] He coordinates government policy. The Prime Minister's position is one of great power, influence and prestige.[92] He keeps the fabric of the parliamentary form of government in working order.[93]

Similar to the position of Prime Minister, equal weightage is given to the Council of Ministers. No Prime Minister can govern without the aid of colleagues. The Council of Ministers is usually a large body consisting of several ministers of various ranks, e.g., Cabinet Ministers, Ministers of State, and Deputy Ministers. The cabinet is the driving and steering body responsible for the governance of the country.[94] Cabinet decides major questions of policy. Its decisions are binding on all Ministers. It is the central

89 INDIA CONST. art.102, cl.1.
90 IVOR JENNINGS, CABINET GOVERNMENT 173(Cambridge University Press 1959).
91 H.M. SEERVAI, supra note 39 at 109.
92 *Id.* at 109.
93 *Id.* at 110.
94 R.K. Jain v UOI, (1993) 4 SCC 119, 147.

directing instrument of government in legislation as well as administration. However, all decisions are not taken by the Cabinet. Many decisions are taken by the Ministers themselves without reference to the Cabinet, or by officials in the department without reference to the Minister. Thus, under the rules of business, most of the decisions are taken by officials in the department under the Minister. Therefore, along with the principle of collective responsibility, there also works the principle of the individual responsibility of each Minister to Parliament which is accountable for his actions. [95]

2.3.5 Upper House: The Rajya Sabha

Rajya Sabha is constituted by indirect elections. Rajya Sabha is designated to fulfill several purposes. First, it has been envisaged as a forum to which seasoned and experienced public men, without undergoing the tussle of general elections, get access to the administration of the Nation.[96] Senior public men are enabled to apply their earned knowledge and experience with wisdom to solve the problems that face the country.[97] Secondly, Rajya Sabha serves as a debating chamber to hold dignified debates and acts as a revising chamber over the Lok Sabha, which is a popular chamber, may at times be swayed to act hastily under the pressure of public opinion or in heat of passions of the moment.[98] Lastly, the Rajya Sabha is designed to serve as a chamber where the States of the Union of India are represented as States in

95 INDIA CONST. art. 75, cl.3.
96 Role of Rajya Sabha in Indian Parliamentary Democracy, Rajya Sabha https://rajyasabha.nic.in/rsnew/publication_electronic/Role_Parliamentary_Democracy.pdf (2019) (last assessed on Jan.19, 2021).
97 INDIA CONST. art. 80.
98 MP JAIN, supra note 55, at 35.

keeping with the federal principles.[99] "Rajya Sabha has emerged as a forum where the problems are discussed and considered from a national rather than local perspective."[100]

The maximum strength of the Rajya Sabha has been fixed at 250 members.[101] Of these, 238 are elected representatives of the States and the Union Territories and 12 members are nominated by the President from those who have special knowledge or practical experience in literature, science, art, and social services. [102]

The representatives of Rajya Sabha are elected by the elected members of the State Legislative Assembly by the system of proportional representation using a single transferable vote.[103] Rajya Sabha is a continuing body and is not subject to dissolution. One-third of its members retire every two years and their seats are filled up by fresh elections and presidential nominations. This rotational system ensures continuity of members in Rajya Sabha and the system remains in touch with the current problems of the community due to the periodic infusion of fresh blood.

The Rajya Sabha is also a legislative body. A second chamber facilitates a second look at legislation that may sometimes be the result of

99 ROLE OF RAJYASABHA, supra note 96.
100 *Id.*
101 MP JAIN, supra note 64, at 26.
102 INDIA CONST. art.80, cl. 1 and art. 80, cl.3.
103 *Id*. at art. 80, cl.1 and art. 80, cl.4.

purely political compulsions of the ruling majority in the popular House.[104] Also, a two-house legislative body allows scope for more talent and expertise and, therefore, wider scrutiny of legislative proposals.[105]

2.4 ROLE OF EXECUTIVE WING IN PARLIAMENTARY GOVERNMENT

Indian democracy is akin to the Westminster model of the United Kingdom, with a major difference that the United Kingdom follows a hereditary constitutional monarchy whereas, in India, the President is elected by an electoral college consisting of the elected members of Parliament and State Legislative Assemblies of the States for a term of 5 years.[106]

The executive power of the Union vests in the President, which can be exercised by him either directly or through officers subordinate to him under his authority on the aid and advice of the Council of Ministers.[107] The President is the head of the State and is detached from partisan politics. In case of any vacancy in the office because of death, resignation, removal, or otherwise, the Vice-President of India becomes the Acting President.[108]

As the head of the State, the President is the golden link between the three organs of the state.[109] The President is a part and parcel of the Parliament, has the final nod in very important matters, and checks the

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104 Role of Rajya Sabha in Indian Parliamentary Democracy https://rajyasabha.nic.in/rsnew/publication_electronic/Role_Parliamentary_Democracy.pdf 2019. (last visited Oct. 29, 2021)
105 *Id.*
106 INDIA CONST. art.55 & 56.
107 INDIA CONST. art.53.
108 INDIA CONST. art.65.
109 MP JAIN, supra note 64 at 153.

working of Parliament through simple queries on the proposed action which makes the Government ponder over the matter afresh leading to course correction or even putting the matter on hold.[110] The President does not sit or participate in the deliberations of a House but he is a constituent part of Parliament. On occasions, when there is turmoil in Parliament, "the opposition seeks an audience with the President which is good enough to smooth the frayed tempers and the ruffled feathers."[111] The Prime Minister has a certain obligation to President, mainly[112]

(a) to communicate to the President all decisions of the Council of Ministers relating to the administration of the affairs of the Union and proposals for legislation;

(b) furnish such information relating to the administration of the affairs of the Union and proposals for legislation as the President may call for and;

(c) if the President so requires, to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council.

The President is prima facie separated from politics. But by Art 75(1), there shall be a Council of Ministers with the Prime Minister at its head to aid and advise the President who shall, in the exercise of his functions, act by

[110] *Id.* at 153.
[111] DEVENDER SINGH, supra note 26, at 29.
[112] INDIA CONST. art.78.

such advice. The provision that 'there shall be a Council of Ministers' is mandatory and at no point in time, the President can dispense with this body. Thus all the constitutional and statutory functions conferred on the President are to be exercised on the advice of the Council of Ministers. But, legalistically speaking, the provision is at best merely of a directory nature because it is not legally enforceable through a court of law. Art. 74(2) protect and preserve the secrecy of the deliberations between the President and his Council of Ministers. The Supreme Court has clarified the implications of Art.74(2) in S.R. Bommai v UOI.[113] No court is concerned with what advice was tendered by the Minister to the President.[114] The court is only concerned with the validity of the order.

No law passed by Parliament can become an Act without the consent of the President.[115] When a Bill is passed by both the Houses of Parliament, it is presented to the President who may, declare his assent to the Bill or withhold the assent and return the Bill to Parliament for reconsideration except in case of a Money Bill and a Constitution Amendment Bill.[116] In case of other bills returned for reconsideration and if the Bill is passed again by Parliament with or without amendment and presented to the President for assent, the assent cannot be refused.[117]

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[113] AIR 1994 SC 1918.
[114] *Id.*
[115] INDIA CONST. art. 111.
[116] *Id.*
[117] *Id.*

The President has the Constitutional obligation, in terms of Art.87, to address both the Houses of Parliament assembled at the commencement of the first session after each general election to the Lok Sabha and the commencement of the first session each year. He also has the prerogative under Art 86 to address and send messages to either House of Parliament or both the Houses assembled concerning a Bill pending in Parliament or otherwise. Art 85 confers power on the President to summon each House of Parliament to meet in session at intervals not exceeding six months. The President may from time to time prorogue the Houses or either House or dissolve the Lok Sabha. In case of a deadlock between the two Houses of Parliament over the passing of legislation, other than the Constitutional Amendment Bill, he can summon the joint sitting of the two Houses.[118]

"The cardinal principle of accountability[119] of the Executive to the Legislature empowers the members and the Parliament to watch and control the government.[120]" The organic connection between the political executive and the legislature, enables, in the words of Woodrow Wilson, "the ministers to lead the Houses- without dictating to them and, the ministers themselves be controlled without being misunderstood." [121]

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118 MP JAIN, supra note 64 at 171.

119 Accountability means being bound to give account for things done by the agent or what the agent admits to do.

120 IVOR JENNINGS, supra note 90 at 38.

121 WOODROW WILSON, THE STATE: ELEMENTS OF HISTORICAL AND PRACTICAL POLITICS 171 Best Books (2012).

2.4.1 Promulgation of Ordinances

The President is empowered to promulgate Ordinances during recess of Parliament or when both the Houses are not in session if he is satisfied with the circumstances which render it necessary to take immediate action to promulgate the Ordinance.[122] The provision confers the power formally on the President; but, as already stated, he acts on the advice of the Council of Ministers, and therefore, the ordinance-making power is vested effectively in the Central Executive. As the Supreme Court has stated, "the ordinance is promulgated in the name of the President and a Constitutional sense on his satisfaction; it is in truth promulgated on the advice of his Council of Ministers and their satisfaction."[123]

2.5 THE STATE LEGISLATURE

The State Legislature is a law-making body at the State level.[124] In most States, the legislature consists of the Governor and the Legislative Assembly (Vidhan Sabha) including Kerala. It is also called a unicameral legislature. In a few states, there are two houses of the Legislature, namely the Legislative Assembly (Vidhan Sabha) and the Legislative Council (Vidhan Parishad).[125] This is called bicameral legislature.

The Legislative Assembly represents the people of the State. The members of the Assembly are directly elected by people based on a universal

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[122] INDIA CONST. art.122.
[123] R.C. Cooper v. UOI, AIR 1970 SC 564.
[124] INDIA CONST. art.168 to 212 in Part VI of the Constitution deal with the organization, composition, duration, officers, procedures, privileges, powers, and so on of the State Legislature.
[125] INDIA CONST. art. 170 & 171.

adult franchise. It is the popularly elected chamber and is the real Centre of power in a State. The Legislature of every State shall consist of the Governor and the State Legislature. The number of members of a legislative assembly cannot be more than 500 and less than 60.[126]

2.5.1 Legislative Procedure

The State Legislature can make laws on the subjects of the State List and the Concurrent List. It can enact any bill on any subject of the State List, which becomes an Act with the assent of the Governor. Normally, the Governor acts as a nominal and constitutional head and as such follows the advice of the state Chief minister and his Council of Ministers.[127] However, he can reserve some bills passed by the State Legislature for the approval of the President of India. Further, in case a law made by the State Legislature on a concurrent subject comes into conflict with a Union Law on the same subject, the latter gets precedence over the former.[128]

The procedure followed in the Assembly is the same as in Parliament. Article 196 of the Indian Constitution tells us about the provisions of the introduction and passing of the Bill. The State Legislature must meet at least twice a year and the interval between any two sessions should not be more than six months.[129] The Governor delivers the opening address at the

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[126] For details see, INDIA CONST. art.170.
[127] For details, refer to Art. 163 of the Indian Constitution
[128] For details, see INDIA CONST. art.239AA of the Indian Constitution.
[129] INDIA CONST. art.174, cl 1. The Governor shall from time to time summon the House or each House of the Legislature of the State 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.

beginning of a new session in which he outlines the policy of the State Government.[130] Any Bill may be introduced in either House of the Legislature except a Money Bill, which can be introduced only in the Assembly.[131] Every Bill has to go through three readings, after which it goes to the Governor for his assent.[132] When a Bill has been passed by the legislative assembly of a State or, in the case of a State having a Legislative Council, has been passed by both Houses of the Legislature of the State, it shall be presented to the Governor and the Governor shall declare either that he assents to the Bill or that he withholds assent therefrom or that he reserves the Bill for the consideration of the President.[133] The Governor may send it back for reconsideration but once it is passed again by the Legislature, he cannot withhold his assent. He may reserve certain Bills for the consideration of the President, who may ask him to place them before the Legislature for reconsideration.[134] When it is passed again with or without amendment it goes to the President for his consideration.[135]

2.6 ACCOUNTABILITY AND COLLECTIVE RESPONSIBILITY

"The most defining, distinguishing and significant feature of India's Parliamentary democracy is that the Council of Ministers is drawn from the Parliament and their survival in office is contingent upon parliamentary support, especially as they must enjoy majority support in and are collectively

[130] Refer INDIA CONST. art.176.
[131] INDIA CONST. art.196.
[132] MP JAIN, supra note 64 at 68.
[133] INDIA CONST. art.200.
[134] For details, see INDIA CONST. art. 201.
[135] *Id.*

responsible to, the directly elected chamber, that is the House of the People."[136] The House of the People is the pivot of the government as it alone has the power to make and unmake the Government.[137] The Council of Ministers is collectively responsible to the House of the People[138] and a motion of no confidence, if carried by the majority vote of the House, brings the fall of the Government. The inability to pass the budget by the Lok Sabha can also result in the fall of the Government.[139]

Thus, the Parliament survives on two notable principles: Collective responsibility which represents ministerial accountability to the legislature and the minister's individual responsibility in his sphere of actions.[140] The principle of collective responsibility is regarded as fundamental to the working of the Parliamentary form of government.[141] It means that the Council of Ministers is responsible as a body for the general conduct of the affairs of the government. All ministers stand or fall together in Parliament and the government is carried on as a unity.[142]

At this juncture, it is apt to quote Jennings, "All roads in the Constitution lead to the Prime Minister."[143] To add, all roads of the Constitution lead to the Parliament. An analysis of the structure of the

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[136] Justice J.S. VERMA, *Human Rights Refined: The New Universe of Human Rights*, 1, JOURNAL OF THE NHRC, 2002, 1, 1-17.
[137] R.C. BHARDWAJ, LEGISLATION BY MEMBERS IN THE INDIAN PARLIAMENT 108(Allied Publishers 2008).
[138] INDIA CONST. art.75.
[139] MP JAIN, supra note 64 at 70.
[140] *Id.* at 156.
[141] *Id.* at 156.
[142] *The Concept of Collective Ministerial Responsibility in India*- Theory and Practice 1 RLR 3 (2014).
[143] SIR IVOR JENNINGS, supra note 90 at 73.

Constitution makes it clear that Parliament plays a pivotal role in our political system. In any modern government legislation is the most important source of law. The system of Parliament has contributed the most to the strengthening of democracy in our country. A member of Parliament once elected is not only a member who represents the people of his constituency who voted for him but the entire constituency and on issues of wider concern, he must rise above all regional interests to subserve the common good and further the national interest.[144] Law is regarded as the expression of the will of the people. The elected representatives are expected to make legislation according to the changing needs of society. It is due to the representational role that a member of Parliament stands on a high public pedestal.[145]

2.6.1 Idea of Representation in Parliament

The concept of democratization and democracy leads to the contemplation of a major issue, the idea of representation; the truth is that democracy complicates the problem of representation. What is being represented and on what terms are the most crucial questions that arise when dealing with the idea of representation in democracy.

The idea of representation is one of the most elusive and contested political notions, deeply implicated in conceptions of public life today.[146] Representation embodies the idea or responsiveness that is, sensitivity to and

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[144] Carole Jean Uhlaner, Politics and Participation, INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 504-508(2015).

[145] SIR IVOR JENNINGS, supra note 90 at 86.

[146] B.L. SHANKAR, VALERIAN RODRIGUES, THE INDIAN PARLIAMENT, A DEMOCRACY AT WORK 105 (Oxford University Press 2014).

accommodation of public opinion in the formation of public policy and functioning of government.[147] The Indian constitution lays down that the people shall be the ultimate repository of power and authority.[148] Since every single person cannot take part in the administration of justice, India adopted a representational framework wherein the representatives of the people are elected.

In representative democracies, inclusiveness can be subdivided into three main components corresponding to three main stages of a democratic process: (1) the inclusiveness of the electoral process, (2) the inclusiveness of cabinets, and (3) the inclusiveness of legislative coalitions. Inclusiveness at the electoral stage and the legislative stage is necessary for overall democratic inclusiveness.[149] If a group is not represented in the assembly at all, it has no sources to influence the formation of portfolio and legislative coalitions. [150] Such is the significance and responsibility of the legislature in the affairs of the general public.

"The legislature is the most visible site of any representative democracy and a directly elected popular House is particularly so with its representational character, and it is not without reason that our democracy is known as Parliamentary form."[151] Direct election by the people gives the

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147 *Id.* at 5

148 A.K. Roy & Ors. v. Union of India and Ors. AIR 1982 SC 710.

149 Steffen Ganghof, *Democratic Inclusiveness: A Reinterpretation of Lijphart's Patterns of Democracy*, BRITISH J.POL. SCI. 680, 683 (July 2010).

150 *Id.* at 683.

151 ANDRE BETEILLE, DEMOCRACY AND ITS INSTITUTIONS 13(Oxford University Press 2012).

members of the Lok Sabha their distinctive democratic legitimacy.[152] The parliamentary system epitomized the principle of more responsibility to more stability.[153] Every act of the Government could be debated, discussed, questioned, and adjudicated. The Council of Ministers was responsible and fully answerable to the House of the People for all its acts of omission and commission.

Representation is also closely bound with the issue of accountability.[154] It is the elections and the electoral process that make a Parliament accountable.[155] The representatives are elected by the people for the governance of their system. The elected representatives are accountable to the people for their actions in the legislature. The Parliament and the State legislatures were to express the urges and aspirations of the people, make laws, and keep the Union and State Governments under their surveillance.[156] That is why it is rightly said that elections have been described as the carnival of democracy. [157]

The responsibility for running the administration rests with the elected representatives of the people. In a democratic society, the people are both authors and subjects of law, by what that means varies from democratic theory

[152] *Id.*at 13.
[153] CAD, Vol. VII 32 (Lok Sabha Secretariat 2003).
[154] ANNE PHILIPS, THE POLITICS OF PRESENT 24 (Oxford: Clarendon, 1995).
[155] B.L. SHANKAR, supra note 146, at 39.
[156] DEVENDER SINGH, supra note 26, at 167.
[157] JAVEED ALAM, WHO WANTS DEMOCRACY? 12 (New Delhi: Orient Longman 2004).

to democratic theory.[158] "Democracy is a mirror where one can see the truth but the mirror also serves as a door to that darkroom just behind it where our chosen representatives are free to make decisions to serve their interests to acquire power and property of the people in the name of the people."[159] According to John Adams,[160] "a representative legislature should be an exact portrait, in miniature, of the people at large." So, when the legislators talk to one another, different parts of society can be taken, through their representation, to be talking to one another. Thus, democracy cannot be viewed as a simple black and white transition, but it commands a large and growing audience, as well as ever-expanding literature, and with that growth comes a growing number of internal disagreements.[161]

The founding fathers of the Indian Constitution adopted the Parliamentary system of government because it will be more suitable to India's pluralism and heterogeneous character.[162] Unfortunately, after six decades of Independence, questions are being asked about the utility and relevance of Parliament in our polity and indeed, about the workability of our democratic set-up based on the parliamentary system.[163]

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[158] Joshua Anderson, *Thinking about Deliberative Democracy with Rawls and Talisse* 13 CONCORDIA L.REV., 134(2020).

[159] Rao, P. Parameshwar, Separation of Powers in A Democracy: The Indian Experience, Peace Research 37, CANADIAN MENNONITE UNIVERSITY 113, 113–22(2005).

[160] Jeremy Waldron, *The Dignity of Legislation* 54 MD.L.REV. 633(1995).

[161] CHRISTOPHER H. SCHROEDER, supra note 29, at 99.

[162] P. Sakthivel, *Indian Parliamentary Democracy in Turmoil* 69 INDIAN J. POL.SCI., 519,519-529 (2009).

[163] Somnath Chatterjee, *Parliamentary Democracy &Amp; Some Challenges* http://www.thehindu.com/todays-paper/tp-opinion/Parliamentary-democracy-amp-some-challenges/article14875518.ece (last accessed Nov. 15, 2007, 7:00AM).

Earlier, Parliament had spent most of its time on legislative business. But the growth of competitive and confrontational politics has overtaken healthy debates in Parliament and the system finds it hard to appropriately discharge its essential functions. Debates and discussions are the hallmarks of Parliamentary democracy, but today it is overshadowed by disruption, confrontation, forced adjournment of the Houses, and adopting other non-democratic alternatives.[164] The introduction of a 24-hour full-fledged Lok Sabha channel, live telecast in the media, and newspaper reports reveal that even for a single issue and by very few members the Parliament was stalled and forced to close the session before its original schedule to conclude.[165] It is a matter of agony for the presiding officers that several legislations of far-reaching importance were passed in the Parliament without any serious discussion. [166]

The current turmoil has overshadowed the steps taken to improve its efficiency and workability. This has diluted people's confidence in the working of Parliamentary democracy. To quote Somnath Chatterjee, former Speaker, "scenes of unruly behavior in the House naturally invite adverse public comments, to which we cannot take exception." [167]

Apart from losing public confidence in the Parliamentary system of governance, the ensuing act has resulted in massive wastage of money. The

[164] P. SAKTHIVEL, supra note 162, at 520.
[165] Lok Sabha TV https://loksabhatv.nic.in
[166] *Id.*
[167] *We Do Not Want Any Confrontation*, OUTLOOK, Feb. 3, 2021. https://www.outlookindia.com/website/story/we-do-not-want-any3, 2021-confrontation/226872. (last assessed on 4th Feb. 2021, 6:00AM)

Government has been spending a huge amount of money for conducting elections for Parliament and State legislature. It is estimated that for conducting one session of the Parliament the government is spending nearly 250 crores.[168] A huge amount of money is further spent to conduct elections in Parliament and Legislatures.[169] However, all these endeavors fritter away when repeated distortions that result in forced closure of sessions, adjournments, irrelevant discussion and walks out take place. The whole law-making process has become a routine mechanism with no effective deliberations. The Executive formulates a policy, which outlines what a government hopes to achieve and the methods and principles it will use to achieve them. This finds expression in a legislative proposal and is presented to the legislature to go through the procedural formalities of enactment. Ideally, the legislature is expected to go deep into every aspect of the proposal and to discuss in a detailed manner every provision of the bill. Active discussions while placing a bill is necessary to scrutinize the outcomes of the enactment. When this hardly takes place, errors are bound to occur. The sentiments of the public barely produce any impact on the bill, unless the elected representatives, who have a solemn responsibility to the public, get involved in the making of the bill. The responsiveness, as Hannah Pitkin observed, need not be constant activity in a representative democracy, but ‘there has to be a constant condition of responsiveness in the sense that

[168] *How much does Parliament cost India*, The ECONOMIC TIMES, Feb.24, 2014, at 2.
[169] Big spenders: Election expenses cross Rs 6,500 crore, shows data https://www.business-standard.com/article/politics/big-spenders-election-expenses-cross-rs-6-500-crore-shows-data-121122600912_1.html (last assessed on 12 March 2019, 8:00PM)

potential readiness of the representatives to respond is ever-present.[170] Lawmaking by elected representatives satisfies the requirement of democratic involvement only in theory. The whole process seems to be a hasty affair and this results in an atrophy of democratic elements in lawmaking. It is without serious discussions and scrutiny that the bills are often passed and later become the law of the land. Here it is not just non-compliance with the procedure of law-making being violated, but the very basic tenets of democracy, i.e., accountability and responsibility of the government, that is at stake. If this is true, there is a severe democratic deficit in the whole process of law-making.

Law-making in India, far from being a consultative and transparent process that stakes all stakeholders on board, especially remains a bureaucratic function. On top of it is the party whip, which directs its members which way to vote practically on every Bill. [171]This enforced adherence to the party line means that a member invariably ends up voting for a Bill if he/she is in the opposition, with the odd spectacle of parliamentarians sometimes voting against a legislative instrument which they had supported previously, depending on whether their party occupies the Opposition or Treasury benches.[172] This in effect disincentivizes the lawmakers from

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[170] HANNAH F. PITKIN, THE CONCEPT OF REPRESENTATION 209 (Berkeley: University of California Press 1967).

[171] For further reference see Explained: What is a whip and what happens if it is disobeyed in the house? BUSINESS STANDARD, https://www.business-standard.com/article/politics/explained-what-is-whip-in-indian-politics-and-what-does-it-do-what-happens-if-it-s-disobeyed-119112600362_1.html. (last assessed on 20th March 2021, 11:00PM)

[172] THE HINDU, April 30th, 2016 at 10.

seriously thinking or researching best practices to incorporate into the legislation.

The requirements of democratic participation in law making is not taking place effectively in all instances. A report published in the Hindu newspaper dated 11th December 2017 points out that there has been a steady reduction in parliamentary hours compared with records of the first 20 years since 1952 show. Between 1952 and 1972, the House ran for between 128 and 132 days a year, according to parliamentary sources.[173] In the last 10 years, it ran for 64 to 67 days a year on average.[174]

It also cites that record shows that 31% of legislations were passed in parliament with no scrutiny or vetting by any parliamentary standing or consultative committee.[175] Further, 47% of bills in the last 10 years were passed with no discussion at all. 61% of these (24% in all) were passed in the last three hours of a session. Even if we leave a margin for the distortions and errors in the survey process it must serve as an eye-opener. A recent report published in The Times of India newspaper in the year, 2022 points out that the no. of assembly sittings went down gradually over the past few years in most of the State Assemblies.[176] The States with the highest average of assembly sittings in a year over the last decade are Odisha (46) and Kerala(43), but even these are much lower than the average of 63 for the Lok

[173] The Hindu, https://edurev.in/studytube/English-11-December-2017-The-Hindu-Editorial-News-/c8b7d546-380c-4b8f-a301-8ecce068d14d_v (Last assessed on 15th December 2017).

[174] *Id.*

[175] *Id.*

[176] TIMES OF INDIA, February 17th, 2022 at 1 & 6.

Sabha.[177] Even Lok Sabha's attendance pales in comparison to national legislatures elsewhere. The US House of Representatives, for instance, was ins session for 163days in 2020 and 166 days in 2021 and the Senate for 192 days both years, The UK House of Commons had 147 sittings in 2020, in line with its yearly average of about 155 over the previous decade.[178] Japan's Diet, or House of Representatives, meets 150 days a year apart from any extraordinary special sessions. In Canada, the House of Commons is to sit on 127 days this year 2022 and Germany's Bundestag, where members must attend on sitting days, is to -meet on 104 days this year 2022. [179]

The National Commission to Review the Working of the Constitution, which was constituted in 2000, had observed in its reports that legislative enactments betray clear marks of hasty drafting and absence of Parliament scrutiny from the point of view of both the implementers and the affected persons and groups.[180] Recently, there has been a declining trend in the percentage of Bills being referred to a committee. In the 15th Lok Sabha, 71% of the Bills introduced were referred to Committees for examination, as compared to 27% in the 16th Lok Sabha. Though it is a well-accepted proposition in a parliamentary democracy that law-making is a deliberative and consultative process, important bills such as The Farmers' Produce Trade

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[177] In almost all states analyzed, the lowest number of sittings was in 2020 or 2021, the two Covid years. Except in Haryana, where the lowest, 11sittings, was in 2020, 2011, 2012, and 2014.

[178] *Most State Assemblies sit for less than 30 days a year,* TIMES OF INDIA, February 17th, 2022 at 1 & 6.

[179] *Id.*

[180] Dept. of Legal Affairs, https://legalaffairs.gov.in/ncrwc-report (last accessed on Jan 1st, 2022).

and Commerce (Promotion and Facilitation) Bill, 2020 and the Farmers' (Empowerment and Protection) Agreement of Price Assurance and Farm Services Bill, 2020, the Jammu and Kashmir Reorganisation (Amendment) Bill, 2021, which amends the Jammu and Kashmir Reorganisation Act, 2019, abrogating Jammu and Kashmir's special status, Citizenship (Amendment) Bill 2019, Muslim Women (Protection of Rights on Marriage) Bill, 2019, and Unlawful Activities (Prevention) Amendment Bill, 2019 were not referred to any of the committees[181] of Parliament for in-depth deliberation for inviting inputs from stakeholders. Despite constant demands from the opposition sides, the farm laws were neither referred to the concerned department-related parliamentary standing committees nor were they referred to the select committee of the Rajya Sabha. In the absence of in-depth deliberation, the Bills or legislative proposals suffer from a serious deficiency of legislative scrutiny. N.K. Premachandran, in an article published in Mathrubhumi[182], discussed in detail how Indian democracy works. He pointed out that in the Indian Parliament in a span of 20days, 20 bills were passed without any discussion. He stated that during his tenure, the performance of Parliament deteriorated, especially in the 16th and 17th Loksabha. Such procedural lapse is a subversion of democracy and an icon of democratic deficit.[183]

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[181] To ensure that a Bill is scrutinized properly before it is passed, our law-making procedure has a provision for Bills to be referred to a Departmentally Related Standing Committees (DRSC) for detailed examination. Any Bill introduced in Lok Sabha or Rajya Sabha can be referred to a DRSC by either the Speaker of the Lok Sabha or Chairman of the Rajya Sabha.

[182] N.K. Premachandran, *Death Bell of Democracy*, MATHRUBHUMI (Malayalam Daily),1st Sep 2021 at 6.

[183] *Id.* at 6.

See Table 2.1[184] Bills Referred for Scrutiny in Lok Sabha

Lok Sabha	Bills Passed	Referred for Scrutiny
10th	227	83
11th	61	26
12th	56	33
13th	297	114
14th	248	143
15th	179	68
16th	180	24
17th	127	17

Source: Mathrubumi Malayalam Newspaper

Of course, attending Assembly is not the only work legislators do, especially if they are ministers too, but the abysmally low number of days for legislative business does raise questions about whether enough time is being devoted for basic functions such as oversight of the executive, debates, and discussions on key issues, and lawmaking.

There are certain inherent strategies in the Constitution that by itself promote democratic lawmaking. Private Member's Bills are introduced in the Assembly very often. The Minister on behalf of the Government assures the member that an official bill for achieving the same object will be introduced soon and request the member to withdraw the bill. Whether such assurances have been honored in practice must be examined. Public participation in the

184 *Id.* at 6.

legislative process results in better laws and fewer amendments. Forwarding to Select Committees results in effective deliberations among different stakeholders. But often these tools are sparingly used. The stages of law-making will be discussed in detail in the upcoming chapter.

CHAPTER – III
OVERVIEW OF LAWMAKING IN THE KERALA LEGISLATIVE ASSEMBLY

3.1 A GLIMPSE THE OF KERALA LEGISLATURE

Kerala lies in the southwestern tip of the Indian Peninsula. The land, with an area of 38,863 sq. km is situated between the Western Ghats in the East and the Arabian Sea in the West. Kerala, which is the land of coconut trees, derived its name from 'Kera' which means coconut, and 'Alam' which means land.

At the time of Independence in 1947, the region comprised two princely States: Princely States of Travancore and Cochin and Malabar, a part of Madras Province, which was under the direct administration of the British.[1] As per the States Reorganization Act, 1956, the States of Travancore-Cochin and Malabar integrated, and the State of Kerala was formed on November 1, 1956.[2] At the formation of the State, there were only seven Districts, but now the State has fourteen Districts.

Kerala has a long history of legislative bodies dating back to 1888, when Sree Mulam Thirunal Rama Varma, the Maharaja of Travancore, established a Council to make laws and regulations, which led to several

[1] A. SREEDHARA MENON, KERALA HISTORY AND ITS MAKERS 43 (DC Books 1987).
[2] *Id.* at 43.

progressive measures in due course. The two regions of Kerala State-Cochin and Malabar also had legislative bodies from very early days. Thus, the Kerala Legislature has had three parallel courses of development in three regions of Travancore, Cochin, and Malabar until they were merged on 1 November 1956 to form the State of Kerala. Today, the State has its 15th Legislative Assembly.[3]

The Kerala Legislature is the law-making body in the State of Kerala. It is the popularly elected chamber and the real Centre of power in a State. The Kerala Legislature consists of the Governor and the Legislative Assembly. The State has a unicameral Legislature with 140 members and a nominated member from the Anglo-Indian Company. Each elected member represents one of the 140 constituencies within the borders of Kerala and is referred to as the Member of the Legislative Assembly (MLA).

The procedure followed in the Assembly is the same as in Parliament. Kerala Legislature meets at least twice a year and the interval between two sessions cannot be more than six months. The process of lawmaking begins with the introduction of a Bill in the Assembly. A Bill can be introduced by a Minister which is called a Government Bill and also by a member other than a Minister which is known as a Private Members Bill.

A Bill undergoes three readings before it is submitted to the Governor for assent. Sec 76 & 77 of the Rules of Procedure and Conduct of Business in

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[3] SREEDHARA MENON, supra note 1, at 57.

the KLA encapsulate the first reading. It constitutes the discussion on the principles of the Bill and its provisions generally on any of the following motions: that the Bill can be taken into consideration; or that the Bill can be referred to a Select Committee of the House; or that the Bill be referred to a Subject Committee of the House; or that the Bill be circulated for eliciting opinion. The second stage constitutes the clause-by-clause consideration of the Bill, as introduced in the House, or as reported by a Subject Committee or Select Committee. At this stage, amendments to Bill can be introduced in consonance with the notice and conditions of admissibility of amendments in Rule 82 of Rules of Procedure and Conduct of Business in the KLA. According to Rule 87 Rules of Procedure and Conduct of Business in KLA, the Speaker may call each clause separately with the amendments relating to it. And once dealt with, the Speaker shall put the question: that this clause (or the as the case may be, that this clause as amended) stand part of the Bill.'[4] The third reading refers to the discussion on the motion of the Bill, or the Bill as amended, be passed.[5] After a Bill has been finally passed by the Kerala Legislature, it is submitted to the Governor for his assent. Once a Bill receives the assent, it becomes the law of the land.

The KLA is popularly known as the Niyamasabha. The first general elections to the new KLA were held in February-March 1957 and the first KLA was constituted on April 1, 1957.

[4] Rule IX of Rules of Procedure and Conduct of Business in KLA, 1976.
[5] Rule X of Rules of Procedure and Conduct of Business in KLA, 1976.

Table 3.1 Kerala Legislature-Duration of Each Assembly

No. of the Assembly	Duration (In months)	Total No. of Sessions	Total No. of Sittings
I	19	7	175
II	28	12	300
III	19	7	211
IV	35	16	322
V	15	6	143
VI	15	7	112
VII	25	14	249
VIII	29	13	312
IX	34	15	264
X	30	16	268
XI	28	15	257
XII	26	17	253
XIII	27	16	237
XIV	27	22	232

Source: Data collected from Kerala Legislative Assembly

The current Legislative Assembly is the 15th Assembly since the formation of Kerala and the Assembly was constituted on 03.05.2021. Since it is only in the first year of functioning, it has not been included in the present study. The data for the analysis has been taken after studying the proceedings

of Kerala Legislative Assembly which is available at the Kerala Legislative Assembly and Niyamasabha Website.[6]

3.2 OVERVIEW OF LAWMAKING IN THE KERALA LEGISLATIVE ASSEMBLY

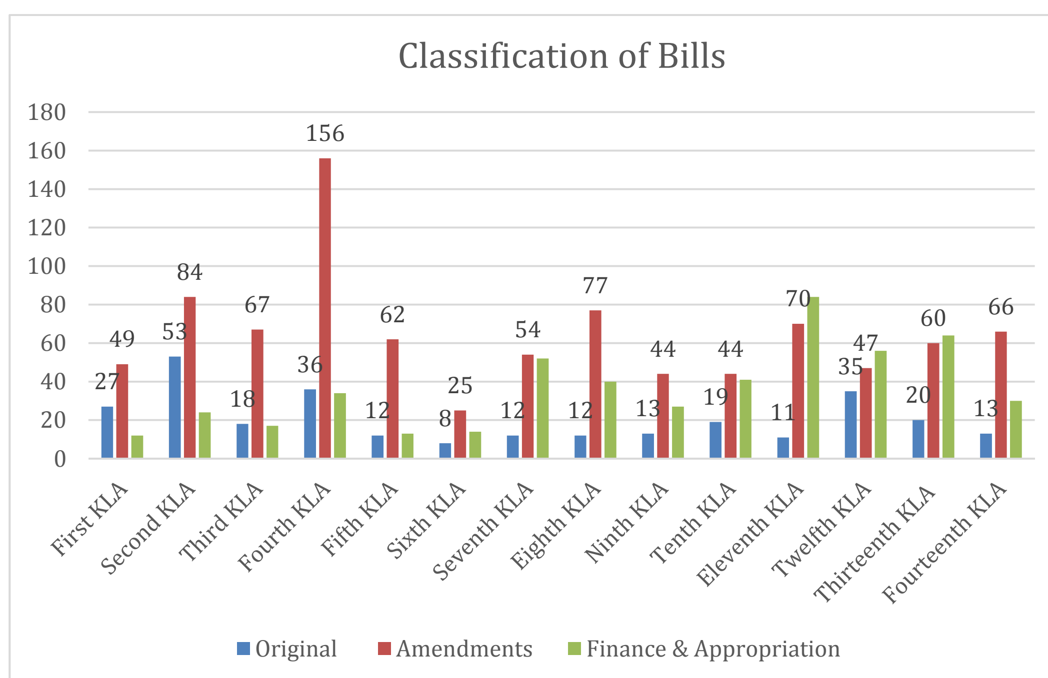
This chapter examines the core question of this research i.e., whether law-making in KLA is truly democratic or to what extent it is democratic. To answer this question, we need some ascertainable and dependable criteria to measure the extent of democratization in lawmaking. However, it is difficult or practically impossible to determine the research criteria in the absence of dependable parameters. Thus, it was decided to focus on some indirect criteria which would act as indicators to decide the democratic element in lawmaking. The indicators are:

1. Time taken for the discussion on the Bill
2. The number of members who participated in a discussion on the Bill
3. The number of amendments moved on the floor of the House
4. Number of amendments accepted by the House

In addition to the above criteria, the contribution of legislative committees in qualitative improvement of the legislative proposal is also proposed to be analyzed.

[6] NIYAMASABHA, KERALA LEGISLATIVE ASSEMBLY, http://www.niyamasabha.org (last assessed on 2nd January, 2022, 7:00PM).

FIGURE 3.1 Classification of Bills



Source: Data collected from Kerala Legislative Assembly

The KLA has passed 1702 Bills from 1956 to 2021. i.e., during the tenure of the first KLA to the fourteenth KLA. The table shows the number of original Bills, Amendment Bills, Finance and Appropriation Bills passed during the period from 1956 to 2021. Figure 3.1 shows that during the initial period the number of original legislations outnumbered the finance and appropriation Bills. However, as years passed by, the number of original legislations began to reduce and an increase in the number of amendments is evident. This is because, during the initial period of the Kerala Legislature, the State was undergoing major law formation. For the merger and unification of States, many laws were enacted.[7] With the birth of Kerala, to address common problems numerous legislations were made. This was the main

[7] SREEDHARA MEMON, supra note 1 at 54.

reason for the increased number of original legislations in the initial years of the KLA. An analysis of the table also shows that there is a steady increase in the number of finance and appropriation Bills over the period from 1956 to 2021. As the State progressed, the need for more and more financial outlays is evident from the increasing number of money-related enactments.

The number of original Bills enacted during the period from 1956 to 2021 depicts a tilted picture. During the initial period, there was a good number of original legislations enacted by the KLA. The First KLA, which lasted only for 2 years, 3 months, and 27 days, enacted 27 original Bills during its tenure, whereas the Second KLA which completed a term of 4 years, 6 months, and 20 days enacted 53 original Bills and the Third KLA enacted 21 original Bills during its tenure of 3 years 4 months, and 27 days. Thus, the first three Kerala Legislative Assemblies even with their reduced tenures had shown a commendable enactment of original legislations. After the Fourth KLA, there had been a diminishing trend in the number of original legislations enacted by each Assembly.

The Fourth KLA, which had the distinction of being the first Assembly to complete the normal constitutional term, had the longest duration with 16 sessions and 322 sittings. Moreover, as the country was passing through the National emergency, the term of the Assembly was extended for eighteen months, in three stages. 36 original Bills were passed during the Fourth KLA, which is a creditable number for original legislations when compared to other legislative assemblies.

The Fifth and Sixth Kerala Legislative Assemblies had only limited tenures and they did not complete even 3 years of their term. Consequently, compared with other Assemblies, the Fifth and Sixth KLA recorded the lowest number of original legislations. The Fifth KLA enacted only 12 legislations in a period of 2 years 8 months and 7days and the Sixth KLA enacted only 8 original legislations. It was during this period i.e., on October 20, 1981, the Nayanar Ministry resigned and on withdrawal of the support by the coalition partners, the State came under the spell of President's rule and the Legislative Assembly was under suspended animation. A new Ministry came under the leadership of Shri. K. Karunakaran who assumed office on December 28, 1981. The Ministry had to resign on March 17, 1982, as it lost the majority and again the State was placed under the President's rule.

Thus, altogether, the Sixth KLA had only 7 sessions with 112 sittings and this may be the main reason for the low legislative outputs during the period. In total, only 47 Bills were passed during the Sixth KLA.

From the Seventh KLA till the 12th KLA, all the Assemblies completed their full term. There had also been slight progress in the number of original legislations. However, when compared to the performance of the initial KLAs, it had only shortened tenures, the performance of the more recent KLAs to be unimpressive. With a full term, the Seventh, Eighth, and Ninth KLAs had enacted only 12,13 and 13 original legislations respectively.

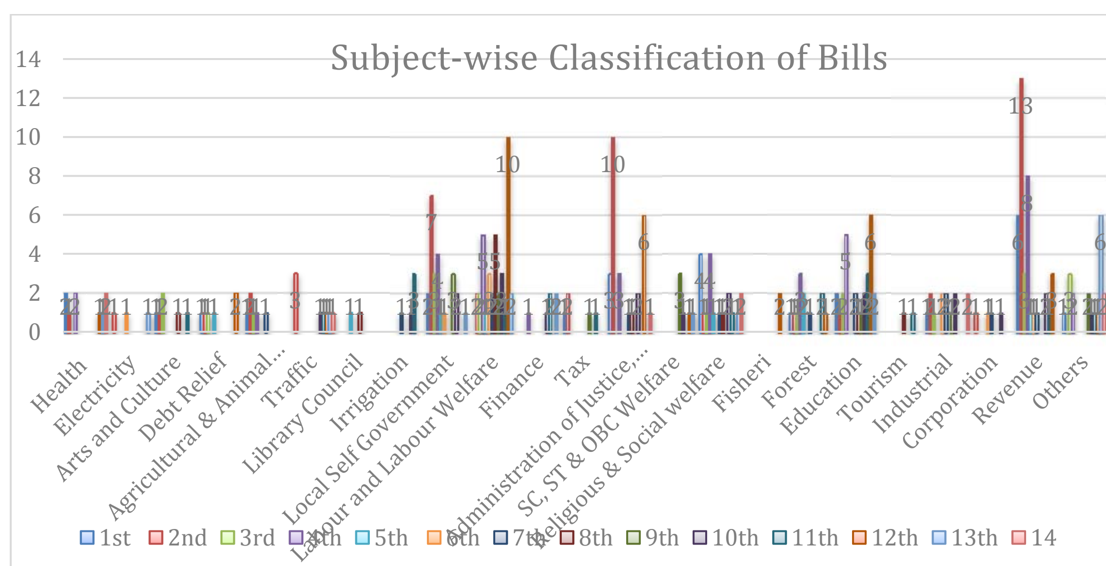
The Tenth and Eleventh KLAs show a narrow increase in the number of original legislations, with 21 and 18 respectively. The Twelfth KLA shows a remarkable record of 35 original legislations. When compared to the performance of the first three KLAs, only the Twelfth KLA stands on the same level of output. The Thirteenth KLA only enacted 20 original legislations during its tenure. In the Fourteenth KLA, the number of original legislations was further reduced to 13. One probable reason may be that due to the ongoing covid pandemic the number of fruitful sessions was reduced in the years 2020 and 2021.

All KLAs show a commendable drift in introducing amendment Bills. During the Fourth KLA, 156 amendment Bills were introduced in the Assembly, which is the highest of all KLAs. An overall analysis of the figure 3.1 shows that during the KLA sessions, the number of original Bills was the lowest when compared to the number of the amendment and other Bills. The increase in finance and appropriation Bills, as already stated, shows a clear steady increase. During the Eleventh and Thirteenth KLA, the number of financial and appropriation Bills also outnumbered the amendments Bills introduced in the Assemblies. The picture reveals that the legislative business is more inclined to discussions and debates on amendments, finance, and appropriation Bills. Unlike the other KLAs, the number of finance Bills was only 30 in the Fourteenth KLA. However, there were around 66 amendment legislations.

Since it would serve no useful purpose for the research to include all the Bills passed by KLA for the analysis it has been considered better to confine the study to original legislation enacted by First KLA to the Fourteenth KLA. Original legislation derives from the complete legislative capacity of an elected legislative body.[8] The complete legislative capacity is derived either from the Constitution of India or is assigned by another Act of Parliament. The partial or nominal use of legislative capacity includes amendments, subordinate legislation, ordinances, etc. The study proposed by the researcher covers only original legislation, which is presumed to be the output of the full legislative capacity of the legislature.

FIGURE 3.2 Subject -Wise Classification of Bills

The subject-wise classification of several original legislations is given in the following Table:



Source: Data collected from Kerala Legislative Assembly

8 Learning, learning.ufs.ac.za. (last visited June 1,2020).

Bills passed by the KLA cover a variety of subjects. Each legislation, depending on the relevance, is formulated by respective Departments of Government, introduced and defended on the floor of the House by the concerned Minister. In the following paragraphs, original legislation over the years is categorized under different subjects. The classification is adopted from the official categorization of the KLA publication.[9] The subject-wise classification of Bills is expected to uncover the socio-political approaches of the legislative assemblies over the period.

A variety of subjects were covered in the very first KLA itself. On the subject of revenue, six legislations were passed during the period. It is remarkable to note that subjects such as law and justice and health were dealt with in the first KLA itself. Other welfare legislation on subjects such as debt relief, social justice, and labor and labor welfare was also reflected in the assembly. The Second KLA also covered a multiplicity of subjects like the first KLA, around 13 legislations were enacted on the subject of revenue. The category of law and order also witnessed a good number of legislations. It can be seen as an effort to bring order into the newly formed State of Kerala. Similarly, the category Local Self-Government also had several legislative enactments. When it comes to the third KLA, again the largest number of legislations were passed under the category of Local Self-Government and revenue. This includes major enactments like Kerala Revenue Recovery Bill, 1967, and Kerala Panchayat Raj Bill, 1968.

[9] *Kerala Niyamasabha, 60 years of Glorious Law Making*, 1957-2017, Kerala Legislative Secretariat (2017).

In the Fourth KLA, the subjects of labor and labor welfare, education, and local self-Government were given due weightage. Bills establishing four Universities were enacted under the head of education, namely The Cochin University Bill,1971, Kerala University Bill 1967, Calicut University Bill, 1975, and The Kerala Agricultural University Bill,1971. The legislation on the subject of labor and labor welfare itself showed varied concerns. Other than just welfare fund Bills, it stressed on Kerala Agricultural Workers' Payment of Prescribed Wages and settlement of Agricultural Disputes Bill,1974, The Kerala Motor Transport Workers Payment of Fair Wages Bill,1971, Kerala Agricultural Workers Bill,1972, and The Bonded Labor System (Abolition) Bill,1975. Apart from the usual categories, the subject of forest finds expression in three legislations, namely The Kerala Private Forests (Vesting and Assignment) Bill,1970, Kerala Preservation of Private Forests Bill 1972, and Kerala Restricting on Cutting and Destruction of Valuable Trees Bill 1974.

The Fifth KLA and the Sixth KLA could pass only very few legislations covering a couple of subjects. In the Fifth KLA, two welfare funds were created for Advocates and fishermen through legislations named Kerala Advocates Welfare Fund Bill,1980, and Kerala Fishermen Welfare Societies Bill,1980. The Kerala Marine Fishing Regulation Bill,1980 also fell under the labor and labor welfare category. The other three legislations were categorized under the subjects of electricity, local self-Government, and industry. During the Seventh KLA, under the head of education, two

important Universities came into existence. The Cochin University of Science and Technology Bill,1986, and Gandhi University Bill,1984 were enacted. Labor and labor welfare were the subjects of only two legislations, namely Kerala Motor Transport Workers' Welfare Fund Bill,1984, and Kerala Fishermen Welfare Fund Bill,1984. No legislations were enacted under the subjects of health and social welfare. Subjects of revenue, prevention of corruption, cooperation, water, forest, industry, and preservation of agriculture and animal husbandry also received attention in the Seventh Legislative Assembly. Each of these subjects had only single legislation.

The Eighth KLA emphasized the category of labor and labor welfare. Five legislations were enacted under the subject. This includes welfare funds for Coir Workers, Khadi Workers, Handloom Workers, Abkari Workers, and Construction Workers. Another important Bill, namely the Kerala Public Men's Corruption (Investigation and Inquiries) Bill,1987 was enacted under the subject category of Prevention of Corruption. Apart from the above, other important subjects such as education, social welfare, and tourism were also covered.

Of the 13 original legislations passed by the Ninth KLA, notable ones were the Kerala Panchayat Raj Bill, 1994, and Kerala Municipalities Bill, 1994 under the subject of Local Self Government. The Kerala Panchayat Bill, 1961 was repealed to comply with the constitutional mandate of the 73rd and 74th amendments of the Constitution of India. The Kerala Panchayat Raj Act,1994, and Kerala Municipalities Act, 1994 were enacted by the KLA to

provide constitutional status to establish democracy at the grassroot level. Only one legislation i.e., Sree Sankaracharya University of Sanskrit Bill,1994 was passed under the Education category. Subjects of welfare were given importance during the Assembly. An analysis of the legislation passed in the Tenth KLA shows that it had given due consideration in matters of labor and labor welfare, social welfare, education, and Local Self-Government. Two legislations namely, Kerala Ration Dealers Welfare Fund Bill,1998 and Kerala Bamboo, Kattuvalli and Pandanus Leaf Workers' Welfare Fund Bill,1998 were enacted under the subject of labor and labor welfare. The other Bill under the category was The Pre-Degree Course (Abolition) Bill,1997, which prohibited the conduct of Pre-Degree Course or such number of batches in an academic year in colleges. This changed the system of education in Higher Education. Another two important enactments which fall under the subject of Local Self-Government were the Kerala Decentralization of Powers Bill, 2000 and the Kerala Local Authorities (Prohibition of Defection) Bill, 1999. The subjects of industry, revenue, and social welfare had only two legislations each. The Kerala Lokayukta Bill, 1999 under the category of prevention of corruption was introduced and passed during this period. In the subject category of finance, traffic, irrigation, law and order, SC, ST and OBC, Co-operation and others only one legislation each was passed during the period. Kerala Highway Protection Bill, 1999, Kerala Sports Bill, 1999, Kerala Restriction on Transfer by and Restoration of Lands to ST Bill, 1999, and Kerala Prohibition of Ragging Bill, 1998 were the major

legislations on the subjects. The subject of health was ignored and no legislation was passed by this Assembly.

A glance at the original legislation enacted during the Eleventh KLA shows that, though there was only a few original legislations, the legislation had touched various subjects. The education and water-related matters record the highest number of Bills enacted in the particular category during the period. The Pariyaram Medical College and Hospital (Transfer for Administration) Bill,2001 and Kerala Self Financing Professional Colleges (Prohibition of Capitation Fees and Procedure for Admission and Fixation of Fees) Bill,2005 fell under the education category. The National University of Advanced Legal Studies was set up through legislation in this Assembly. In the category of water-related subjects three important Bills, namely The Kerala Protection of River Banks and Regulation of Removal of Sand Bill, 2001, the Kerala Irrigation and Water Conservation Bill,2003, and the Kerala Ground Water (Regulation and Control) Bill,2002 were enacted. Similarly, to conserve and preserve the environment, two vital Bills, namely Kerala Promotion of Tree Growth in Non-Forest Areas Bill,2004 and The Kerala Forest (Vesting and Management of Ecologically Fragile Lands) Bill, 2003 also came into existence.

The subject-wise analysis of Bills of the Twelfth KLA shows that the ministry gave high priority to introducing welfare legislation. Out of the 34 legislations in total, 10 were enactments related to labor and labor welfare. The categories covered under the labor and labor welfare included a wide

variety of subjects like fishermen, dairy farmers, small plantation workers, jewellery workers, coir workers, handloom workers, etc. The Assembly had also given due importance to education and has enacted six legislations on the subject. Kerala Professional Colleges (Prohibition of Capitation Fees, Regulation of Admission, Fixation of Non-Exploitative fees and other Measure to Ensure Equity and Excellence in Professional Education) Bill, 2006, Kerala Professional Colleges (Prohibition of Capitation Fees, Regulation of Admission, Fixation of Non-Exploitative Fees and other Measure to ensure Equity and Excellence in Professional Education) Bill, 2007 and Kerala State Higher Education Council Bill, 2007 were the key enactments. Two Universities i.e., Kerala Veterinary and Animal Sciences University Bill, 2010, and Kerala University of Fisheries and Ocean Studies Bill, 2010 were also introduced. In the Thirteenth KLA, most of the important subjects were covered. To mention, in the field of education and labor and labor welfare two legislations each were enacted. The House also focused on subjects of electricity, traffic, religious and social welfare, SC, ST and minority, and Local Self Government. Finally, in the Fourteenth KLA, the category of health, which was neglected in many legislative assemblies, were given importance and two new legislations namely, Kerala Medical Education (Regulation and Control of Private Medical Educational Institutions) Bill, 2017 and Kerala Clinical Establishments (Regulation and Registration) Bill, 2017. Several amendments were also introduced in the existing healthcare legislation. Unique legislations were also enacted by the Fourteenth

Legislative Assembly like the Kerala Investment Promotion and Facilitation Bill, 2008, Kerala Prevention of Damage to Private Property and Payment of Compensation Bill,2019, Kerala Micro Small and Medium Enterprises Facilitation Bill, 2019, Kerala Metropolitan Transport Authority Bill, 2018 and Kerala Christian Cemeteries (Right to Burial of Corpse) Bill, 2020. In the subject of Education, only one Bill namely Sree Narayana Open University Bill, 2021 was enacted.

An analysis of the subject-wise categorization of Bills depicts a picture of the type of legislation passed by each assembly. During the period from 1957 to 1961 subjects like revenue, Local Self-Government, and law and order were given prominence to address the immediate needs of the New State. Slowly, the priorities spread out to subjects like labor and labor welfare, setup of universities through the subjects of education, reformation in the educational system, decentralization, etc. As time progressed, legislations began to focus on subjects like traffic safety, corruption, agriculture and animal husbandry, water-related enactments, etc. Of all the categories, the subject of labor and labor welfare was given importance in all the KLAs. At least one legislation on the subject was presented in all the thirteen Legislative Assemblies, which is a very positive note. The subjects of revenue, religious and social welfare, education, Local Self-Government, and forest also show good coverage in the legislative enactments from 1956 to 2016. However, it is disappointing to note that on the subject of health, being a matter of public importance, only very few legislations were enacted. Many of the KLAs had

not enacted any legislation covering the subject of health. Over the period from 1956 to 2021, only seven legislations were enacted on the particular subject. Under the category of others, few unique legislations were enacted over the period. To mention a few, Kerala State Housing Board Bill, 1971, Kerala Payment of Pension to Members of Legislature Bill, 1994, Kerala Sports Bill, 2000, Non-resident Keralites' Welfare Bill, 2008, The Kerala Document Writers' Scribes' and Stamp Vendors' Welfare Fund Bill, 2012, The Kerala State Youth Commission Bill, 2014, The Kerala Prevention of Damage to Private Property and Payment of Compensation Bill, 2019 and The Kerala Micro Small and Medium Enterprises Facilitation Bill, 2019.

The researcher to avoid bias, as far as possible, tries to disregard the political scenario of the State of Kerala, though the subject of research is very much related to politics. However, the passing of a particular Bill involves many factors such as the willingness of the political party in power, agenda of the Ministry, support of the House, etc. Thus, the researcher feels it is useful to share the data of the party-wise ruling of each Assembly and the categorization of the subjects which gained top priority. Political activity in Kerala takes place in a multi-party framework. There are two major political coalitions in Kerala. The United Democratic Front (UDF) is the coalition of centrist and Centre-left parties led by the Indian National Congress. The Left Democratic Front (LDF) is the coalition of left-wing and left parties, led by the Communist Party of India (Marxist) (CPI(M)). The party which gets the majority comes to power. The political alliances have stabilized strongly in

such a manner that, with rare exceptions, most of the coalition partners stick their loyalty to the respective alliances. As a result of this, ever since 1979, the power has been alternating between the two fronts without any exceptions. These trends had helped in formulating solid debates and criticism of both parties on the floor of the House.

TABLE 3.2 Subject of Importance During Different Assemblies

Assemblies	Subjects Given High Importance**	Total number of original legislations
First KLA	Religious and social welfare, Local Self-Government	27
Second KLA	Revenue, administration of justice, and Local Self-Government	49
Third KLA	Local Self-Government	18
Fourth KLA	Local Self-Government Government, labor welfare, religious and social welfare, education, revenue	36
Fifth KLA ***		12
Sixth KLA ****	Labor welfare	8
Seventh KLA		12
Eighth KLA	Labor welfare	12
Ninth KLA	Scheduled Caste and Schedule Tribe, Local Self-Government	13
Tenth KLA	Labor Welfare	19
Eleventh KLA	Irrigation	11

Twelfth KLA	Education	35
Thirteen KLA	Other legislations	20
Fourteenth KLA	Health, Industries, Social Welfare	13

Source: Data collected from Kerala Legislative Assembly

*The Blue color indicates ruling by United Democratic Front (UDF) and the red color indicates ruling The Left Democratic Front (LDF).

** Number of Legislations enacted 3 or more on each subject

***25th March 1977 to 27th October 1978 UDF in power and from 29th October 1978 to 1st December 1979 LDF in power.

****25th January 1980 to till 20th October 1981 LDF in power and 28th December 1981 to 17 March 1982, UDF in power.

An analysis of Table 3.2 shows that during the initial period of KLA Assemblies subjects like revenue, administration of justice, Local Self-Government was given much importance to address the emergence and formation of the State of Kerala. Table 3.2 shows that whenever the LDF Government came into power, legislations on labor and labor welfare were given priority. This is clear from the data shown where the total number of original legislations were very few,[10] the Government enacted three laws on the subject of labor welfare. Similarly, when in the Eighth KLA of the twelve original legislations, again two legislations were ordained on the subject of labor and labor welfare. Similarly, the subject of religious and social welfare

[10] Only 8 original legislations in total in the Sixth KLA.

was also prioritized by the LDF Government in the First KLA and also in the Fourth KLA. The Communist Ministry had also given importance to the subject of education in the Fourth and Twelfth KLA. In the recent Fourteenth Legislative Assembly, health, social welfare, and small-scale industries were prioritized. No such uniform practice is reflected in the legislative trend of the UDF Ministry.

Overall, the subjects covered in each Assembly serve as a tool in measuring the outcome of democratic law making. Legislations of important nature touching social welfare measures, education, etc. are intended to be discussed on the floor with more care and caution.

3.3 DEMOCRATIZATION OF LAWMAKING

Analysis of democratization of law-making involves dissection of various factors in the subject as well as the process of passing of Bill. The strategies to assess the element of democratization in the law-making procedure involve factors such as

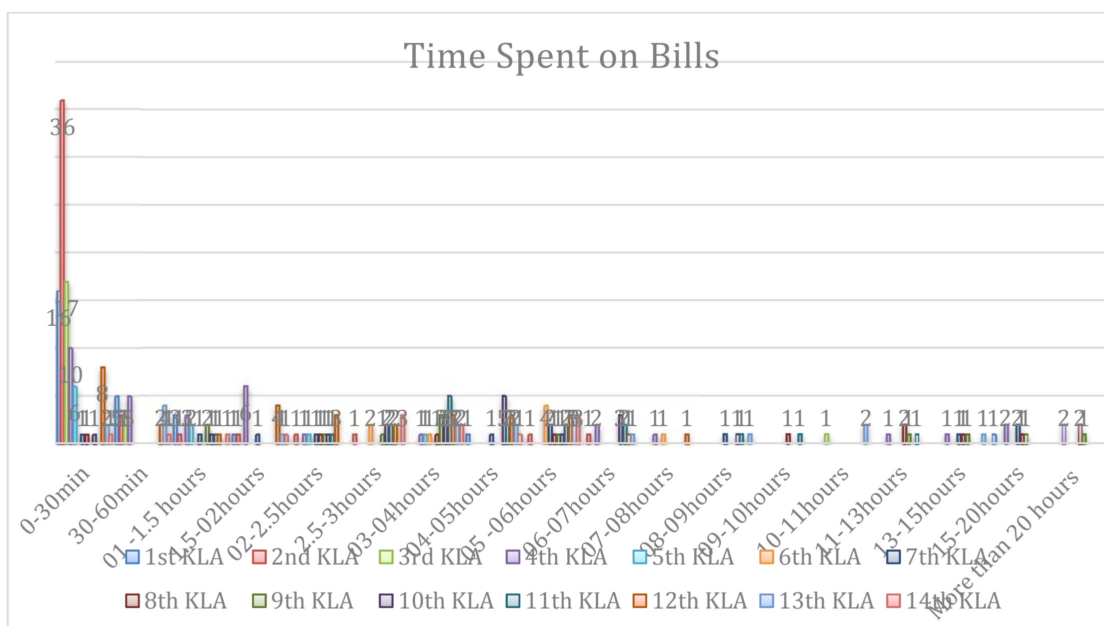
i. The time taken for the passing of the Bill
ii. Number of members participating in the discussion of the Bill
iii. Quality of debate
iv. Number of amendments moved and accepted on the floor of the House

The above-stated approach is designed to measure the constituents of democracy engraved in the passing of legislation in the Assembly.

3.3.1 The Factor of Time and Number of Members Participating in Discussion

How much time is taken in discussing and passing the Bill is considered to be an important indicator to measure the extent of the democratic element in the law-making process. Of course, depending on the importance of legislation and the number of provisions in the Bill time taken may vary. Still, the time taken in enacting a Bill into an Act in the House can be considered as an important indicator of how democratic the process of lawmaking is.

FIGURE 3.3 Time Spent on Discussion of Bills



Source: Data collected from Kerala Legislative Assembly

Figure 3.3 depicts the time taken for passing the original Bills in the respective legislative assemblies. From the Fourth KLA, proper documentation of legislative proceedings was available on the website and in the library of KLA. However, in the case of the first three assemblies, no

reliable records were obtainable about the time spent on each Bill. Hence a different approach had been taken in analyzing the time taken for passing a Bill i.e. the first three KLAs.[11] From the Fourth KLA, time spent on each original Bill could be derived from the documents available in the Kerala Legislature Library.

Over 65 years of KLAs, 99 Bills were discussed in less than 30 minutes. During the period of First, Second, and Third KLAs, the number of Bills discussed in less than 30minutes was greater when compared to more recent legislative assemblies.[12] It must also be kept in mind that during the initial period there was a large number of original legislations.[13] The analysis shows that 36 legislations were enacted in the Second KLA in less than 30minutes. During the Assembly, one of the important legislations, the Kerala Shops and Commercial Establishment Bill,1960 which contained 36 sections with IX chapters was passed in 9minutes. Over the period, the Kerala Shops and Commercial Establishment Bill, 1960 underwent six introductions at various sessions of assemblies to undergo amendments and the latest being the Kerala Shops and Commercial Establishments (Amendment) Act, 2018.

[11] From the proceedings of each session, the number of pages that discussed a particular original Bill was counted. An average was taken from the number of pages and time spent on each Bill. The average received was calculated to analyze the time spent on each original Bills in the First, Second and Third Kerala Legislative Assemblies.

[12] In the First, Second, and Third Kerala Legislative Assembly, an average of 23 Bills were discussed in less than 30minutes. Whereas, in the Eleven, Twelve, and Thirteen Kerala Legislative Assembly only an average of 5 Bills were discussed in less than 30minutes.

[13] The number of Bills discussed in less than 30 minutes in the First, Second, and Third Kerala Legislative Assembly should be calculated on the basis of the total number of original legislation passed by each Kerala Legislative Assembly. When calculating in such terms, the number of Bills discussed in a short time is passable.

Similarly, some of the important Bills such as the Kerala Government Land Assignment Bill, 1960, Kerala Gaming Bill, 1960, and Kerala Habitual Offenders Bill, 1960 were also discussed in less than 30 minutes. The Kerala Government Land Assignment Bill, 1960 had only nine sections that got discussed and passed in 10 minutes. The Kerala Gaming Bill, 1960 with 20 provisions cleared the floor in 11 minutes. And the Kerala Habitual Offenders Bill, 1960 with 22 sections got passed in 13 minutes. Likewise, the Kerala Forest Bill, 1960 with 86 provisions was also discussed and passed in 25 minutes.

In the First KLA, out of the 27 original Bills enacted in the Assembly, 16 Bills were discussed and passed in less than 30 minutes. The Bills passed in less than 30 minutes include subjects covering health and social welfare. Under the health category, the Kerala Anatomy Bill, 1957 which had only 10 provisions was passed in less than 10minutes. And under the category of social welfare, the Kerala Maternity Benefit Bill, 1957 with 21 provisions was passed after 19 minutes of discussion. Later the Act was repealed by Kerala Maternity Benefit (Repeal) Bill, 1970, since the Centre came up with a Maternity Benefit Bill, 1961. The other Bills which were discussed in less than 30 minutes include subjects of less importance.[14] During the Third KLA, akin to the Second KLA, 17 Bills were discussed in less than 30 minutes.

[14] For example, Bills such as Kerala Weights and Measures Enforcement (No.2) Bill,1958, Kerala Control of Poison Contaminated Articles (Validation) Bill,1958, Kerala Land Relinquishment Bill,1958, Kerala Money Lenders Bill,1957, Kerala Nampoothiri,1957 Bill etc. were discussed in less than 30minutes. The Bills does not have much sway over public safety, health or welfare measures.

However, the analysis shows that no Bills which cater to the health, safety, and social welfare of the people were discussed and passed in a hurry. [15] However, an exception to this is the Calicut University Bill,1970 with 53 provisions which were discussed in 21minutes. A reading of the proceedings clearly shows that the Assembly took such a stand on the assertion of the Minister that the Calicut University Bill,1970 contained provisions similar to that of the Kerala University Bill, which was discussed for several hours. Nevertheless, The Calicut University Bill, 1970 underwent 5 amendments during the period of the Fourth KLA. Six major amendments replaced the Act as the Calicut University Act, 1975. Thereafter also several amendments were introduced, the latest being the Calicut University (Alternative Arrangement Temporarily of the Senate and Syndicate) Act, 2018.

From the Fourth KLA, the number of Bills that were discussed in less than 30 minutes was drastically reduced.[16] In the Fourth KLA, ten legislations were passed in less than 30 minutes. However, all of these were Bills covering certain minor subjects addressing specific causes. This includes the Kerala Payment of Pension to Members of Legislature Bill, 1994 with only 4 sections

[15] Random Bills such as Kerala Private Forest Acquisition Bill,1963, The Family and Political Pensions Payment (Abolition) Bill,1963, Kerala Housing Board Bill,1971, Kerala Slum Areas(Improvement an Clearance) Bill, 1981, Kerala Industrial Employees Payment of Gratuity Bill, Kerala Ancient Monuments and Archaeological Sites and Remains Bill,1968 Kerala Treasure Trove Bill,1968, Kerala Official Language(Legislation) Bill,1968, Kerala Toddy Tappers Welfare Fund Bill,1968, Kerala Record of Rights Bill,1968, Kerala Animals and Birds Sacrifices Prohibition Bill, 1968 etc. were passed.

[16] It must be also noted that the approach taken by the researcher in analyzing the time spent on each Bill (First, Second, and Third Kerala Legislative Assembly) is different from the rest of the Assemblies. This would also be a contributing factor to the larger figures of Bills discussed in short time.

cleared the floor in 7 minutes with only 4 participants engaging in discussion. The House passed the Kerala Chitties Bill, 1972 consisting of 12 parts and 72 sections in 6 minutes. In the discussion of the Kerala State Rural Development Board Bill 1970, 9 members participated and the Bill cleared the floor in 29 minutes. But the discussion of the Supply of Paddy and Rice to Travancore Palace(Extinguishment of Rights and Liabilities) Bill, 1976 with 3 sections and The Judicial Proceedings (Validation) Bill, 1971 with 2 sections showed only reduced participation, i.e., only 3 and 4 members participating in the discussion respectively. Labor Welfare Fund Bill, 1975 consisting of 45 sections, the only welfare legislations among the above-stated category, was discussed in 15 minutes.

The Fifth KLA with few original legislation, important legislations like the Guruvayur Devaswom Bill, 1978, Kerala District Administration Bill,1978, and Kerala Public Library Bill, 1977 were all discussed for a scant amount of time. For example, The Guruvayur Devaswom Bill, 1978 with 43 sections was discussed in 30 minutes, whereas the Kerala District Administration Bill, 1978 with 102 sections was debated and passed in 1hour.

Conversely, from the Sixth KLA to the Eleventh KLA, the number of Bills discussed in less than 30 minutes became minimal. Hardly one or two Bills were discussed in a short time.[17] An exception to this is the Twelfth KLA, which shows that out of the 35 original legislations passed, 11 Bills

[17] Seventh, Eighth, and Tenth Kerala Legislative Assembly had only one Bill discussed in less than 30minutes, meanwhile, the other Kerala Legislative Assemblies of the period had none.

were passed with less than an hour of discussion. Out of the 11 Bills, 8 Bills were discussed and passed in less than 30 minutes. This includes many of the important legislations like Kerala Public Ways(Restriction of Assemblies and Processions) Bill, 2011(10 sections), The Plachimada Coca-Cola Victims Relief and Compensation Claims Special Tribunal Bill, 2011, Kerala High Court Services (Determination of Age), Bill 2008(10 sections), Kerala Coir Workers Welfare Cess Bill, 2007(15 sections), The Non-resident Keralites' Welfare Bill, 2008 (30 clauses), The Kerala Dairy Farmers Welfare Fund Bill, 2007 (27 sections and 1 schedule) and Kerala Ayurveda Health Centres (Issue of License and Control) Bill, 2007(13 sections). In enacting the Kerala Coir Workers Welfare Cess Bill, 2007 only 2 members each participated in the discussion before and after reference to the subject committee and the Bill passed the floor in less than 22 minutes. Similarly, in the passing of the Kerala Dairy Farmers Welfare Fund Bill, 2007, 5 members have participated in the discussion before referring it to the subject committee, however, no participation was recorded after the Bill came from the subject committee, and in a total of only 15 minutesthe Bill cleared the floor. The Bills of Kerala Public Ways (Restriction of Assemblies and Processions) Bill, 2011, Kerala High Court Services (Determination of Age), Bill 2008, and the Kerala Coir Workers Welfare Cess Bill, 2007 were passed in less than 9minutes. A maximum of only 3 members had participated in the discussion of the above-stated Bills.

An analysis of the legislations enacted in the Thirteenth KLA reveals a very depressing state of affairs. Out of the 20 legislations, 6 Bills were passed with less than one-hour discussion, and out of which two Bills were passed in less than 25 minutes. The Bills that were passed in less than one hour includes the Kerala Health Care Service Pension and Healthcare Service Institutions Prevention of Violence and Damage to Property) Bill, 2012(8 sections). The Bill was a matter of great public interest though it was not discussed fruitfully on the floor. In the first reading not even, a single member participated in the discussion. The Chair expressed its dissatisfaction with the responses of the members.[18] He added: 'Lawmaking on those important matters are currently being taken to the floor and it is a pity that no discussion is being put forth by the members, which is against democratic principles and the people of Kerala'.[19]

In the Fourteenth KLA, except for one Bill, the Kerala Farmers Welfare Fund Bill, 2018, all other Bills were discussed in detail. However, the above stated Bill was referred to the Select Committee and was considered in the committee for 9 days. Similarly, the Kerala Metropolitan Transport Authority Bill, 2018 which was discussed for 23 minutes in the House was considered in the Select committee for 7 days. Usually, the welfare fund Bills in every session take only a span of a maximum of 3 hours, but in the case of the Madrasa Teachers' Welfare Fund Bill, 2019, the Bill was discussed for 5

[18] There was no participation from the members even after the Speaker pressed for comments.

[19] Refer KLA proceedings, 13th June 2012 at 307.

hours. The discussion started generally on the subject and later focused on the key provisions of the Bill. Before referring the matter to the subject committee, 23 members participated and in the discussion of the report 10 members came forward for the discussion. The discussion of the Kerala Christian Cemeteries (Right to Burial of Corpse) Bill, 2020, along with rights and issues of the community, concerns were also raised regarding the other sectors of the Christian community. The opposition criticized the move for a particular Bill as a favor to the particular group. Before referring to the subject committee, 27 members participated, and in the presentation of the report of the committee only 3 members participated since many of the concerns were addressed in the committee. The discussion in the Micro Small and Medium Enterprises Bill, 2018 were almost welcoming and several concerns and hurdles were discussed. Whereas around 24 members took part in the discussion before referring to the subject committee and no member participated in the report discussion. In the health category, the Clinical Establishments (Regulation and Registration) Bill, 2018 3 members participated before reference to the subject committee and 13 members participated in the subject committee report. The discussion was smooth and focused on the matter. The highest number of discussions recorded on the Malayalam Language (Compulsory Language Bill), 2017 wherein around 27 members participated before the reference to the committee and 55 participated in the report presentation. The discussion went general and concentrated on the value of the Malayalam Language and its history.

Generally, depending on the importance of the Bill and the number of provisions, some of the Bills discussed exhaustively. In the Ninth KLA, two prominent Bills namely Kerala Panchayat Raj Bill, 1994, consisting of 285 sections and 5 schedules, and Kerala Municipalities Bill, 1994 with 574 sections were discussed and debated for 24 hours and 50 hours respectively. It also shows active participation before and after reference to the subject committee. Around 53 members each participated in the passing of both the legislations. Similarly, the Public Library Bill, 1989 (29 sections) of the Eighth KLA was discussed for 56 hours with a record participation of 64 members at the time of presentation of the Subject Committee report. Around 12 members took part in the discussion before referring it to the Subject Committee. Likewise, in the Fourth KLA, The Kerala University Bill, 1972 was also passed in 20 hours 38 minutes with 37 members participating in the discussion. These were the Bills that received the maximum legislative attention. Close to this, several other Bills generated a great deal of discussion as well as informed debates. Some such Bills are The Cochin University Bill, 1986 (58 sections) which was discussed for 17 hours with 43 members participating in the discussion, the Kerala Agricultural University Bill, 1971 with 65 sections that were passed in 11 hours and 31 minutes, and around 65 members discussed and debated.[20] The Kerala Water and Waste Water Bill, 1984 of the Seventh KLA were discussed for 16 hours, and the Gandhi University Bill, 1985(102 sections) was discussed for 14 hours. Both the Bills

[20] Fourth KLA.

witnessed a good number of participants expressing their opinions, discussing and debating the provisions. However, in the post-presentation of the committee report of the Gandhi University Bill, 1985 only 4 members participated. The Kerala Public Men (Prevention of Corruption) Bill, 1983 of the same KLA was discussed for 17 hours and 26 minutes with 24 members participating before referring it to the committee and 57 members participating at the time of presentation of the committee report before the Assembly. The Kerala Local Authorities (Constitution and Preparation of Electoral Rolls) Bill, 1987, was discussed for 11hours and 54 minutes with 6 members participating before referring it to Subject Committee, and after reference to the subject committee, 19 members participated. The Sree Sankaracharya University of Sanskrit Bill, 1994 (27 sections) also shows a thorough discussion with 26 members participating, and the time taken on the floor is 13 hours.[21]

The Eighth KLA also witnessed a meaningful discussion on many Bills. In the discussion of Kerala Public men's Corruption (Investigation and Inquiries) Bill, 1987, 17 members participated before the reference to the subject committee and 42 members participated in the discussion thereafter. It took around 35 hours for the Bill to pass the floor. Most of the labor welfare legislation was discussed for a fair amount of time. The Kerala Coir Workers' Welfare Fund Bill, 1987, Kerala Khadi Workers' Welfare fund Bill, 1988, and the Kerala Abkari Workers' Welfare Fund Bill, 1989 were discussed and

[21] Ninth KLA.

debated about 11-13 hours. The Kerala Handloom Workers' Welfare Fund Bill, 1988 was discussed and passed in 9 hours and 3 minutes. The Kerala Construction Workers' Welfare Fund Bill, 1989 took around 18 hours for its discussion and for clearing the floor. Except for the Kerala Handloom Workers' Welfare Fund Bill,1988, and Kerala Khadi Workers' Welfare Fund Bill, 1988 all the labor welfare Bills were discussed by 11-20 participants before referring it to Subject Committee. However, in the case of the Kerala Handloom Workers' Welfare Fund Bill,1988, and Kerala Khadi Workers' Welfare Fund Bill,1988, none of the members expressed their opinion before the reference to the committee. But in the report presented in the Assembly session, in all the cases a good number of members participated in the discussion. For instance, in the case of the Kerala Construction Workers' Welfare Fund Bill, 1989 around 39 members participated and in the Kerala Khadi Workers' Welfare Fund,1988 Bill 29 members discussed and debated before the Bill got enacted. It is disappointing to note that, compared to other legislations, the Kerala Women's Commission Bill, 1990 with 28 provisions, was discussed only for two hours and 27 minutes only. There was no participation from the members before referring it to the subject committee. However, 9 members participated in the post–reference discussion.

Some of the important legislations over the period were discussed as follows: Three Bills of the Twelfth KLA session namely Kerala Farmers' Debt Relief Commission Bill, 2006 with 21 sections, Kerala Police Bill,2010 (131 sections), and Kerala Professional Colleges (Prohibition of Capitation

Fees, Regulation of Admission, Fixation of Non-Exploitative Fees and other Measures to Ensure Equity and Excellence in Professional Education Bill,2006, were discussed for more than 11hours. Around 39 members participated in enacting the Kerala Professional Colleges (Prohibition of Capitation Fees, regulation of Admission, Fixation of Non-Exploitative Fees), 2006 and in passing the Kerala Farmers' Debt Relief Commission Bill,2006 and Kerala Police Bill, 2010, 25 members and 15 members participated respectively. The other Bills which were discussed and passed in more than 5 hours observed the participation of 10 to13 member participation. However, the Kerala Conservation of Paddy Land and Wetland Bill, 2007 witnessed a participation of 23 members, which records 20 members participating in the discussion of the subject committee report of the Bill, the highest among all.

The Pariyaram Medical College and Hospital (Transfer for Administration) Bill, 2001(18 sections) of Eleventh KLA was discussed for more than 11hours with 9 members participating in the discussion before referring to the Subject Committee and 33 members participating in the discussion after it returned from the Subject Committee. However, the Kerala Loading and Unloading (Prohibition of Extraordinary, Intimidatory or other Unlawful Practices Bill, 2002 was discussed for 6 hours and 57 minutes with outstanding participation. An analysis of the above data shows that there is no correlation between the time spent on each Bill and the number of members participating in the discussion. This is because a single member talks for long hours without a productive output as seen above. Thus, we cannot say that

higher participation the Bill was well-discussed. This aspect will be dealt with in detail in the forthcoming paras.[22]

3.3.2 Amendments Moved

Over the period many significant legislations were discussed and debated on the floor of the House. As seen above, many of the legislations were deliberated with great participation from the members of the Assembly, though the content of discussion varies.

In addition to the time taken, the number of members who had participated in the debate, the number of amendments moved and the number of amendments accepted by the House are also important indicators to ascertain the democratic nature of lawmaking by the legislature. Since such an analysis concerning all the Bills introduced and passed in KLA during the tenure of First to Fourteen KLA is considered impracticable and not attainable during the limited period of research, it is proposed to adopt a selective approach.

As already stated, there are 276 original legislations so far enacted by the KLA. Only original legislation was taken for content analysis. As a first step, the legislations which were categorized subject-wise were studied.[23] Around 59 important legislations from each subject category were taken and analyzed for deriving the scope of discussion, the type of amendments moved,

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[22] A qualitative analysis of some selected Bills to portray the kind of discussion, the number of amendments moved and the number of amendments accepted by the House.

[23] The KLA published a book, 'Kerala Niyamasabha: Niyamanirmanathinte Aarru Pathittandukal', which categorizes the legislation subject-wise (2017).

and to measure the qualitative content of debates and discussion in the Assembly. In total 30 legislations were examined.[24]

TABLE 3.3 Amendment Moved-Accepted

Act	Amendments Moved	Amendments Accepted	Poll Taken
The Kerala Healthcare Service Pension and Healthcare Service Institutions (Prevention of Violence and Damage to Property) Bill,2012	43 (3 by Minister)	3	4
Kerala Medical Practitioners Bill, 2019	7 (5 by Minister)	5	
Kerala Electricity Surcharge (Levy & Collection) Bill, 1989	54 (4 moved by Minister)	4	18
Kerala Ancient Monuments and Archaeological Sites and Remains Bill, 1969	0	0	
Kerala Dramatic Performance Bill,1961	4	0	
Kerala Farmers' Debt Relief Commission Bill, 2006	231	20	10
Kerala Debt Relief Bill, 2006	13	1	
Kerala Agricultural Workers Bill, 1972	30	1	2 polls won
Kerala State Cooperative Agricultural Development Banks Bill, 1982	0		
Kerala Road Safety Authority Bill,2006	161	32	7

[24] Of the 59 legislations, 30 legislations that had complete data to analyze qualitative content discussion were taken for study.

Kerala Ground Water (Regulation and Control) Bill,2002	15	14	
Kerala Forest (Vesting and Management of Ecologically Fragile Lands Bill, 2003	462	8	125
Kerala Preservation of Trees Bill, 1973	44	12	9
Silent Valley Protected Area (Protection of Ecological Balance) Bill, 1979	1	0	
Kerala Restricting on Cutting and Destruction of Valuable Trees Bill, 1974	0	0	
The Pattazhai Devaswom Lands (Vesting and Enfranchisement) Bill, 1972	9	4	1
Guruvayur Devaswom Bill, 1978	6 (moved by Minister)	6	
Non-Residents Indians (Keralites) Commission Bill,2015	91	18 including 5 by Minister	0
Kerala Dairy Farmers Welfare Fund Bill,2007	3 (moved by the minister)	3	
The Kerala Inland Fishery Bill, 2010	62 (53 moved by Minister)	53	
Kerala Tourism (Conservation and Preservation of Areas) Bill, 2005	96	6	1
Kerala Lokayukta Bill, 1999	344	17 including 1 by Minister	10
Kerala Local Fund Audit Bill, 1993	64	12 including 3 by Minister	1
Kerala Abkari Workers' Welfare Fund Bill, 1989	301	15	36

Kerala District Administration Bill, 1978	69	16	11
Kerala Debt Relief Bill, 1977	24 (2moved by Minister)	2	3
Kerala Parks, Play-fields and Open Spaces(Preservation and Regulation) Bill, 1969	0		
Kerala Record of Rights Bill, 1968	4 moved by Minister	4	
Kerala Education Bill, 1957	48	22	8
Malayalam Language (Compulsory Language) Bill, 2017	41	18	7

Source: Data collected from Kerala Legislative Assembly

The above Table shows the amendments introduced by members, both Ministers, and Non-Ministers, during the clause-by-clause discussion of the Bill. However, for the House to admit such amendments, majority support of the House is necessary. If the amendments are put forward by the MLAs usually fail since the ruling party necessarily commands a majority in the House. It is overwhelming to note that, in most of the cases, the amendments introduced in the House fail to get accepted. This is because many amendments which are moved by the members of the House, especially those moved by the non-ministers, are rejected by the Minister. The Minister, the Member-in-Charge, who moves the Bill, plays the most decisive role and has the sole discretion in deciding whether to accept or reject the amendments. Usually, the ruling party does not accept amendments moved by the opposition parties. However, the opposition side is always at an urge to

contribute something to the legislation. This results in an increased number of amendments being moved and simultaneous rejection of the same.

Table 3.3 shows that in the Kerala Forest (Vesting and Management of Ecologically Fragile Lands Bill,2003 of the 462 amendments moved, only 8 were accepted. Though 125 polls were taken, all failed. That is predictable since the ruling party always enjoys majority support. Also, in the case of the Kerala Farmers' Debt Relief Commission Bill,2006 of the 231 amendments introduced, 20 were accepted. Similarly, in the Kerala Abkari Workers' Welfare Fund Bill, 1989 out of the 301 amendments introduced only 15 were accepted and in the Kerala Lokayukta Bill, 1999 of the 344 amendments moved, 17 were accepted, one amendment was moved by the Minister. Thus, the amendments moved by the MLAs are never accepted. The polls, if any, are also destined to fail.

Though in general, the practice is as stated, there are some exceptions. In the case of the Kerala Ground Water (Regulation and Control) Bill, 2002 of the 15 amendments introduced 14 were accepted. In the case of the Kerala Education Bill, 1957 of the 48 amendments moved 22 were accepted by the House. This includes amendments introduced by both members and non-members. The Education Bill, 1958 was the legislation that was introduced during the first KLA. And throughout the discussion, we could see a welcoming approach from both sides in accepting amendments. They tried to accommodate suggestions as far as possible.

The Minister, the Member-in-charge, who moves the Bill, has the sole authority in deciding the acceptability of the amendments. There is also a practice that the Minister moves amendments including oral ones. And these amendments clear the floor easily. Many examples illustrate this practice. In the Guruvayur Devaswom Bill,1978 only 6 amendments which were moved by the Minister were accepted. Similarly, in the Record of Rights Bill, 4 amendments were moved by the Minister. In every Bill, the Minister moves 2 or 3 amendments along with the amendments moved by other Members but the fate of both is different. However, an unusual instance was seen in the case of the Kerala Inland Fisheries Bill. Out of the 62 amendments moved, 53 were moved by the Minister. The 53 amendments placed by the Minister passed the floor easily but the 9 moved by MLAs failed to get the acceptance of the House.

On some Bills, no amendments were introduced by the members or from the Minister. From the Table 3.3, it is seen that Kerala Ancient Monuments and Archaeological Sites and Remains Bill, 1968, Kerala Parks, Play-fields and Open Spaces (Preservation and Regulation) Bill, 1968, and Kerala Restriction Cutting and Destruction of Valuable Trees Bill, 1974 did not see any amendments.

The study of the legislative proceedings shows that many valuable amendments, propositions, and opinions are put forward by the members of the House. A leading change is seen in the content analysis of the clause-by-clause discussion of the Bill. Earlier the clause-by-clause discussion

comprised of a member explaining the need for his amendments, the Minister would also state the reasons for his approval or rejection of the amendments. Even other Members would comment on the introduced amendments opposing or supporting those. This practice assured that though the amendments are not made to be part of the Bill, its scope is genuinely considered by the House as a whole. But now the clause-by-clause discussions are just monologues. On the discussion of a clause, several amendments are moved in a row without much explanation of the object of the amendment and the Minister at the end of each clause discussion comments on whether he accepted those with no explanations. If not, it is either withdrawn or lost in the poll. This change of practice, seen from the Ninth KLA, has severely affected the quality of amendments moved. However, compared to earlier times, participation is more. But the element of effective discussion and readiness of acceptance is lost.

3.3.3 Content Analysis of Bills

The study of the time spent on discussion of Bills showed that some Bills had been discussed for more than 20 hours. But the question that arises is whether the time thus spent on each Bill was fruitful and resulted in substantial positive contributions. For finding out how much time is utilized productively, a relevance test is formulated by the researcher. When the discussion is confined to the provisions, objects, and impact of the Bill, the so-called deliberations are termed relevant. When it falls out of the above categories, the Bill is poorly discussed and fails the relevance test.

Irrelevant discussions and debates are seen as a part and parcel of every sitting. A member may talk for long hours disregarding the principle or provisions of the Bill and be unmindful of the warnings of the Chairman. Citing the example in the Thirteenth KLA, The Malayalam Language (Discrimination and Enrichment) Bill, 2011 and the Malayalam University Bill, 2013 were the two Bills which was discussed for more than 5 hours. However, the Malayalam Language Bill, 2011 which was approximately discussed for 5 hours never became an Act. An analysis of the content of the discussion reveals that rather than a focused discussion on the provisions and related matters of the Bill, the discussion surrounds the substance of Malayalam in the present society. These discussions were irrelevant and they didn't contribute any positive contribution to the Bill. Since no ministers were present during the first reading and prior excuse for the absence was taken from the Chair, for the first fifteen minutes, arguments were raised by non-official members for the absence of Ministers. This is a serious consideration from the purview of democracy. Members absent from their seat during the discussion is not favorable to democratic lawmaking. Similarly, during the discussion of the Right to Service Bill, 2012, on 23 July 2012, a member (Shri.V. Sivankutty), by pointing out to the gallery criticized that only two officials are present when an important Bill was under discussion. In response, the Chair expressed his concern over the absence of many MLAs and Ministers as sub-committees are running parallel.[25] Coming back to the

[25] KLA Proceedings, 23rd July 2012 at 310.

Malayalam Language (Discrimination and Enrichment) Bill, 2011 and the Malayalam University Bill, 2013 of the Thirteenth KLA, the discussion further extended to poor working conditions of already existing universities, the degradation of Malayalam in the present society. Thus, a quantitative study of the Bill shows that the discussion which lasted for several hours barely focused on the main provisions of Bills as such. In most cases, the discussion seems general and there are cases where the discussion proceeds on purely political lines. On the discussion of Minorities and Youth Commission Bills,2013 the discussion went far from the provisions of the Bill. For example, discussion on minorities turned to the religious discussion, whereas in the case of the Youth Commission Bill, the focus was given to youth problems in general like non-employment, use of drugs, mobile addiction, etc.

An analysis of the content of the discussion shows that in-between the debates many instances of unnecessary interventions hinder the speeches and the deliberations on the scope of the Bill are often withered away at different stages. During the discussion of The Kerala Forest (Vesting and Management of Ecologically Fragile Lands Bill), 2001 of the Tenth KLA which was passed in 3 hours and 20 minutes with 37 members participating in the discussion, the opposition questioned an illegal use of a 500-acre land from the property of the forest land. The reply of the Minister that law alone cannot do anything, people’s minds along with law should change resulted in chaos. Speaker asked to move to amendment discussion. But the fights continued. Topics such as illegal wood exports from forests came into the limelight. Speaker repeatedly

intervened and asked to focus the discussion. The discussion on the presentation of the select committee report also the discussion went too general and failed to satisfy the relevancy test. Illegal wood exportation from the forest was still the main reason for disorder and unpaved discussions. Even during the clause discussion, the House could not unanimously agree on certain facts.

Again, in the deliberations on Kerala Lokayukta Bill,1999 the subject of corruption led to aggressive talks by the Members. At one point, reference to an article published in Mathrubhumi newspaper by the then Minister arose further debates. Similarly, in stating the remedies to control theft in the parks,[26] one of the ministers made a reference to the plucking of flowers from the MLA quarters by the MLAs amounted to theft. This resulted in some tough deliberations among the members. Also, in the case of the Kerala Road Safety Authority Bill, 2006 one of the Ministers, while discussing the motion for sending the Bill to public opinion, deviated from the talk, and Reference was made to Mathayi Chacko, who was a member of KLA whose last wish was to conduct his funeral rites by the party office. But due to the inference of UDF leaders, the party lost the land for performing rites. Though he was given the best treatment in Lakeshore hospital, it was again criticized. This though did not raise any debates, but explanations and re-explanations on the topic took some valuable time of the legislative business. The above stated are some of the selected instances wherein topics, entirely different from that of the

[26] Discussion on Kerala Parks, Play-fields and Open Spaces (Preservation and Regulation) Bill, 1969.

Bill, are discussed and debated on the floor. However, this alone is not comprehensive. In most of the instances of legislative business, a comment by a single member of the Assembly had resulted in deviations and unwarranted deliberations. The above situations were also examples where the Speaker, being the Chair of the House, failed to maintain order in the House.

Of the analyzed legislations, there were some cases in which happenings had interrupted the usual proceedings of the Assembly. In the report presentation of the Kerala Agricultural Workers Bill, 1972 the scope of the term 'family' was not considered properly in the select committee due to delay in getting exact legal provisions. However, later it was left out of the agenda. Opposition members of the Committee raised interpretative defects in the report. Ministers disagreed. Speaker intervened and said the proceedings of the report need not be discussed in the Assembly. The members continued that a report which was scheduled to be discussed later, whenever discussed, forms part of the report. After some exchange of dialogues, the Speaker pointed out that the report has already been published, now again reopening is not right and asked to refrain from the discussion. Again, at some other point of the discussion of the same Bill, the Speaker asked if any amendments were moved for referring the Bill to public opinion i.e., if anyone is pressing. Since there was no response, he asked the members to limit speeches per member by reaching a consensus on the subject and invited one of the members to talk. This action of the Speaker raised serious disorders in the proceedings of the House and the debates were tainted irrelevant.

On the introduction of the presentation of the Subject Committee report on Kerala Local Authorities (Prohibition of Defection Bill), 1999, it was contended that though the Bill was circulated for 10-12 days before coming to assembly, none of the ministers expressed their opinion before the subject committee and said they will speak in the Assembly. But in the title of the report, it is printed as 'as reported by the Subject Committee'. The opposition complained that the subject committee had become a mockery. There were a lot of disagreements by the opposition on the enactment of the Kerala Lottery Bill, 1986. Importantly, they raised two things; firstly, some sections violate the Constitution itself. Secondly, provisions are not in compliance with central law. Endless opinions were expressed by both parties. The arguments led to the ruling of the Speaker that though we cannot decide the first question through our collective wisdom, we cannot get finality over this. Only court can do such things. When referred to the Subject Committee, the committee can through collective wisdom, decide on the matter. Thus, they overruled the objection of the Opposition. In the discussion of the Kerala Electricity Surcharge (Levy & Collection) Bill, 1989, aggressive comments over non-withdrawal of night load shedding led to staging a protest in the Centre of the House by some members of the opposition. During the discussion, in several instances, the then Electricity Minister was asked to resign since it was alleged that he placed wrong records on electricity consumption. The opposition also teased that the Minister' fuse had gone and the voltage of the

Marxist party had decreased. Such unwarranted comments in the Assembly only further weakened the relevant criteria.

In the Kerala Electricity Surcharge (Levy & Collection) Bill, 1989 discussion was initiated on violation of the rule. Two days' clear mandate for circulation of the Bill was not satisfied. Members argued they did not even get 24hrs to study the Bill and hence need to be postponed. Minister did not agree on the point and said previous Bills which went for select committee report, did not even come before the Assembly, hence appropriate action needs to be taken in this case and compared some examples of previous Bills which were introduced without clearance of two days. During the heated arguments, the Chair intervened and said as per rule 205 it's right that two days' clearance is needed. But the Select Committee had suggested this particular session exclusively for the discussion of the Bill and hence it can be waived and that is the practice. Speaker asked to stop the irrelevant discussion but still, the members raised violations of rules. The Speaker found it difficult to manage the Members. After several repeated interventions, the Speaker succeeded. During the discussion of the Kerala Ground Water (Regulation and Control) Bill, 2002, Kerala Electricity Surcharge (Levy & Collection) Bill, 1989, and Kerala Road Safety Authority Bill, 2006 the discussion got diverted at several intervals. In the discussion of the Kerala Road Safety Authority Bill, 2006, in at least five instances the discussion lost its essence.[27] In the discussion of the

[27] During the debut speech, as already stated, the discussion was purely political, the allegation of violation of Rule 303 Rules of Procedure and Conduct of Legislative

Kerala Electricity Surcharge (Levy & Collection) Bill, 1989 also, many unwanted comments against the then electricity Minister, resulted in a lack of determined discussion.

At this point, the discussion of the Kerala Local Authorities (Prohibition of Defection Bill),1999 assumes relevance. From the very beginning, the opposition criticized that the Bill was brought by the ruling party to promote their interest. An incident of a defection that happened in Kannur Panchayat was cited. The comments[28] of the Judiciary was also quoted as shameful. The opposition proposed several amendments. They said the Bill of the Government, is not of the people, by the people, and for the people. This Bill is for Kannur Panchayat. Speaker intervened several times to limit the speeches but in vain. The day of passing the Bill was also termed as the dark day in the history of Kerala. Despite the repeated shaming and numerous amendments, the Government was not ready to accept changes. Unmindful response from the Government resulted in protest. And the opposition walked out.[29] No amendments were moved and no effective discussion took place after the walkout. This helped the ruling party and the Bill cleared the floor easily

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Business KLA, suggestions such as minimum for 4 persons in a private car, use of cycle for transportation, etc.

[28] Court said to Chief Secretary: You have wilfully disobeyed the order by not taking effective steps to implementing the order and thereby committed civil contempt

[29] The law is good. Generally, we support the Bill. But you people are utilizing and remodeling the Bill for the benefit of a small constituency, said the then Opposition Member.

One of the major factors for unwanted discussion is the introduction of various types of motions, wherein a member gets ample time to talk about anything. Motion for public opinion and motion for reference to select committee are moved by the members of the Assembly, though they are aware of the fact that the Bill would be referred to a Subject Committee. Such amendments moved by the members are lost unless the Minister moves the motion. Many major and minor amendments are moved by the Ministers and non-Ministers of the Assembly during discussion. Minor amendments moved by the non-ministers are accepted by the House in certain cases, whereas, major amendments are often rejected. [30] This practice is seen in most of the Bills.

For example, the Kerala Agricultural workers Bill, 1972 was discussed for more than 11 hours with 45 members participating in the debate. In the discussion of the Bill, clause 42 was the most discussed provision. The opposition argued that the clause is not beneficial to the Agricultural workers and is discriminatory. It was argued that as per clause 42, it is not just 1-hectare, but the Government can avoid all landowners based on their whims and fancies. As a result, workers working in 1 hectare above will get the benefits of the act, and those working in 90 cents won't get the benefit. This was termed arbitrary. After so much discussion, an explanation was added by

[30] One member asked to change the title as Kerala Agricultural Workers Welfare Fund and Settlement of Disputes. Poll was taken and declared lost.

the Minister to clause 42(1).[31] Several suggestions were put forward by the opposition as amendments, however, when put to vote,[32] it seems lost. This happens to most of the amendments moved in the case of every Bill. For instance, motions for referring the Bills to public opinion were moved by at least one member in every Bill[33] which needs a public opinion. However, in most cases, it is put to vote and failed or it is withdrawn by the Member.

The above discussion shows cases how the discussions on Bills failed to satisfy the relevancy test proposed by the researcher. Citing those instances doesn't mean that there are hardly any effective deliberations taking place in the Assembly. Some of the Bills are discussed with full focus and detailed proposals are submitted. No Bill can be discussed perfectly without any unwanted interferences since the members are a group of people of varied opinions, views, and different political interests. However, if the majority of the time were used for discussing the scope, objects, and impacts of the Bill, it can be termed a fruitful and productive discussion. For example, in the discussion of the Kerala Ancient Monuments and Archaeological Sites and Remain Act, 1969, Kerala protection of river banks and sand mining Bill, 2011 though the discussion went general at some point, overall, the provisions were well deliberated. Similarly, the Kerala State Rural Development Board Bill, 1971 Kerala Prohibition of Ragging Bill, 1998, Kerala Parks, Playfields

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[31] Where the landowner is a member of the family, the land individually held by any member or jointly held, will considered as deemed to the landowner.

[32] When an amendment is moved by a member of the House, it is put to vote, if not withdrawn.

[33] E.g. the Kerala State Cooperative Agricultural Development Banks Bill, 1982, Kerala Decentralization of Powers Act, 2000.

and Open Spaces (Preservation and Regulation) Bill, 1969, Kerala Public Men (Prevention of Corruption) Bill, 1987, and Kerala Madrasa Teachers Welfare Fund Bill, 2019, Sree Narayana Open University Bill, 2021 were all discussed in the Assembly in detail.

The discussions taking place in the Assembly are not always on a serious note. There are interesting references made by the members. One of the MLAs, cited the Decentralization Bill, 2000, and said that all Bills introduced by LDF Government are similar to Kerala's *aviyal*[34] recipe. Comments were added that though *aviyal* is a good recipe, all ingredients (provisions) needed for a good curry were not there. During the discussion on the Kerala Farmers Debt Relief Commission Bill, 2006 and Kerala Scheduled Tribes (Restriction on Transfer of Lands and Restoration of Alienated Lands) Act, 1975, poems were narrated beautifully.

The study to examine whether law-making is truly democratic or to what extent it is democratic was ascertained by the researcher by formulating certain indicators. The criteria laid down were first, the time taken for the passage of the Bill, secondly, the number of members who had participated in the discussion of the Bill, thirdly, the number of amendments moved on the floor and accepted by the House and lastly, measuring the content of discussion by formulating a relevance test. Analysis of the time taken for passing the Bills on the floor gives a diversified output. Many important legislations such as Kerala Shops and Commercial Establishment Bill, 1960,

[34] It is a traditional side dish with all mixed vegetables and made to serve for Sadhya.

Labor Welfare Fund Bill, The Non-Resident Keralites' Welfare Bill, 2008, Kerala Health care Service Pension and Healthcare Service Institutions (Prevention of Violence and Damage to Property) Bill, 2012 to name a few were passed without much discussion and debates on the floor. In contrast, some legislations like Kerala Panchayat Raj Bill 1968, Kerala Municipalities Bill, 1994, Kerala University Bill, 1972, The Kerala Local Authorities (Constitution and Preparation of Electoral Rolls) Bill, 1961 were some of the legislations that were discussed and debated for long hours.

An overall analysis of the passing of the Bills from 1958 to 2015 reveals that during the initial years of KLA the House devoted more focused time on legislative business. More qualitative time had been utilized for discussion of the provisions of the Bill. No legislation was discussed for more than 15 hours after 1982 (i.e., 7th KLA). However, more justified time management is seen after the Seventh KLA. During the period from 1958 to 1982, the majority of the legislation was passed in less than 4 hours. However, during the mid-period (from 1982 onwards), many of the legislations were passed in a span of 4 to 8 hours. The participation from members also shows an increase during the period. More and more MLAs are actively participating in legislative businesses of the House. However, as the researcher stated above, the content of the discussion, qualitatively, had deteriorated. Unnecessary interventions during speeches, socio-political discussions, disagreement on Speaker's Ruling, absence of members in the House, unwanted agendas/protests, walk-outs, etc. had increased. Many Bills had

failed to pass the relevancy test put forward by the researcher. Considering the importance of the Bill, the Members hardly engage in discussion. Whereas, when the topic is general and comfortable, the members voice their opinions and give suggestions. This also results in vague talks.

The number of amendments moved by the members has increased considerably. During the first reading of a Bill, members introduce motions for referring the Bills to select committees and circulating it for public opinion, wherein the usual procedure is referring the Bill to the subject committee, which will be discussed in detail in the forthcoming chapters. In the light of the introduction of such amendments, a member expresses his opinions and sharp criticisms on the Bill. The speech may also extend to purely political talks and even debates. Conversely, the member-in-charge, the Minister, who moves the Bill hardly considers the motions. Moving amendments in the second reading of the Bill is more interesting. Every other Member introduces various amendments to clauses at each stage of discussion. As stated in the above paras, as a routine, most of the amendments introduced by MLAs are rejected by the Minister. During the inception of KLA and the mid-period, the amendments placed by the Members carried explanations along with the reason and object of the specified amendments. And also, the Minister, in some cases, stated the reason for disapproval of the amendments. However, by late, the practice changed. Now the placing of amendments and rejection of the same had become mechanical. Numerous amendments are placed and rejected in no time.

To the question of whether law-making in the KLA suffers from any democratic deficit, the answer based on the foregoing analysis must be in the affirmative. The true meaning of democracy implies how authority is shared among the elected representatives for democratic development and for upholding constitutional values. The key elements of democracy are a system of representation and citizen involvement in decision-making.[35] Legislative business must uphold democratic values. Qualitative legislative business can only command democratic outputs. Rather than increasing quantitative outputs, focusing on the content of quality legislation must be the aim. Politics presume that, whoever wins the majority, has the autonomous power in legislative business. They indeed have the majority, but only a more participatory democracy can reflect the varied interest of a State. MLAs, being elected representatives, are part and parcel of a House. A combined effort can bring forth more qualitative outputs of legislation. For this reason, attitude and mindset should change. Only then the House can positively contribute to the outcome of a Bill. Or it will continue to be the byproduct of the executive.[36] Ideally, the legislature is expected to go deep into every aspect of the proposal and to discuss in a detailed manner every provision of the Bill.

Lawmaking by elected representatives satisfies the requirement of democratic involvement only in theory. It is without much serious discussion and scrutiny that the Bills are often passed and later become the law of the

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[35] The Principles of Democracy, www.sjsu.edu. (last assessed on Aug. 20, 2019).

[36] The Executive formulates a policy, which outlines what a government ministry hopes to achieve and the methods and principles it will use to achieve them. This finds expression in a legislative proposal and is presented to legislature in order to go through the procedural formalities of enactment.

land. Here it is not just non-compliance with the procedure of law-making being violated, but the very basic tenets of democracy, i.e., accountability and responsibility of the government, that is at stake. As a result, there is a democratic deficit in the whole process of law-making.

CHAPTER – IV
REFERENCE OF BILLS TO SUBJECT/SELECT COMMITTEES: TOWARDS DEEPER SCRUTINY AND A MORE PARTICIPATORY EXERCISE

The visible part of Parliament's work takes place on the floor of the House. This includes deliberations and discussions in different stages of the passing of the Bill. This part of the Legislature's work is publicized and closely watched by the public. However, Legislature has another wing where considerable amount of work is done. These are the Legislative Committees, which are smaller units of members of the legislature, and they deliberate on a range of subject matters, bills, and budgets. Legislature transacts a great deal of its business through Committees.

Subject Committees and Select Committees in Kerala provides a platform for added democratization in the law-making process. Select Committees advance the in-depth study of bills by seeking expert evidence and representatives of special interests affected by the measure before them. Scrutiny of a bill by the Subject Committee in which all political parties in the House are represented is also intended for a more democratic process of law-making. The Subject Committee, unlike Select Committee, is a small and compact body that helps in deeper scrutiny of the Bills. The Subject Committees of the Kerala Legislature were devised as a more effective means of scrutiny during executive functioning and of enhancing public

accountability.[1] During the period of initial KLAs, bills that needed evidence were directly referred to the Select Committee. But with the advent of Subject Committees, as a routine, the bills are referred to respective Subject Committees. Only a detailed study of both Subject Committees and Select Committees will bring out the significance of both. The impact of changes that the system underwent with the reference to the Subject Committee as a routine procedure are examined in detail.

4.1 REFERENCE OF BILLS TO SELECT COMMITTEE

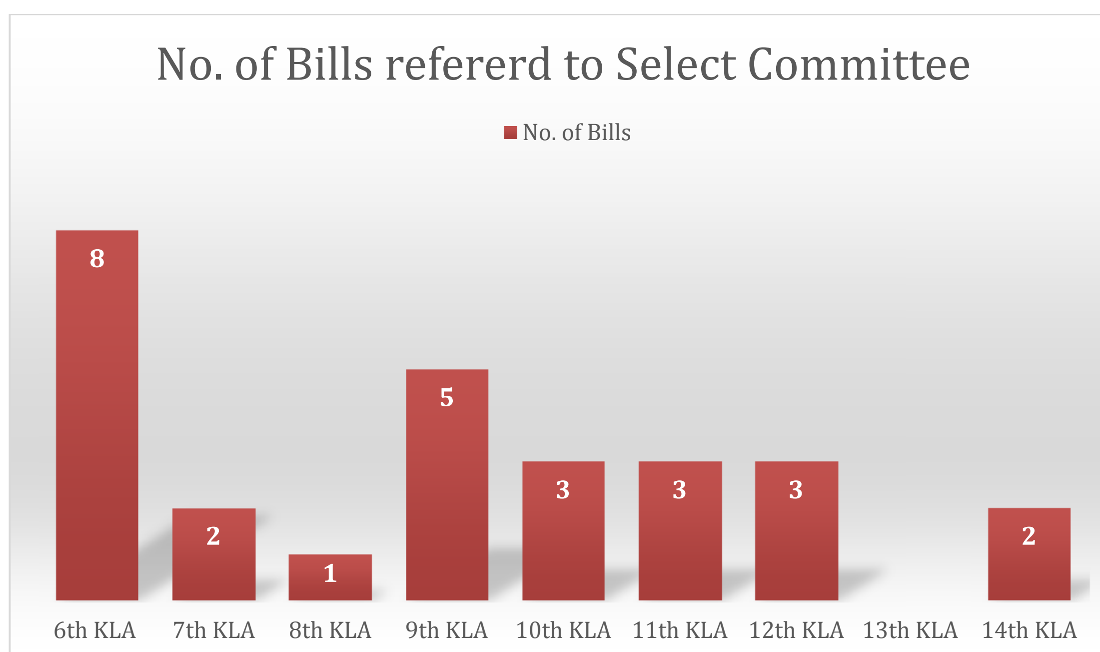
In the Rules of Procedure and Conduct of Business in the KLA, there are provisions for the constitution of Select Committees which are ad hoc Committees for in-depth study of Bills. The members of a Select Committee on a Bill are appointed by the Assembly when a motion that the Bill be referred to the Select Committee is passed.[2] The Select Committee may hear expert evidence and representatives of special interests affected by the measure before them. The Committee reports their findings along with their suggestions for amendments in the Bill.[3] The Report and the Bill as reported by the Select Committees are published in the Gazette.

The Select Committee was constituted in the First KLA itself. From the Sixth Kerala Legislative Assemblies, most of the Bills were forwarded to the Select Committees. With the introduction of Subject Committees, the use of

[1] The Kerala Legislative Assembly, 36 Glorious Years of Subject Committees 28 (1980-2016).
[2] Rule 76 of Rules of Procedure and Conduct of Business of KLA, 1976.
[3] Rule 80 of Rules of Procedure and Conduct of Business of KLA, 1976.

Select Committees was restricted, and only very important Bills which require a hearing of expert evidence and representation of special interests are sent to Select Committee. Table 4.1 shows the number of bills that were referred to the Select Committee from 1980 to 2021.

FIGURE 4.1 Bills Referred to Select Committee



Source: Data collected from Kerala Legislative Assembly

From Figure 4.1, only 27 Bills were referred to the Select Committee from 1980. This shows how sparingly a device that invites expert evidence from representatives of special interest is used. However, it is found that the Bills which were referred to the Select Committee had undergone an in-depth study.[4] The data for analysis had been taken from the reports of the Subject Committee and Select Committee available in the Kerala Legislative Assembly.

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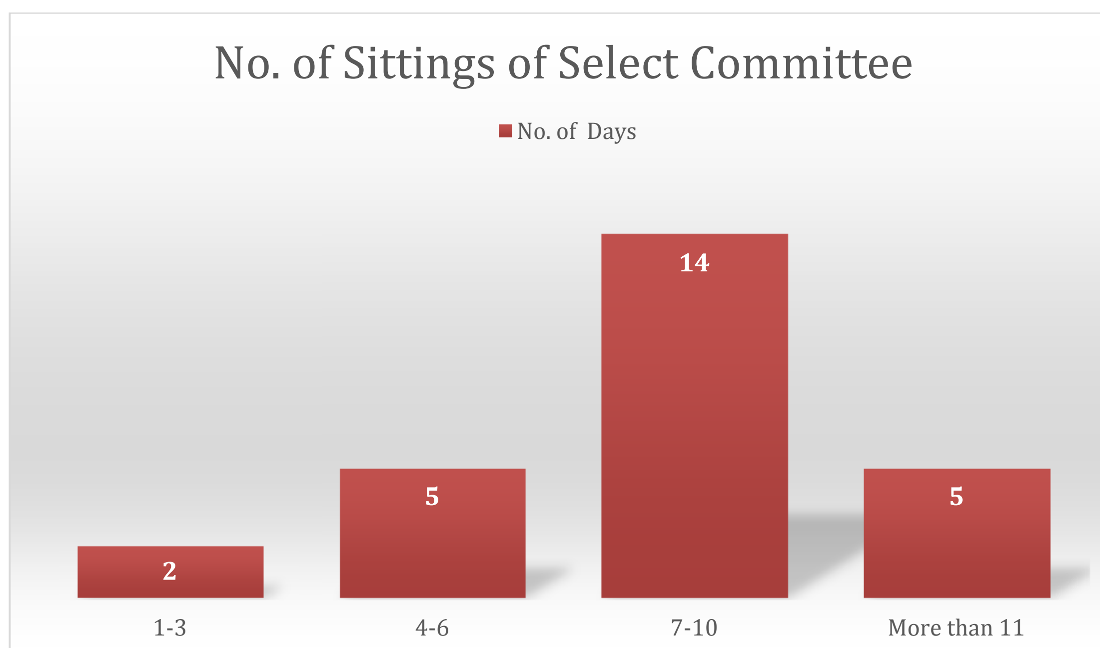
[4] The Bills which were referred to Select Committees from the Twelfth KLA are discussed below

FIGURE 4.2 No. of Sittings of Select Committee



Source: Data collected from Kerala Legislative Assembly

Figure 4.2 shows that each Bill is discussed in the Select Committee for a good number of days. The number of sittings of each Select Committee shows a progressive approach. Since the Select Committee is designated to collect evidence and expert opinions from stakeholders, the duration of the Select Committee stretches to an average of 7 to 10 days. Each Bill is discussed and studied in detail and placed before the House with proposed amendments. Since the report of Select Committees is not disclosed to the public and only the report is presented to the House, it is not possible to evaluate the quality of the discussion in the respective Committees.

However, similar to the Subject Committees, the Select Committee reports are placed before the House. Certain Bills, thereafter are referred to the scrutiny of the respective Subject Committee. The reports of the Select

Committee are discussed on the same lines as those of the Subject Committee, which will be discussed in detail in the next paragraphs, and hence only those amendments which receive the majority in the House are added to the final Bill.

4.1.1 Analysis of the Select Committee Reports

Since the advent of the Subject Committee in the Sixth KLA, only very few Bills were referred to Select Committee. A total of 27 Bills were referred to Select Committees from Sixth to Fourteenth KLA. An in-depth analysis of the Select Committee Reports is not possible since the reports are not accessible to the public. Few Bills[5] that were referred to Select Committees are analyzed here. The Kerala Police Bill, 2010 was referred to the Select Committee on 31st March 2010. Meetings were held in several districts of Kerala to invite opinions and suggestions from elected representatives, different political party leaders, human rights organizations, youth organizations, women organizations, the public, and other officials. The panel visited the States of Tamil Nadu, Andhra Pradesh, Mumbai, and Delhi, which amended their police Acts as per the directions of the Supreme Court, and studied the working of the police department. Based on the study, several points were included in the Kerala Police Bill, 2010. The Preamble incorporated the values respecting human rights in dealing with public grievances and fostered a dedicated police service. Expanded the ambit of the

[5] Only Select Committee Reports from Twelfth KLA are available. The full select committee reports of previous KLAs are unavailable in the library and few were in an unrecoverable state.

meaning of the words, places, vehicles, traffic, etc. in the lines of the study conducted by the Select Committee. General duties of the police officer were amended to include moral values as well. Also, several amendments were carried in the Metropolitan police system. And there was a ramification of police regulations.

In the Report of the Select Committee on Kerala Fishermen Debt Relief Bill, 2007, opinions were invited from Union representatives of fishermen, elected representatives, bank representatives, fishermen welfare groups including matsyafed, religious representatives, public, etc. The Committee visited Gujarat, a State which has a big fishing harbor port. The bill provided for a Debt Relief Commission as a relief for fishermen who are in distress due to indebtedness. The Bill was modified in the Select Committee and amended accordingly. There was strong dissent from the opposition to make the Commission an independent agency and also to include persons who sell fish under the purview of the Bill. However, the dissent was not taken seriously. About the Kerala Farmers Debt Relief Commission Bill, 2016 reffered to Select Committee, the Committee visited different parts of Kerala State like Kanjangad, Kalpetta, Palakkad, Thodupuzha, and Alappuzha circulating questionnaires for collecting opinions. Suggestions were invited from a group of farmers, farmers' union representatives, Local -Self Government representatives, officials, and the public. Though opinions and evidence were collected no major changes which

alter the soul of the original Bill were carried out. Only some additions and corrections were found necessary.

The Kerala Protection of River Banks and Regulation of Removal of Sand Bill, 2000 was referred to the Select Committee on 9th September 2007. After its first meeting on 9th September 2007, the Committee collected evidence and opinions from farmers, agricultural workers, agricultural experts, and other officials related to agriculture. They also visited places in Karnataka, Andhra Pradesh, Maharashtra, and Delhi. Only minor corrections were made to the original Bill. In the Select Committee, the Bill was strongly dissented to by some members of the opposition. They opposed stating that the Government must assist the farmers and not take over the farmers' land even at a prevailing market price. There was dissent to many other key provisions. However, the Government did not take the dissent on a serious note.

In Kerala Metropolitan Transport Authority Bill, 2018 opinions were invited from experts, officials, elected representatives of people, public, political party leaders, trade unions, private bus owners' associations, residential associations, and auto-rickshaw drivers' union. The Act provided for the constitution of the Metropolitan Transport Authority in the State of Kerala. Apart from some other minor corrections, additions, and substitution of words, the provisions of resignation, removal, and suspension of members, declaration of urban mobility areas and alteration of their limits, etc. had undergone modifications as suggested by Select Committee.

4.2. REFERENCE OF BILLS TO SUBJECT COMMITTEE

The KLA had initiated so many innovative experiences that have made far-reaching changes in the legislative scrutiny. The year 1980 was a milestone in the history of KLA. It was in that year the Sixth KLA had paved the way for the constitution of a new set of committees called Subject Committees.[6]

The functions of the Subject Committee shall be[7]- (i) to scrutinize the demands for grants ; (ii) to examine legislation ; (iii) to study and report on a specified area of Governmental activity in the wider public interest, or a project, scheme or undertaking intended for the general welfare ; (iv) to advise Government on a question of policy or legislation on which Government may consult a Committee ; (v) to discuss generally and formulate views on,- (a) State's Five Year Plan Programmes and their implementation ; (b) Centre-State relations in so far as they concern the State of Kerala ; (c) Reports of Public Service Commission; (d) Reports of Public Undertakings; (e) Reports of any statutory or other body, including any Commission of Inquiry, which are laid before the Assembly; (f) Annual Performance Report of Government Departments ; and 9 (vi) to consider the draft rules to be framed by,- (a) the Government or any other authority in pursuance of the powers delegated by an Act of the legislature; (b) the Government in pursuance of the powers delegated by an Act of Parliament.

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6 Handbook on Subject Committees (Incorporating Amendments up to 2010)3 Secretariat of the Kerala Legislature (May 2011).

7 *Id.*

Each Subject Committee shall consist of not more than eleven members and not less than seven members who shall be nominated by the Speaker, as soon as may be, after the commencement of the Assembly or from time to time.[8] No Member shall be a member of more than one Subject Committee: Provided that a Minister shall be ex officio member of every committee in respect of which the subject/subjects allocated to such committee may fall within his responsibility.[9] The Speaker may nominate one of its members to be its Chairman. The term of the Subject Committee shall be thirty months from the date of constitution of the Committee or until a new Committee is nominated.

There shall be fourteen Subject Committees as enumerated in the Fifth Schedule.[10] The formation of the committees gave a new dimension to the system of law-making in the KLA. Almost all Bills are referred to Subject Committee for legislative scrutiny. The Subject Committees cover a wide variety of subjects touching all areas of legislation. Each Subject Committee shall deal with a plethora of subjects shown against it in the Fifth Schedule.

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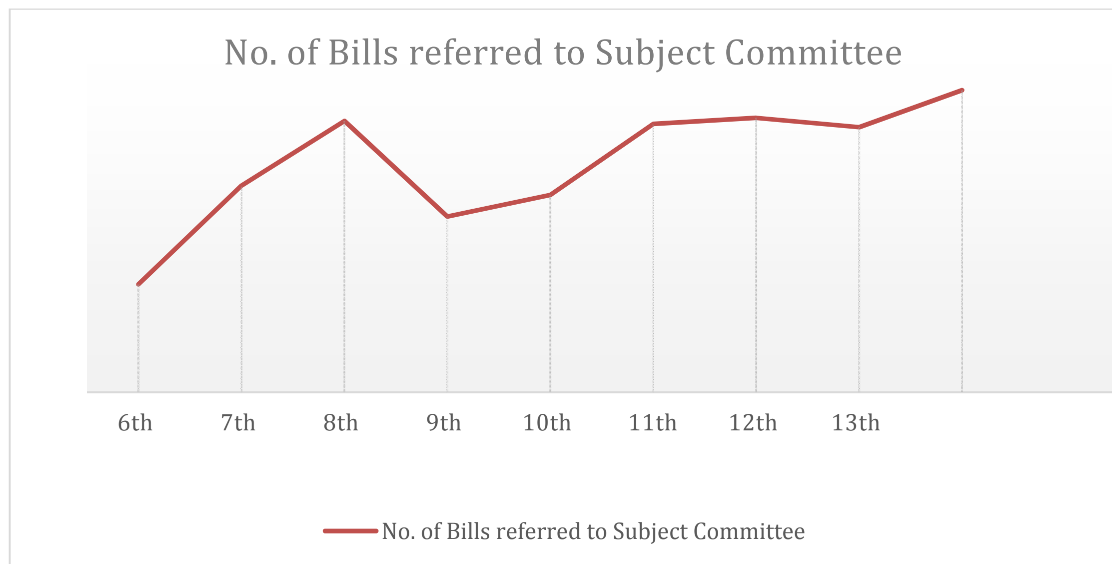
8 Cl. 233(1) of Rules of Procedure and Conduct of Business, KLA, 1976.

9 Cl. 233(2) of Rules of Procedure and Conduct of Business, KLA, 1976.

10 Handbook of Subject Committee, supra note 6 at 3.

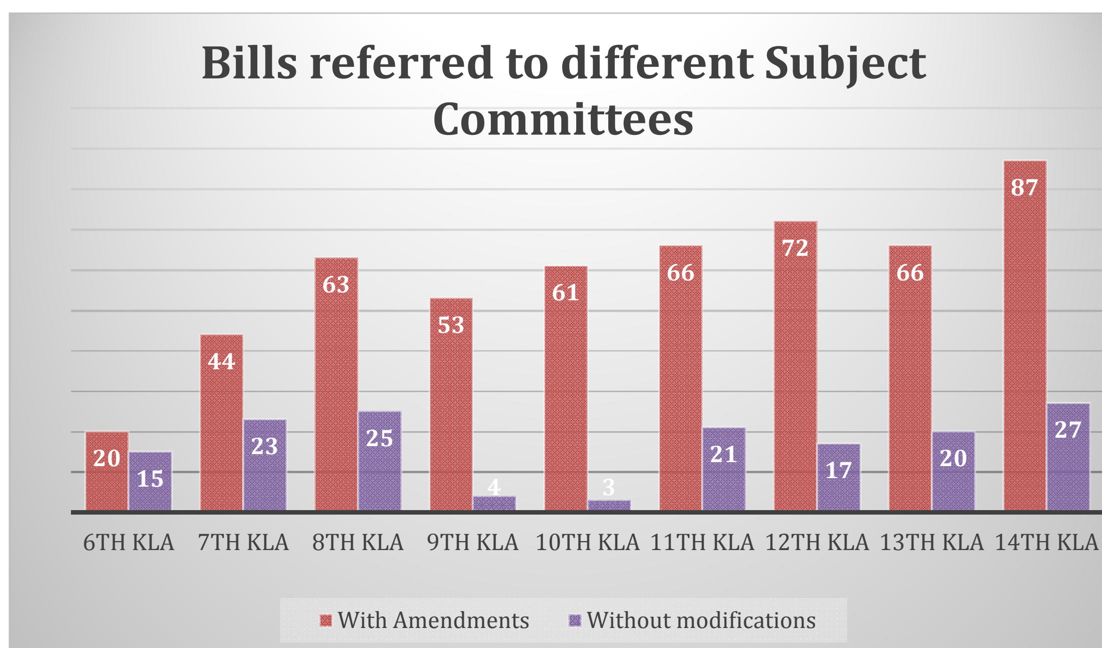
FIGURE 4.3 Bills Referred to Subject Committee



Source: Data collected from Kerala Legislative Assembly

As discussed already, it was from the Sixth KLA, that the Subject Committee was introduced. From there on, most of the Bills were forwarded to the respective Subject Committees as a routine task. Figure 4.3 clearly shows an increase in the number of Bills including amendments and financial Bills forwarded to respective Subject Committees. There were only 10 Subject Committees till the 11th KLA. Four new committees namely Food, civil supplies and corporation (SC XI), Health and Family Welfare (XII), Social Service (SC XIII), and Home Affairs(SC XIV) were introduced from the Twelfth KLA, by which 14 Committees were entrusted with the scrutiny of the Bills.

FIGURE 4.4 Bills Referred to Different Subject Committees

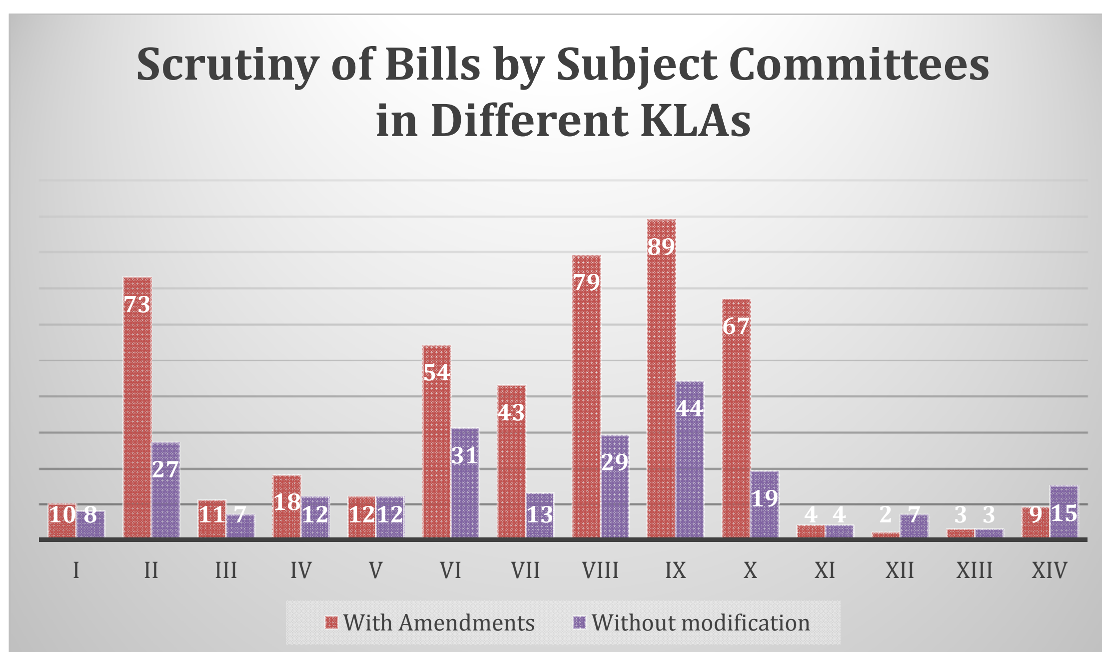


Source: Data collected from Kerala Legislative Assembly

Over the period i.e., from Sixth KLA, 1980 to Thirteenth KLA, 2021, a total of 687 original Bills were referred to different Subject Committees. (See Figure 4.4). A Subject Committee can scrutinize the Bills and forward the report back to the Assembly with or without any modifications. The Sixth KLA graph shows that out of the 35Bills forwarded to different Subject Committees, only 25 Bills were reported with modifications, and the rest, around 15 Bills, were reported with no amendments. Similarly, in the Seventh KLA, of the 67 Bills which were forwarded to the subject committees, as many as 44 were reported to Assembly with modifications, and 23 were referred without any modifications. From the Eighth KLA, one could see a drastic change in the number of Bills that were modified and there is a sharp decline in the number of Bills not being modified or corrected. In the Ninth

and Tenth KLA, the differences are so evident that less than 8 Bills were reported without any modification. In the Eleventh, Twelfth, and Thirteenth KLA, only a small proportion of the total number of Bills was reported without any modification. Fourteenth KLA gives a clearer picture of the amendments and recommendations put forward by the Committee. Out of the 87 Bills that were referred to Subject Committees, 27 were submitted without any modifications. Bills that were submitted without modifications were mostly the first, second, and third amendment Bills which generally includes a minor change in certain provision. Some of those amendment Bills were The Madras Hindu Religious and Charitable Endowments (Amendment) Bill, 2017, The Abkari (Amendment) Bill, 2018, The Kerala Shops And Commercial Establishments (Amendment)Bill, 2018, The Kerala Veterinary and Animal Sciences University (Amendment) Bill, 2019, Calicut University (Alternate Arrangement Temporarily of the Senate and. Syndicate) (Second Amendment), 2018, Kerala Municipality (Third Amendment) Bill, 2018, Kerala Panchayat(Third Amendment)Bill, 2018, The Kerala High Court (Amendment) Bill, 2018, etc. About the original Bills, most of the Bills were reported with ample suggestions and modifications, though some were minor corrections. This gives a positive note that subject committees are contributing to the improvisation of the Bills.

FIGURE 4.5 Scrutiny of Bills

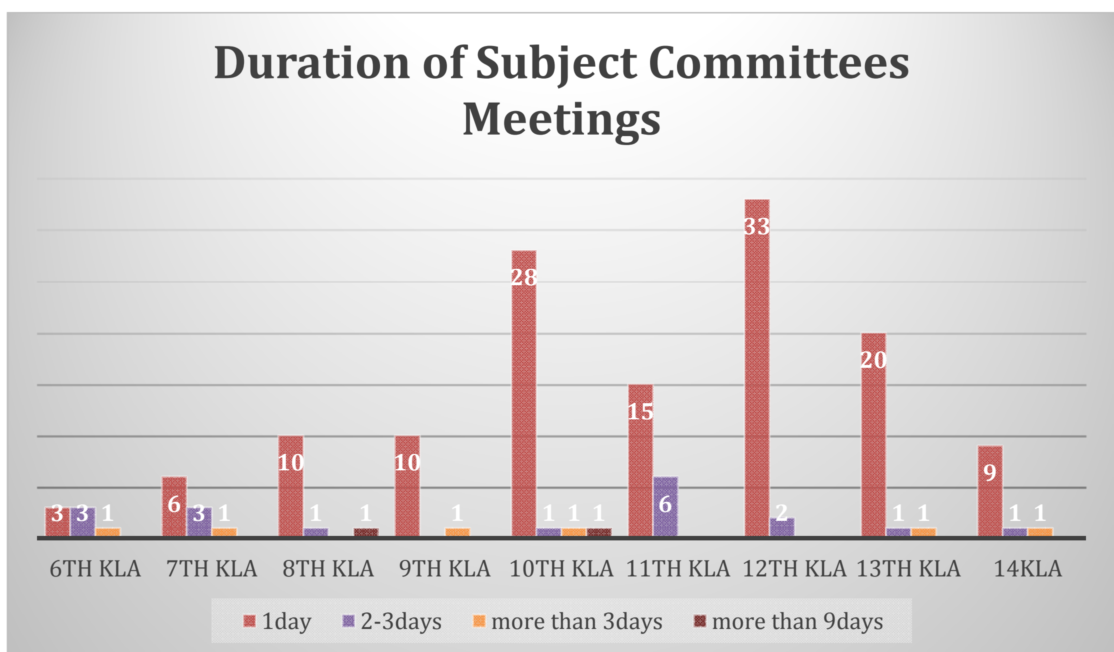


Source: Data collected from Kerala Legislative Assembly

Each Subject Committee deals with a specific subject and the Bills are referred to each Committee based on the subject the Bill deals with. The IX Subject Committee of Local Administration and Rural Development and Housing had scrutinized the greatest number of Bills with a total of 89 Bills over the period (Sixth to Thirteenth KLA). Along with it, the Subject Committees of Economic Affairs (SC VIII), the Subject Committee of Forest, Environment and Tourism (SC X), and the Subject Committee of Land, Revenue and Devaswom (SC II) shows creditable scrutiny of Bills. And all other Subject Committees such as Agriculture, Animal Husbandry and Fisheries (SC I), Industries and Minerals (SC IV), etc. had also contributed substantially. However, the new Committees such as the Food, Civil Supplies and Corporation (SC XI), Health and Family Welfare (XII), Social Service (SC XIII), and Home Affairs (SC XIV) are yet to show their performance in

the Thirteenth KLA. The graph shows only very few Bills were scrutinized during the period from 2006 to 2013 in Subject Committee XI, XII, XIII, and XIV. It is also true that the subject of legislation is very less in categories of health, family welfare, social service, home affairs, etc. But the Fourteenth KLA shows a peak in the performance of the XIV Subject Committee. Around 24 Bills were sent for scrutiny by the Subject Committee of Social Service and Home Affairs, of which 9 were reported with major modifications and corrections. This is also because in the Fourteenth KLA, as seen in the previous chapter, the Government gave priority to social services. However, the other new committees are still at a dormant stage and only in the upcoming years, the performance and work of the new Committees would be evaluated.

FIGURE 4.6 Duration of Subject Committee Meetings



Source: Data collected from Kerala Legislative Assembly

The graph depicts the time/duration of which a Bill is referred in the respective Subject Committee and a report is made thereby. From the Fig. 4.6, it is clear that the greatest number of Bills were discussed in one sitting. Once the Bills are referred, the Committee is designed to make the report after a detailed discussion of the provisions of the Bill and forward the report to the Assembly. Except for a very few Bills, all others are discussed in a span of 1-3days. The data in the graph only shows time taken for original Bills enacted by the Legislature. Amendment Bills and finance Bills are exempted here. This is because amendments, in most cases, would be a minor variation from the existing provisions. Hence a long-detailed discussion is not intended in case of amendments, unlike the original Bills.

Around 130 original Bills were discussed in one day in the respective Subject Committee. This includes Bills such as Kerala Registration of Tourist Trade Bill, 1989 and Kerala Civil Courts Bill in the Eighth KLA, Kerala Industrial Infrastructure Development Bill, 1993, Kerala State Commission for Backward Classes Bill, 1993, Kerala Local Fund Audit Bill, 1993, Kerala Tailoring Workers' Welfare Fund Bill,1992, Kerala Local Authorities (Constitution and Preparation of Electoral Rolls) Bill, 1994 and Kerala State Backward Classes(Reservation of Appointments or Posts in the Services under the State) Bill, 1995 and Kerala (SC & ST)Regulation of Issue of Community Certificate Bill, 1996 in the Ninth KLA. Kerala Restriction on Transfer by and Restoration of Lands to ST Bill, 1999 and Kerala Local Authorities(Prohibition of Defection) Bill, 1999in the Tenth KLA, The

Pariyaram Medical College and Hospital (Transfer for Administration) Bill, 2001, The Kerala Protection of River Banks and Regulation of Removal of Sand Bill, 2001.Kerala Loading and Unloading (Prohibition of Extraordinary, Intimidatory or other Unlawful Practices Bill, 2002, Kerala Tourism (Conservation and Preservation of Areas) Bill, 2005 in the Eleventh KLA. Similarly, in the Thirteenth KLA important Bills such as The Kerala Health Care Service Pension and Healthcare Service Institutions (Prevention of Violence and Damage to Property) Bill, 2012(Act 14 of 2012),The Kerala State Right to Service Bill, 2012 (Act 18 of 2012),The Kerala Prohibition of Charging Exorbitant Interest Bill, 2012 (Act 2 of 2013), The Kerala State Commission for Minorities Bill, 2014 (Act 5 of 2014), The Kerala State Youth Commission Bill, 2014 (Act 6 of 2014), The Kerala Fish Seed Bill, 2014 (Act 4 of 2014),The Kerala State Road Transport Corporation (Passenger Group Personal Accident Insurance, Improved Passenger Amenities, Employees' Social Security and Cess on Passenger Ticket) Bill, 2014 (Act 5 of 2015) ,The Kerala Protection of Interests of Depositors in Financial Establishments Bill, 2013 (Act 7 of 2015), The Kerala Anganawadi Workers' and Anganawadi Helpers' Welfare Fund Bill, 2016 (Act 10 of 2016) Malayalam Language (Compulsory Language) Bill,2017 Kerala Prevention of Damage to Private Property and Payment of Compensation Bill, 2019, Sree Narayana Guru Open University Bill, 2021 etc were discussed in just one sitting. A study shows that during the Sixth and Seventh KLA more Bills were discussed in more than one sitting. Bills such as Kerala Slum Areas

(Improvement & Clearance) Bill were discussed in 4 days, the Cochin University of Science and Technology Bill, 1986, the Kerala Command Areas Development Bill, 1986 in 3 days, and the Kerala Gandhiji University Bill, 1984 in 7 meetings. From the Tenth KLA, the number of days was reduced to a maximum of 3 days, and more and more Bills were discussed in a single sitting and many important Bills did not get the importance they ought to receive. An exception to this practice is the Kerala Clinical Establishments (Regulation and Registration) Bill, 2017 of the Fourteenth KLA which was discussed in the Subject Committee for a span of 7 days. The Kerala Investment Promotion and Facilitation Bill 2018 was also discussed for 3 days in the Subject Committee.

4.2.1 Analysis of The Subject Committee Reports

The Subject Committee is hailed as an important milestone in scrutinizing the legislation. From the Sixth KLA, most of the Bills were forwarded to the Subject Committee as a routine task. However, for an in-depth analysis, the reports of the Subject Committee are not available to the public. The available data shows that many of the Bills that were referred to the Subject Committee were scrutinized in one day and some even the same day on which the Bills were referred. Close to the Thirteenth KLA, the number of Bills that were scrutinized in a single day irrespective of the importance nor its numerous sections, increased drastically from the inception of Subject Committees. This leads to an important question as to the outcome of the Subject Committee meetings. The core question that is addressed here

in the forthcoming paras is the qualitative improvement of a Bill, after the discussion in the respective Subject Committees. Since the report of the Subject Committee is not publicly available, the data that is introduced in the Assembly, viz., the Bill as reported by the Subject Committee, is used for the analysis together with the amendments made in the Subject Committee.

The study of Subject Committee reports shows that many Bills are discussed elaborately and some major amendments are introduced in the Committee Reports. For example, The Kerala Slum Areas (Improvement and Clearance) Bill, 1980 of the Sixth KLA, had a good discussion in the Subject Committee on clauses 3, 5, 8,11,12,21,27,30,31,32, and 39 of the Bill. Minor corrections were made and the overall discussion broadened the scope of the Bill. Similarly, in the Kerala Command Areas Development Bill, 1986 Clauses 2,4,10,11,47,50 were well discussed. Minor and major changes were made. The Cochin University of Science and Technology Bill, 1986 was discussed very elaborately and almost all clauses (provisions 1-52) were well discussed. Similarly, the Kerala Gandhiji University Bill, 1984, the Kerala Public Libraries Bill, 1989, Kerala Waste Water Bill, Kerala Public Men's Corruption(Investigation and Inquiries) Bill, 1987, Kerala Industrial Single Window Clearance Boards, and Industrial Township Area Development Bill, 1999, Kerala Highway Protection Bill,1999, Kerala Irrigation and Water Conservation Bill, 2003, Monsoon Fishery (Pelagic) Protection Bill,2007, The Kerala Devaswom Recruitment Board Bill, 2015, Kerala Ground Water (Regulation and Control) Bill, 2002 and The Kerala Technological University

Bill, 2015 were discussed in detail in the Subject Committee. While discussing the Kerala Ground Water (Regulation and Control) Bill, 2002, the Committee also suggested a tour program to study the water conservation and irrigation plan in areas of Andhra Pradesh and Tamil Nadu. Key points were added during the discussion. Also, in the Monsoon Fishery (Pelagic) Protection, after the general discussion on the subject, it was posted for collection for advice from the community. Lots of amendments were introduced in the due course including minor changes and substitution of words.

During the discussion of the Bills in the Subject Committee, some members raise their dissent regarding certain provisions of the Bill or against the Bill as a whole. Some of the notable dissents raised during the period are in the Kerala Public Men’s Corruption (Investigation and Inquiries) Bill, in which dissent was expressed against the narrow scope of the Bill. Suggestions were made to widen the ambit of corruption. Again, in Kerala Local Authorities (Constitution and Preparation) of Electoral Rolls) Bill, 1994, 4 members dissented against the Bill. Similarly, in Kerala Highway Protection Bill, 1999, The Pariyaram Medical College and Hospital (Transfer for Administration) Bill, 2001, The Kerala Protection of Interests of Depositors in Financial Establishments Bill, 2013 (Act 7 of 2015), The Kerala Healthcare Service Pension and Healthcare Service Institutions (Prevention of Violence and Damage to Property) Bill, 2012, The Kerala Lifts and Escalators Bill, 2013 were some of the major Bills where dissent was expressed. The highest

number of dissents was raised against The Kerala Prohibition of Charging Exorbitant Interest Bill, 2012 which included 10 members raising dissent against certain provisions of the Bill. Similarly, the Common Wealth Trust, Kozhikode (Acquisition and Transfer of Undertaking) Bill, 2012, which did not get the assent of the President, was also dissented and criticized on the basis that the Bill does not contain provisions for utilization intended to be acquired for comprehensive industrial or commercial purposes. Several dissents were also placed against certain provisions of the Ayurveda Health Centres (Issue of License and Control Bill and Health and Allied Sciences Bill, 2020.

The above data shows that most of the Bills that were introduced in the Subject Committee received a good makeover in Subject Committee. However, the truth is that there are Bills that are not discussed at all and hardly any amendments have been introduced except minor changes and substitution of words in the Committee. Some examples are Kerala Fishermen Welfare Societies Bill, 1980 wherein no substantial changes were made except an increase in the term of elected members, Kerala Marine Fishing Regulation Bill, 1980, Kerala Apartment Ownership Bill, 1983, Sree Sankaracharya University of Sanskrit Bill, 1994, Kerala Restriction on Transfer by and Restoration of Lands to ST Bill, 1999. Kerala Industrial Revitalisation Fund Bill, 1999, The Pariyaram Medical College and Hospital (Transfer for Administration) Bill, 2001, Recognition of Trade Unions Bill, 2010, The Kovalam Palace (Taking over by Resumption Bill) 2005, The

Kerala Kissan Pass Book Bill, 2005, The Kerala Health care Service Pension and Healthcare Service Institutions (Prevention of Violence and Damage to Property) Bill, 2013, The Thunjath Ezhuthachan Malayalam University Bill, 2013, The Kerala State Commission for Minorities Bill, 2014, The Kerala Fish Seed Bill, 2014, The Kerala Prohibition of Charging Exorbitant Interest Bill, 2012 were some of the important Bills which were hardly discussed at the Subject Committee. Among the Bills of the Fourteenth KLA, the most discussed Bill in the Subject Committee is the Municipality Bill, 1994. The Subject Committee discussed the Bill in a span of 9 days and lots of amendments were introduced. Similarly, in the discussion of the Malabar University Bill, 1996, the Committee recommended the Law Department redraft the whole Bill in tune with the Kerala University Act, 1974. The Committee had disagreements with many clauses in the Malabar University Bill, 1996. Evidence was taken from the stakeholders and consulted with experts while redrafting the Bill.

In the Subject Committee, Minister shall be the ex officio member of every committee in respect of which the subject/subjects allocated to such committee may fall within his responsibility. The Minister as a Chairman of the Committee helps to present the Government perspective in the right sense. And also, the Minister is the Chairman, which improves the importance of the Committee. The above study shows that the Subject Committee was made to be a platform for an in-depth discussion regarding the provisions and scope of

the Bills. And it is supposed to be a platform for independent, unbiased discussion.

However, the truth is that the quorum of the Subject Committee is again a small group consisting of conflicting interests reflecting their political views. The Minister has a dominating role in the Committee and his influence affects the deliberations of the Committee. Thus, in actual practice majority in the Subject Committee are members of the ruling party and their suggestions reflect a political consensus hence they are readily accepted.

But when it comes to dissent, often expressed by opposition members, the proposed amendment/ suggestions rarely receive any support either in the Subject Committee or on the floor of the House. Dissent is a core principle of democracy; expressing one's view is an important constituent element in a democracy. The examples already discussed show that in the Subject Committee one or more members raise their dissent against certain provisions of the Bill or the Bill as a whole. When the dissent so expressed comes to the floor of the House, it is hardly given importance and given weightage. Since the dissent is often expressed by the members of the opposition party, whether the dissenting opinion gives a positive impact on the Bill or not, it fails on the floor. The dissent is sometimes included for the sake of expressing dissent and considered as a tool of argument against the ruling party and expressed without any basis. Even though it is expressed in a serious note, dissent is considered with least importance in the House.

However, the above practice is only with the proposed amendments by an opposition member which propose any substantial improvement in the content of the Bill. Amendments which include minor corrections, the substitution of words, etc are mostly accepted by the House uniformly. The Kerala Command Areas Development Bill, 1986, Kerala Fishermen Welfare Societies Bill, 1980, Kerala Marine Fishing Regulation Bill, 1980 Kerala Apartment Ownership Bill, 1983, Sree Sankaracharya University of Sanskrit Bill, 1994, Kerala Restriction on Transfer by and Restoration of Lands to ST Bill, 1999, Kerala Industrial Revitalisation Fund Bill, 1999, The Pariyaram Medical College and Hospital (Transfer for Administration) Bill,2001, Recognition of Trade Unions Bill,1999, The Kovalam Palace (Taking over by Resumption Bill) 2005, The Kerala Kissan Pass Book,2005, Bill, etc were some of the Bills where the minor amendments were readily accepted without much opposition.

The working of the Subject Committees in the Fourteenth Legislative Assembly shows a good example. Kerala Clinical Establishments (Regulation and Registration) Bill, 2017, Kerala Madrasa Teachers' Welfare Fund Bill, 2019, Malayalam Language (Compulsory Language Bill)2017, and Sree Narayana Open University Bill, 2021 had a good discussion in the respective Subject Committees and unlike, previous practices, many of the major amendments were accepted. Numerous minor amendments were proposed by the subject committee in the Kerala Micro Small and Medium Enterprises Facilitation Bill, 2019, Kerala Christian Cemeteries (Right to Burial of

Corpse) Bill, 2020, etc, which were also welcomed by the Assembly. However, about the dissent expressed by members in a Subject Committee, like other KLAs, the Fourteenth KLA also gave the least importance to the opinions. Dissents were expressed in the case of Kerala Christian Cemeteries (Right to Burial of Corpse) Bill,2020, Kerala Investment Promotion and Facilitation Bill 2018, Malayalam Language (Compulsory Language)Bill 2017, and Sree Narayana Open University Bill, 2021.

4.2.2 Pre and Post Era of Subject Committee

The study on Subject Committee shows that the Subject Committees had paved a great platform for scrutinizing the Bills subject-wise for improving its content. Legislative work is transacted not in the House alone, a great deal of it is done in the Committees also. Parliamentary Committees are, in fact, mini legislatures.[11] So are the committees of the legislature. In Committees, the bills undergo deeper scrutiny on behalf of legislative bodies, as these bodies do not find sufficient time at their disposal. Given their enormous work, they are often termed mini legislatures.

Before this innovative concept of Subject Committees, the Bills either went to the Select Committee or it was straightway discussed on the floor. But this mandatory procedure of sending all Bills to the respective Subject Committee paves a stage for discussing the Bill in detail and formulating views on the Bills. In an exceptional case, Subject Committees had suggested

[11] Committees-MiniLegislature, https://rajyasabha.gov.in/rsnew/performance_profile/2006/content2.pdf (Last assessed on Dec 20, 2021).

the House re-sending the Bills to the legislative section to re-draft the Bill. The Malabar University Bill, 1996 had been so re-drafted on the lines of the Kerala University Act, 1967 by the recommendation of the Subject Committee. Also, the titles of many Bills had been changed on the recommendation of the Subject Committee. For example, the title of The Kerala Technological University Bill,2014, to Kerala Science and Technological University Bill, modification of the title of The Kerala Healthcare Service Pension and Healthcare Service Institutions (Prevention of Violence and Damage to Property) Bill, 2013, etc. Likewise, many minor corrections, amendments, the substitution of appropriate words in place of wrong usages, etc had been the contribution of respective Subject Committees.

A drawback in the study of the Subject Committees and Select Committees is that the scope for in-depth qualitative analysis is absent since the reports are not accessible. However, from the available data, the Subject Committee shows a satisfactory performance except in a few cases as mentioned above. However, those amendments mentioned by the opposing parties in the Subject Committee are not welcomed in the House easily. This is evident in the case of the discussion in The Kerala Prohibition of Charging Exorbitant Interest Bill wherein most of the suggestions put forward by the opposition in the Subject Committee as well as in House were rejected by the Minister. Similarly, in the Kerala Public Men’s Corruption (Investigation and Inquiries) Bill, 1987, the demand of opposition to widening the scope and

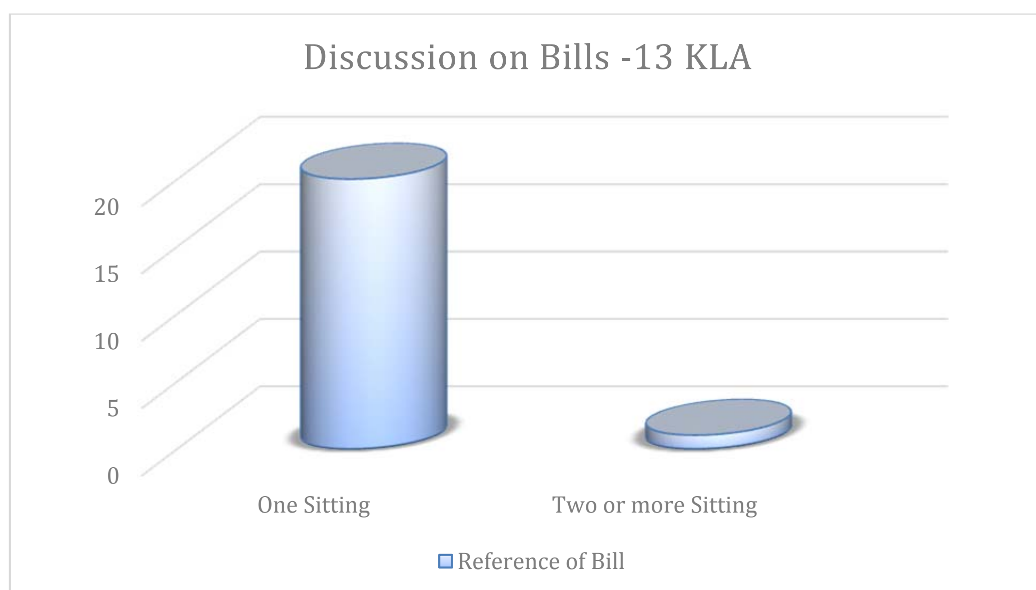
ambit of corruption in Subject Committee as well as on the floor of the House was not approved by the majority of the House. However, these specific instances do not undermine the Subject Committee as a whole.

An overall analysis of the working of the Subject Committee over the period from Sixth to the Fourteenth KLA shows that more serious discussions and added number of sittings were common during the Sixth, Seventh, Eighth, Ninth, and Tenth KLA, but the Eleventh, Twelfth and Thirteenth KLA show reduced the number of sittings for each Bill, wherein several important Bills were not discussed fruitfully in the Subject Committee.

A graphical representation of the performance of the Subject Committees in the most recent Thirteenth KLA and Fourteenth KLA throws more light on our analysis.

FIGURE 4.7 Sittings in Subject Committee

Discussion of Bills in Sittings of Subject Committee

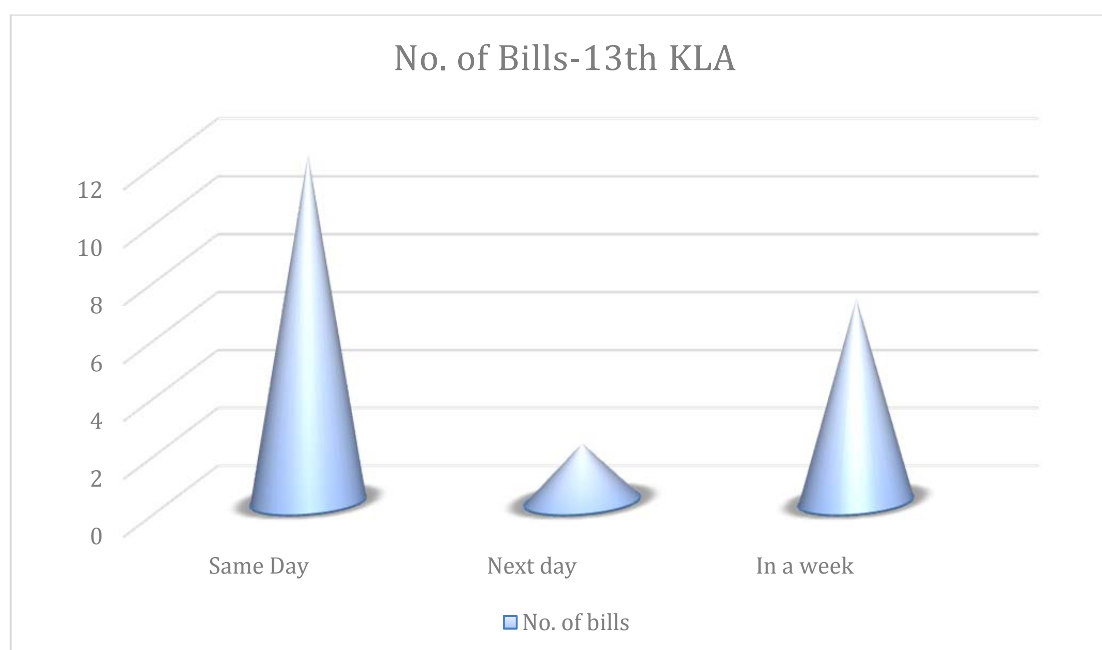


Source: Data collected from Kerala Legislative Assembly

Figure 4.7 shows that of the 20 original legislation, 19 were discussed in just one sitting and it made the report on the same day itself. This includes scrutinizing some important Bills in the Thirteenth Kerala Legislative Session. The only Bill that was discussed for a span of 3days was the Kerala Technological University Bill,2015.

Further, the Figure shows that 12 of them were discussed on the same day of the Assembly session which includes key Bills such as The Common Wealth Trust, Kozhikode (Acquisition and Transfer of Undertaking) Bill, 2012, The Kerala Lifts and Escalators Bill, 2013, The Kerala Real Estate (Regulation and Development) Bill, 2015, The Malayalam Language (Discrimination and Enrichment) Bill, 2015. Two of them were discussed the next day after the report was referred to Subject Committee. And only seven of them were discussed in the coming week without much haste.

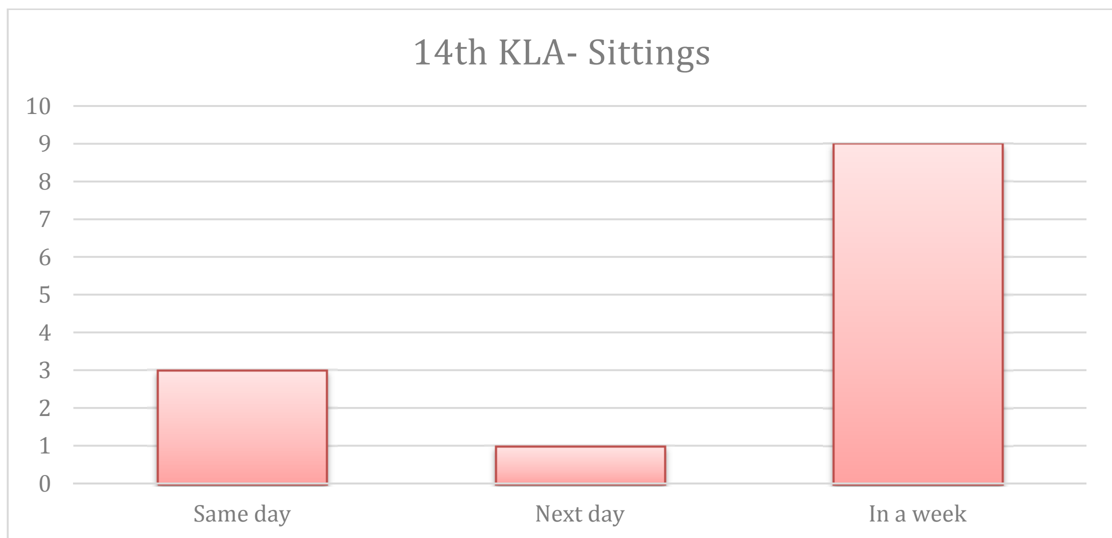
FIGURE 4.8 Proximity of Sessions and Sittings of Subject Committee



Source: Data collected from Kerala Legislative Assembly

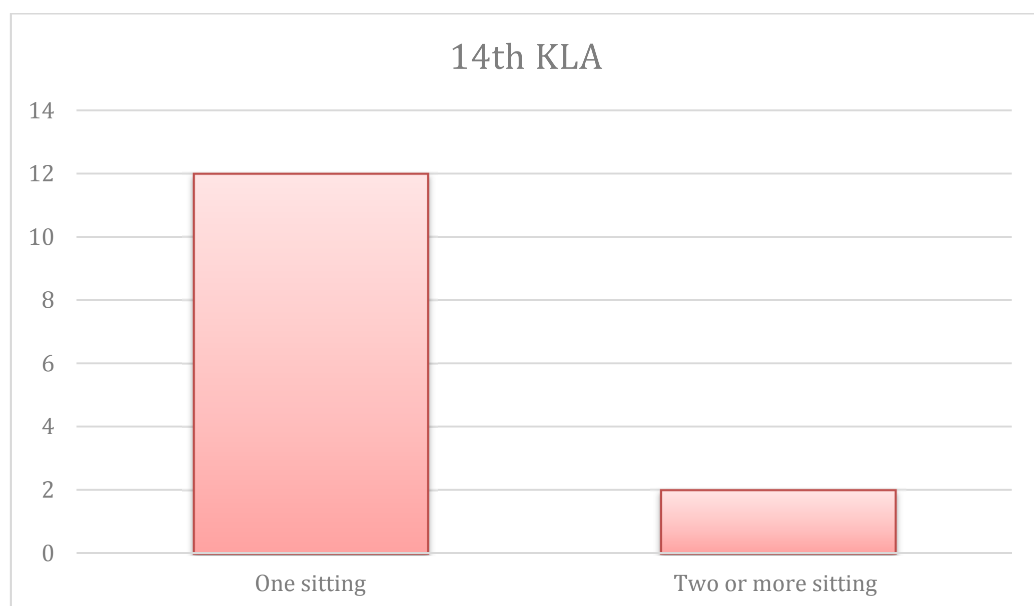
The Subject Committee was constituted with many expectations to scrutinize the legislation more systematically. The Committees must continue to strive hard to keep those standards in the future also. The procedure of acceptance of Subject Committees in a major revamp and only this could give the intended benefit of the Subject Committee.

FIGURE 4.9 14th KLA Sittings



Source: Data collected from Kerala Legislative Assembly

FIGURE 4.10



Source: Data collected from Kerala Legislative Assembly

In contrast to Thirteenth KLA, the Subject Committee shows a better performance in the Fourteenth KLA (See Figure 4.8 and 4.9). Out of the 13 original Bills, 12 were discussed in one sitting and the Kerala Clinical Establishment (Regulation and Registration) Bill, 2017 had 7 sittings and the Kerala Investment Promotion and Facilitation Bill, 2018 had 5 sittings. The data further show that the Subject Committee meetings were not held in a haste and only 3 Bills were discussed on the same date after the assembly sessions to which they were referred. The other Bills were discussed in one week. Further, we have already discussed the qualitative output of the committees.

The study on Subject Committee and Select Committee reveals that to get the desired output of vibrant and relevant parliamentary practices, a more systematic approach to the committee system is necessary. From the data analysis, it is seen that some discussions in the Committees are concluded on an urgent basis without any fruitful discussion. Despite the express rule stated in the Rules of Procedure R.237(2) that there shall be at least one clear day in between the day of reference of a Bill to the Subject Committee and the date of the meeting of the Subject Committee for the purpose, unless the Speaker, in his discretion, allows the meeting to be convened, many Subject Committee sittings are done on the same day the Bill is referred to the Subject Committee. The exception is often practiced as a rule. Further, a provision to incorporate qualitative amendments in the final output of the Bill is necessary. Except for the Fourteenth KLA, the effort of the Subject Committee often

fails to get accepted in the Assembly. Moreover, the right to dissent is an important factor that needs to be recognized in our system.

The Minister has a dominating role in the Committee and his influence affects the deliberations of the Committee. Hence it is suggested that Chairman may be any other Member, who is not the Chairman of the bill. It is recommended that two members must be added as invitees at the time of formation of the Subject Committee. A social worker, working in the relevant field connected in the area of proposed legislation and an Advocate, who has at least 10 years of practice is proposed to analyze the scope and impact of the provisions of the bill.

With the advent of the Subject Committee, the reference of Bills to Select Committees had drastically reduced. More Bills must be referred to Select Committee so as obtain expert evidence from representatives of special interests.

The Subject Committee and Select Committee reports must be published to ensure more transparency and accountability. A guideline must be formulated to select the important bills that need to be referred to select committees, which is necessary since it serves as a tool to obtain expert evidence from representatives of special interests. To uphold democratic principles and people's aspirations, the committees must strive to march to excellence in parliamentary democracy.

CHAPTER – V

PRIVATE MEMBERS' BILLS AND OTHER INPUTS IN LAW-MAKING: AN EXPLORATION

5.1 PRIVATE MEMBERS' BILLS

Democratic theory induces governments to be responsive to the preferences of people. Government adopts several tools to collect the evidence of changing needs and attitudes of people. This includes the appointment of the Law Reform Commission and the placing of Private Members' Bills (PMB), which draws the attention of the Government outside their political agenda. Further, through the system of election, the political parties try to influence the public by placing a picture of the prospective Government. All these processes strive for a responsive government in a democracy.

Legislature is the temple of democracy.[1] The Members of a Legislative Assembly (hereinafter referred as MLAs) are the first and foremost legislators. Every MLA, whether in the Government or the opposition is empowered to propose new laws. Bills introduced by Ministers are referred to as government Bills. They are backed by the government, and reflect its legislative goals. Any Member of Legislature who is not a Minister is referred to as a private member. Both Ministers and Private Members contribute to the

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[1] President Ram Nath Kovind said addressing the Nation on the eve of the 75th Independence Day, 15th August, 2021. Address to the Nation by President Ram Nath Kovind on the Eve Of 75th Independence Day, THE HINDU, 14th Aug., 2021. https://www.thehindu.com/news/resources/address-to-the-nation-by-president-ram-nath-kovind-on-the-eve-of-75th-independence-day/article35914979.ece

law-making process. Private Member's Bills are piloted by non-Minister MLAs. Their purpose is to draw the government's attention to what individual MLAs see as issues and gaps in the existing legal framework, which require legislative intervention. Rule 70 of Rules of Procedure and Conduct of Business in the KLA states that any member other than a Minister desiring to move for leave to introduce a Bill, shall give notice of his intention and shall, together with the notice, submit a copy of the Bill and an Explanatory Statement of Objects and Reasons which shall not contain arguments. The Speaker if he thinks fit can revise the statement of Objects and Reasons. Rule 70 Cl. (2) Rules of Procedure and Conduct of Business, KLA provides that if the Bill is a Bill which under the Constitution cannot be introduced without the previous sanction of the President or recommendation of the Governor, the member shall annex to the notice such sanction or recommendation, and the notice shall not be valid until this requirement is complied with. The period of notice of a motion for leave to introduce a Bill under this rule shall be fifteen clear days unless the Speaker allows the motion to be made at shorter notice.[2]

The admissibility of a PMB is decided by the Speaker of KLA. The Member must give at least a month's notice before the Bill can be listed for introduction. While Government Bills can be introduced and discussed on any day, PMBs can be introduced and discussed only on Fridays. Rule 20 of the Rules of Procedure and Conduct of Business in the KLA provides for the allotment of time for Private Members' Business and precedence of business.

[2] Rule 70, cl.3 of Rules of Procedure and Conduct of Business, KLA, 1976.

It states that the last two and a half hours of a sitting on Friday shall be allotted for the transaction of Private Members' Business. Further, in consultation with the Leader of the House and the Leader of the Opposition, the Speaker may allot any day other than a Friday for the transaction of Private Members' Business. If there is no sitting of the Assembly on a Friday, the Speaker may direct that two and half hours on any other day in the week may be allotted for private members' business. On the scheduled Friday, the Private Member moves a motion for introduction of the Bill. The relative precedence of notices of Bills given by the Private Members shall be determined by ballot to be held by the orders made by the Speaker, on such day as the Speaker may direct. [3]The motion for leave to introduce Bill may be opposed, and in such cases, the Speaker after permitting, if he thinks fit, a brief explanatory statement from the Member who moves and from the Member who opposes the motion, may, without further debate, put the question.[4] Provided that where a motion is opposed on the ground that the Bill initiates legislation outside the legislative competence of the Assembly the Speaker may permit a full discussion. [5] If it is to be taken up for discussion, upon conclusion, the Member piloting the Bill can either withdraw it on the request of the Minister concerned, or he may choose to press ahead with its passage. In the latter case, the Bill is put to vote and, if the Private Member gets the support of the House, it is passed.

[3] Rule 21 of Rules of Procedure and Conduct of Business, KLA, 1976.
[4] Rule 71 of Rules of Procedure and Conduct of Business, KLA, 1976.
[5] *Id.*

There is also a Committee on Private Members' Bills and Resolutions which allots time to different PMBs and goes through all of them. Rule 219 provides for the constitution of a Committee on Private Members' Bills and Resolutions. The Committee on Private Members' Bills and Resolutions consists of not more than seven members and the Committee shall be nominated by the Speaker at the commencement of the Assembly or from time to time, as the case may be. The functions of the Committee according to Rule 220(1) Rules of Procedure and Conduct of Business, KLA shall be:

(a) to examine all Private Members' Bills after they are introduced and before they are taken up for consideration in the Assembly and to classify them according to their nature, urgency, and importance;

(b) to recommend the time that should be allocated for the discussion of the stage or stages of each Private Member's Bill and also to indicate in the time-table so drawn up the different hours at which the various stages of the Bill in a day shall be completed;

(c) to examine every Private Member's Bill which is opposed in the Assembly on the ground that the Bill initiates legislation outside the legislative competence of the Assembly, and the Speaker considers such objection prima facie tenable;

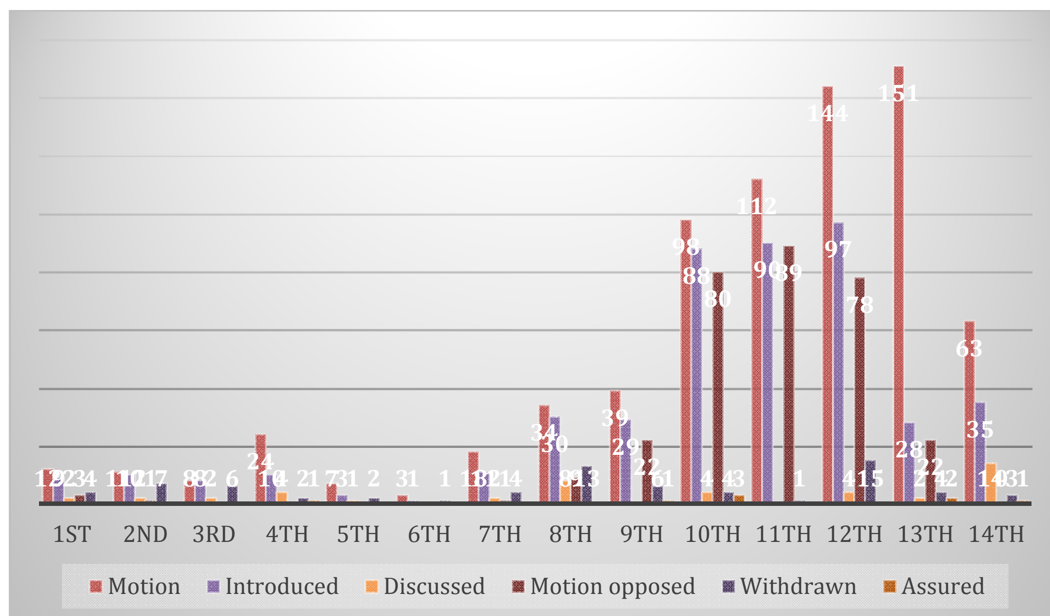
(d) to recommend time limit for the discussion of Private Members' Resolutions and other ancillary matters;

(e) to examine and report to the Assembly whether-- (i) the resolutions passed by the Assembly from time to time have been implemented

and where implemented whether such implementation has taken place within the minimum time necessary for the purpose; and (ii) the assurance, promises, undertakings, etc; given by Ministers, from time to time, on the floor of the Assembly relating to Private Members' Bills or Private Members' Resolutions have been implemented and where implemented such implementation has taken place within the minimum time necessary for the purpose.

Thus, the Committee helps in classifying these Bills based on their nature, urgency, and importance. This classification, in turn, determines which of the introduced Bills are discussed first. PMBs were designed to empower MLAs to draw attention to issues that were willingly or unwillingly ignored by the party at the helm.

Figure 5.1 PMB From 1st KLA to 14th KLA



Source: Data collected from Kerala Legislative Assembly

Figure 5.1 shows how PMBs were transacted during the period from First KLA to the Fourteenth KLA. During the initial period, the motion for which several private bills moved were fewer. In the First, Second, and Third KLA, motions for 12 PMBs were moved. Further, the number of introduced PMBs was much lesser. Only 9,10 and 8 Bills respectively were introduced on the floor. From the 10th KLA, the motion for several private bills began to rise drastically. From 39 PMBs in the Ninth KLA, the number rose to 98 in Tenth KLA, 112 in the Eleventh KLA, 144 in the Twelfth KLA, and 151 in the Thirteenth KLA. The data shows a positive approach of the members of Legislature in contributing towards lawmaking in the State. In the Fourteenth KLA, the number of private bills which were submitted for motion is reduced to 63. The reduction may be also because of the Covid pandemic, but one cannot wholly justify the poor performance, since only two years of the entire Assembly tenure was affected due to Covid 19. Further scrutinizing of the whole data shows a dismal state of affairs. Whether fewer the number or greater than the number of private bills, none of them were properly recognized on the floor or resulted in any follow-up action.

During the First KLA, of the 12 motions for PMBs, only 9 were introduced in the Assembly, of which only 2 were discussed and 4 of them were withdrawn after the reply from the Minister, and 3 of them were opposed by the Minister. Of the discussed 2 Bills, the discussion was inconclusive. In the Second KLA, of the 10 private bills introduced, 7 were withdrawn by the respective members after the Minister's reply. And again, in the 2 Bills taken

up for discussion, it was inconclusive. This is the case of every PMB taken up for discussion. Only 5 minutes were allotted to PMBs by the Committee of the PMB and Resolution. And hence, though the Bill is taken up for discussion, the speech by the member ends up without any firm conclusion. In the Third KLA, though 8 Bills were introduced, 6 were withdrawn after the reply from the respective Minister. Out of the 24 motions for PMBs in the Fourth KLA, only 10 were introduced, of which, 4 had an inconclusive discussion, and 2 were withdrawn. One of the PMBs, namely Kerala Public Men (Inquiries) Bill, 1971, when introduced, the Minister gave assurance that legislation will be made on the subject. Consequently, the Kerala Public Men's Corruption (Investigation and Inquiries) Bill was enacted in the Eighth KLA by a different Government. Rather than allowing the non-Ministers of the Assembly to be a part of governance, the Government in power tries to prevent a PMB to come to the limelight and may enact the legislation on the same lines at a later date.

In the Fifth and Sixth KLA, only very few PMBs were set in motion. In the Fifth KLA, of the 7 PMB, only 3 were introduced and in the Sixth KLA, motion for only 3 PMB came up, of which only 1 was introduced. From Seventh KLA, the number of PMBs slowly began to increase. In the Seventh KLA, 11 PMBs were introduced, out of which 4 were withdrawn after the Minister's reply. In the Eighth and Ninth KLA, the number of PMBs was 34 and 39 respectively. When the number of PMBs increased, the motions opposing the Bill also increased gradually, whereas the PMBs that were

withdrawn by the members began to decrease. In the Ninth KLA, when the number of PMBs that was introduced was 29, motions opposing the Bill made by the respective Minister were 22. Similarly, in the Tenth KLA motion of PMB was 98 and introduced ones were 88, of which 80 were opposed by the Minister. Only 4 were withdrawn by the Members.

In the Ninth KLA, one PMB which was introduced was the Kerala Backward Class of Citizens (Reservation in Appointments and Posts) Bill, 1994. When introduced the Minister concerned, gave assurance of enacting a similar Bill by the Government, and hence the proposal of the PMB was withdrawn. Later a Bill on the same lines, i.e., Kerala State Backward Classes (Reservation of Appointments or Posts in the Services Under the State) Act, 1995 was enacted by the Government. In the Tenth KLA also the respective Ministers gave the assurance on 3 PMBs namely, The Thrissur Kole Development Authority Bill,1999, Code of Criminal Procedure (Kerala Amendment) Bill, 1996, and Kerala Agriculturists' Pension Welfare Fund Bill, 1998. Though a Kole Development Authority was formed, separate legislation was not enacted as assured. Code of Criminal Procedure was later amended on the lines of the proposed private bill. Though an Agriculturists' Pension Welfare Fund Bill was not enacted, the Government implemented an Agriculturists' Welfare Fund Pension Scheme.

From the Eleventh KLA, the data shows a tremendous increase in the number of PMBs. In the Eleventh KLA,112 motions for PMB came up, of which 90 were introduced in the Assembly. A huge number, i.e., 89, was

opposed by the Minister, and one was withdrawn by the Private Member himself after the Minister's reply. Similarly, in the Twelfth KLA, of the 144 PMBs which came up, 97 were introduced, of which 78 were opposed by the Minister. And 15 were withdrawn after the Minister's reply. The above data shows the casual approach to PMBs in the Assembly. The pending PMBs which were not discussed due to lack of time, are posted next Friday. Private Member's Resolutions and PMB are taken up only on Fridays.

In the Thirteenth KLA, motions for 11 PMBs were moved. But only 28 were introduced on the floor and 22 PMBs were opposed by the respective Minister. A total of 20 days were allotted for Private Members Business in the Thirteenth KLA. Private Members' Business was not transacted during the Fourth, Tenth, Eleventh, Twelfth, and Sixteenth sessions.

In the Fourteenth KLA, of the 63 PMBs, only 35 were introduced in the Assembly. Others were either not scheduled, postponed due to holidays, or not introduced due to the absence of the concerned Member. The data shows 14 PMBs were discussed on the floor which is comparatively a good number compared to previous Assemblies. In the Fourteenth KLA, not even a single PMB was opposed, whereas in the Thirteenth KLA, as seen above, around 22 PMBs were opposed by the concerned Minister. One Bill namely, Kerala Right to Pure Water Bill, 2016 was withdrawn after the assurance given by the Minister. However, so far it was not implemented.

In the Fourteenth KLA, PMBs were introduced only for11days. However, a further dissection shows that only two were discussed on the floor in a span of 5years. One was withdrawn after discussion and the other motion was withdrawn by the Member on the assurance given by Minister that the Bill will be considered. There is also one Bill that was withdrawn on the assurance given by the Minister without even discussion. The Kerala State Unaided School Teachers Welfare Fund Bill, 20l2, and The Kerala Hotels (Classification and Unification of Price) Bill, 2014 were the Bills withdrawn by the Members on the assurance by Minister. Both of them did not see light regardless of the assurance. In 2018 the Government had proposed to consider the Minimum Wage for Private School Teachers in Kerala, which was a recommendation of the then PMB.

About other Bills, most of them were not discussed due to lack of time. This shows that the Assembly considered PMB with the least importance. The only exception to the Private Members' Business is of the first session of the Fourteenth KLA where all 7 motions were considered by the House. However, all were opposed by the Minister for Finance, Law, and Housing.

Thus, we could see that no proper representation or acceptance is given to the PMB. The motion is hardly introduced in the Assembly. Only a discussion on the proposed Bill will expose the need and scope of the Bill.

An important method of promoting democratization is the recognition of PMBs. This is considered valuable because MLAs are close to their

respective constituency and connected with the people in real-time. Moreover, PMBs were designed to empower MLAs to bring attention to issues that were willingly or unwillingly ignored by the party at the helm. It helps to draw the government's attention to what individual MLAs see as issues and gaps in the existing legal framework, which require legislative intervention. Further, this unfortunate trend restricts whatever little space individual members have left for legislative activity. However, the study shows that PMBs are considered the least important legislative business. Ministers consider legislative business as their domain and they are not willing to accept the proposals made by MLAs. This explains the fate of PMB.

A systematic guideline must be framed for the discussion of PMB in the Assembly. This includes an increase of days fixed for discussion of PMB, systematic allocation of PMB, in case of assurance given by the Minister, a follow-up method to see its implementation. Usually, the lack of intent is evidenced by low attendance on Fridays, probably because most of the members will be eager to go back to their constituencies during the weekend. Hence, a day other than Friday may be allotted for discussion of PMBs.

5.2 LAW REFORM COMMISSION

Law reform is a sublime response to constitutional responsibility. In the ancient period, when religious and customary law occupied the field, the reform process had been ad hoc and they were not institutionalized through duly constituted law reform agencies. Since the third decade of the nineteenth century, Law Reform Commissions were constituted by the Government from

time to time and were empowered to recommend legislative reforms to clarify, consolidate and codify particular branches of law where the Government felt the necessity for it. The first such Commission was established in 1834 under the Charter Act of 1833 under the Chairmanship of Lord Macaulay which recommended codification of the Penal Code, the Criminal Procedure Code, and a few other matters.[6]

After independence, the Constitution of India with its Fundamental Rights and Directive Principles of State Policy gave a new direction to law reform geared to the needs of democratic legal order in a plural society.[7] In response to the rising demands in Parliament and outside, a Central Law Commission was established to recommend revision and update laws to serve the changing needs of the country. The First Reform Law Commission of Independent India was established in 1955 with the then Attorney-General of India, M.C. Setalvad, as its Chairman.[8] Over the years, 21 more Law Reform Commissions have been constituted, each with a 3 year term and different terms of reference.[9]

Kerala Government, in a sublime response to its constitutional responsibility, established a progressive law reform project, on the lines of the Central Law Commission. The First Law Reform Commission in Kerala

[6] LAW COMMISSION OF INDIA https://lawcommissionofindia.nic.in/main.html. (visited June 6, 2020, 8:00 AM).
[7] *Id.*
[8] *Id.*
[9] *Id.*

presented its report on 24th January 2009.[10] The Committee consisted of 10 members including its Chairman Justice V.R. Krishna Iyer and Vice-Chairman Justice T.V. Ramakrishnan. The Commission recommended 65 Bills for new legislation.[11] The Bills recommended by the Commission included many important Bills which were not addressed by the legislative wing of the Government. It includes The Kerala Prohibition of Plastic Articles Bill, , The Kerala Disposal of Confiscated and other Vehicles Bill, The Kerala Public Grievances Redressal Tribunal Bill, The Kerala Vexatious Litigation Bill, The Kerala Regulation to Control Noise Generated from Loudspeakers, Fireworks Display, and other Plural Sources Bill, The Kerala Domestic Workers(Livelihood Rights, Regulation of Employment, Conditions of Work, Social Security, and Welfare) Bill, The Kerala Unorganised Workers (Rights, Regulation of Employment, Conditions of Work, Social Security, and Welfare) Bill, The Kerala Clean Air Bill, The Kerala Disposal of Garbage and Waste Management Bill, The Kerala Alternative Energy Sources Bill, The Kerala Pubic Charities Societies Bill, The Kerala Electronic Waste Management Bill, The Kerala Widow's Right to (Shelter and Maintenance)Bill, The Kerala Right to a Small Farm and Shelter Bill, The Kerala Women's Code Bill etc.[12] Likewise, the Commission recommended many Bills covering a variety of social, economic, secular, and welfare subjects which were never addressed by any Kerala Government during its

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[10] Kerala Law Reforms Commission, http://www.lawreformscommission.kerala.gov.in/ (Last accessed on Jan.3rd, 2020).

[11] *Id.*

[12] Final Report of Law Reforms Commission, Government of Kerala, Report (2009).

regime. The Commission also recommended 30 Bills for amending the existing legislation which was enacted by the legislature and 9 Bills for amending rules, regulations, etc.[13]

Though the Law Reform Commission recommended 65 new draft laws and numerous amendments, only two were considered by the Government. The Kerala Medicare Service Persons and Medicare Service Institutions (Prevention of Violence and Damage to Property) Bill was the sole Bill that successfully became an Act.[14] The Act was renamed as Kerala Healthcare Services Persons and Healthcare Service Institutions (Prevention of Violence and Damage to Property, 2012. The content of the Bill is almost the same apart from the substitution of certain terminologies and usages.[15] Another Bill that sought Government attention is the An Act for Fair Negation, Salutary Regulation, and Special Legitimation, in Public Interest, of Hartals and Validation of Workers Right to Strike Bill.[16] The Bill which was titled as Harthal Control Act envisages implementing a series of steps to check the shutdown call given by different outfits including political parties.[17] Forced closure of shops, institutions and forcefully blocking people from their activities can get six months imprisonment and Rs 10000 fine if found guilty as per the Bill.[18] The Bill was referred to the select committee in 2015 but no progress had been made so far. In 2019 LDF Government proposed to

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13 *Id.*
14 KERALA LAW REFORM COMMISSION, supra note at 10.
15 FINAL REPORT, supra note 12.
16 KERALA LAW REFORM COMMISSION, supra note at 10.
17 I*d.*
18 *Id.*

reintroduce the Hartal Bill, which was pending before the Assembly Select Committee since 2015. However, no law had been made so far.[19]

By an Order dated 09.03.2017 Government has constituted the Kerala Law Reforms Commission consisting of Justice K.T. Thomas, Former Judge of the Supreme Court as Chairman, Sri. K. Sasidharan Nair as Vice-Chairman, and Dr.N.K.Jayakumar, Adv. M.K.Damodharan and Smt.Lizama Augustin as Members.[20] The main objective of the Commission was to examine the existing laws and suggest amendments as are necessary according to the present-day needs, to make recommendations for repealing obsolete laws, to recommend new laws as are necessary for the present-day context, and to systematically develop and reform law.

Commission submitted the following draft Bills along with reports to the Government;

(1) Kerala Vexatious Litigation (Prevention) Bill, 2018.

The Honorable High Court had repeatedly made observations emphasizing the necessity for a legislation to prevent Vexatious litigations. The Division Bench of the Honorable High Court of Kerala in its judgment has observed that the prevention of vexatious litigation is a very laudable object.[21] The Government referred this matter to the Law Reform Commission and the Commission proposed enacted a uniform legislation in this regard.

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[19] The Kerala Regulation of Hartal Bill, http://www.niyamasabha.org/bills/13kla/published/369-pub-eng.pdf

[20] KERALA LAW REFORM COMMISSION, supra note at 10.

[21] State of Kerala v. T.A. Rajendran 1988(1) KLT 305.

(2) The Kerala Prevention and Eradication of Inhuman Evil Practice Sorcery and Black Magic Bill, 2019.

In response to the alarming reporting of instances of inhuman evil practice, sorcery and black magic by conmen, Government sought the opinion of the Commission regarding the enactment of a legislation on the matter of eradication and prevention of inhuman evil practice and black magic. The Commission considered the subject in detail, including the constitutionality and prepared a draft bill to promote scientific temper and social awareness in the society so as to create a healthy and safe environment with a view to protect the common people from the fraudulent and exploitative evil practice and black magic. [22]

(3) The Kerala Regulation of Procedure for Preventing Person to Person Transmission of Infectious Organisms Bill, 2019.

During a pandemic situation, the State Government has to be empowered to prohibit social gatherings or activities including religious celebrations by Gazette Notification.[23] The Commission considered the matter in detail and prepared a draft bill. The preparation of the draft bill by the commission carries a prophetic blend in the background of Covid-19 pandemic sweeping the whole world.

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[22] Law Reforms Commission, Government of Kerala, Report (Vol.1) 7 (October 2020)
[23] *Id*. at 10

(4) The Kerala Emergency Medical Care and Protection of Good Samaritans Bill, 2019.

Several incidents have been reported in Kerala in which victims of accidents or persons in emergency medical conditions have been refused medical care. In Paramanand Kartara v. Union of India,[24] the Supreme Court of India emphasised the need for making it obligatory for hospitals and medical practitioners to provide emergency medical care. The Commission prepared a draft bill on this regard after considering the suggestions and recommendations obtained in this subject.

(5) The Kerala Christian Cemeteries(Right to Burial of Corps) Bill, 2019.

Some of the believers belonging to the category approached the Commission and requested the need of a Statute to tackle the issue of delay and decent obstructions for a Commission timely burial of corpse in certain cemeteries of Christians. The Commission also found that Government's intervention in the issue was inevitable and the draft bill was prepared. the government took up this bill and enacted a law as 'Kerala Christian Cemeteries (Right to Burial of Corpse) Act, 2020'.

(6) The Malabar Hindu Religious and Charitable Institutions and Endowments Bill, 2020.

In the proposal submitted by the Devaswom Department to the Government for enacting a new law for the Hindu Religious and Charitable

[24] AIR 1989 SC 2039

Institutions in the Malabar area of the State of Kerala by repealing the applicability of the exiting law, there were some provisions which attracts huge financial obligations on the part of the Government and some provisions appeared to be in conflict with the provisions of Indian Constitution and States Re-Organization Act, 1956.[25] The Commission after elaborate discussions with the stakeholders and an indepth study in the legal perspective, prepared a draft Bill.

(7) The Kerala Protection from Lynching Bill, 2020.

The Hon'ble Supreme Court of India in its judgment dated 17.07.2018 in Walla v. Union of India and Others (W.P.(c) No.754/2016) had made a recommendation for enacting legislation to curb mob violence, in the name of religion, race, caste, sex, place of birth, dietary practices, sexual morality and sexual orientation which results in loss of life, loss of livelihood and causes injuries to persons. Law Department has forwarded a file of the Home Department requesting to make legislation in this regard and the Commission prepared a draft Bill after detailed deliberations and submitted the same to the Government.

(8) The Kerala Christian Marriage Registration Bill, 2020.

There was no unified law in the State of Kerala for the purpose of registration of Christian marriages. The present registration of Christian marriages under the rules was found inadequate by the Commission. Hence the Commission found the necessity and drafted a Bill for the same.

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[25] LAW REFORMS COMMISSION, supra note 22 at 49.

(9) The Kerala Prevention of Fraud Bill,2020.

The Hon'ble High Court of Kerala in its judgment in B.A.No.5077/2013 (Shalu Menon @ Shalu Venogopal v. the State of Kerala) has observed that it is high time that those who are at the helm of affairs view seriously the need to enact special legislation to deal with the offense of fraud with clear and stringent penal provisions for effectively curbing and meeting out punishment to those who dupe and defraud the innocent public by fraudulent activities has to be brought into force without any delay. A file of the Home Department in this regard was forwarded to the Commission by the Law Department and the Commission prepared a draft Bill with stringent penal provisions and submitted the same to the government.

(10) The Kerala Protection of Right, Title and Interest of Parish Church properties and Right of worship of the Members of Malankara Church Bill, 2020.

Hon'ble Supreme Court in the judgment in Civil Appeal No.3674/2015 (Varghese v. St.Peters and Paul Syrian Orthodox Church) has held that the Malankara Churches, its properties, and other matters are to be governed by the 1934 constitution and the same was an unregistered instrument does not create, declare, assign, limit or extinguish whether in present or in future any right, title or interest, whether vested or contingent in the Malankara Church properties and only provides a system of administration. Even after the judgment, such disputes continue to exist concerning the right, title, and interest over the properties and buildings and right of worship which causes

serious law and order problems in various parts of the State. The attempts initiated by the government to resolve the differences between the two factions did not yield any positive results, the Commission prepared a Bill to put the ownership and administration of churches to the majority parishioners and submitted the same to the government.

(11) The Kerala Residents' Associations (Registration and Regulation) Bill, 2021.

At present, so many residents' associations are functioning in this State. In each resident's association, there may be about 100 to 150 families as members. Now they get registration from the Travancore-Cochin (Literary, Scientific and Charitable Societies Registration) Act,1955, and they are not under any lawful control for such associations by the government or other authorities. So that financial irregularities and other similar administrative malpractices are happening in almost all such associations. Considering the above circumstances, Commission prepared a Bill for compulsory registrations for the existing associations and the association to be formed and for the constitution of Apex bodies for regulating and controlling them and submitted the same to the Government.

(12) Kerala Domestic Workers' (Regulation and Welfare Bill) Bill, 2021.

Domestic workers which include a large number of women workers and home nurses are now a neglected lot and are being exploited by society in one way or the other. The Commission has decided to recommend a law on this subject to enable the domestic workers to enjoy their rights guaranteed by

the Constitution of India by constituting a Welfare Board to implement a scheme for welfare and the benefit of domestic workers including home nurses.

(13) Kerala Repealing and Saving Bill, 2021.

Among the terms of reference to the Commission, one of the major studies is to identify laws that are no longer needed or relevant and which are liable to be repealed and also to identify laws that are not in harmony with the changing or modern times. The Commission proposed to repeal 37 Laws applicable to Travancore, Cochin, Travancore-Cochin, and Kerala Acts which are no longer needed in those areas, and also proposed to repeal 181 Amendment Acts which need not be retained as separate Acts since they have become part of their parent Acts.

The Law Reform Commission submitted its report and the Government is yet to implement the recommendations. A study of the recommendations made by the Law Reform Commissions reveals that only a few recommendations are generally accepted by the Government.

Justice Ajit Prakash Shah, Chairman of the 20th Law Commission of India through his study shows that approximately 45 percent of the recommendations made by the Commission so far have been either implemented or made into laws.[26] The pace of the legal reform depends on the studies conducted by the Law Commissions. The recommendations in the

[26] Prachi Shrivastava, How laws have been getting better, LIVEMINT, https://www.livemint.com/Politics/9vX3JeYApFnGllm5vHpHlN/How-laws-have-been-getting-better.html (June 14, 2020, 9:29 PM).

form of draft Bills and amendments constitute a great input to the entire legislative exercise undertaken by the government. The process of the Commission in evolving a Bill, or any other task, involves huge research backing when compared to the process adopted by the Legislative Department and its subsequent scrutiny by the Legislature. Once the Commission receives a reference from the Government or decides to take up an issue of its own accord, a consultation paper is drafted. Once the Commission receives responses to the paper, it forms a working Sub-Committee to work on the report. The Sub-Committee that is formed consists of full-term members including Judges and legal experts as well as researchers and consultants. An in-depth study of the subject takes place and several rounds of internal consultation are carried out, which is in turn discussed in the full commission.

The Law Reform Commission often works sincerely for legal development. But lack of definite composition nor fixed functions dilute the importance of the Law Commissions. The Government under its discretion constitutes it as an *ad-hoc* body. All these factors affect the implementation of the recommendations of the Law Commission. On a major step, the Kerala Government had placed the Church Bill prepared by the Kerala Law Reforms Commission within the public domain for elicing public views.[27] This is a major step since it is the first time a bill recommended by the Kerala Law Reform Commission is placed for public opinion without legislative scrutiny.

[27] The Hindu, *Awaiting public's views on Church Bill* dated 25th March, 2022 at 6.

The Government needs to reconstitute the Law Reform Commission and provide it with statutory status. The Commissions which had been effectively working for reforming legal provisions and new legislations need to be mandatorily considered by the Government.

5.3 Election Manifesto: Solemn promises or Hollow Declarations?

In every election political parties come up with a new election manifesto, which is essentially a list of policies that a political party says it will enact if it is voted into office at a general election. Manifesto has become an important asset in warranting the winning of candidates or parties in a general election. Manifesto serves a very important function because they are the main source of communicating with voters what they intend to do when they are elected and why they should give their vote to a particular political party. These manifestos will form the basis of the election campaign. This means that they are usually written in a persuasive style that attempts to make readers believe that the policies they contain will be in their best interests.[28]

The word manifesto itself originates from the Latin manifestum, which refers to a list of facts. Though a manifesto is just a simple list of proposed ideas, these days political manifestos tend to be lengthy documents that explain the party's policies in great detail. The subjects usually covered are economy, health, education, welfare, jobs, housing, defense, law and order,

[28] Conservative Party, Conservative Party Manifesto: Invitation to Join the Government of Britain, The Conservative Manifesto 2010.

environment and agriculture, etc. The body of a manifesto usually breaks the party's policies into several key areas.

In Kerala at the time of the general election, political parties compete among themselves in presenting their proposed policies and objectives through manifestos. The manifesto is a promise given to the voters that when they come to power, they will fulfill these policies in their best interests. This is a practice that adds to the democratization of lawmaking by the elected representatives. Two manifestos of different political parties are taken for study to see how the parties when elected fulfill these promises in a democratic sense. Since the research is oriented to the study of lawmaking, only those related to law are selected for the study.

After the 2011 general election, the UDF came to power and ruled in Kerala for 5 years. Hence for the study, the UDF manifesto, which was published ahead as a set promise is taken for the analysis. The 2011 election manifesto is centered on administrative matters, rather than initiating specific legislations. The policies promised by the Congress party in its manifesto included promises to support small plantation workers, encourage public-private partnership (PPP), resolves issues in areas of handicrafts, coir, cashew, khadi, and handmade textiles and techniques to explore more job opportunities etc. Further revamping of certain laws such as Disabilities Act, Building Rules, Police Act etc were placed etc.

From the proposals listed out in the manifesto, the then UDF Government had only fulfilled very few of its objectives from the law category. Though a promise to enact legislation for protecting landowners who provide land to small plantation workers had been given, no law was framed. However, a law providing welfare funds for the plantation workers, viz The Small Plantation Workers' Welfare Fund Bill, 2007 was enacted. This does not cover any of the objectives as stated in the Manifesto. For timely redressal of grievances of the public, Kerala Right to Service Bill 2012 was enacted. As per the provisions of the Act, the power to notify stipulated time limit was given to every Department of the Government, every Head of Department, every Local Self-government. Institution, and every statutory body as per Sec 3 of the Act. The bodies shall within 6 months of the commencement of the Act notify the time limit in the Gazette. The provision further states that within the stipulated time the authority may accept or reject the application with reasons. There is also provision for the first and second appeals.

The Kerala Co-operative Societies (Amendment) Act was enacted in 2013. Many provisions were rectified and new sections were added. The Kerala Shops and Commercial Establishments (Amendment) Bill, 2014 was another proposed objective in the manifesto that was fulfilled by the Government. The Police Act was also amended in 2014.

The LDF Government came to power in the year 2016. The election manifesto which led to the victory of the LDF Government is taken for study.

The Manifesto contains a spectrum of categories that foster communal harmony and a sense of democracy. Out of the 594 proposals stated in the Manifesto, several promises were placed relating to law. An overhaul of Water Reforms, Aquarium Reforms Act, Kerala Marine Fishing Regulation (KMFR) Act, Land Limitation Act, Coastal Area Protection Laws, Land Mining Regulation, Air-Water Pollution, implementation of Kerala Public Health Act, Paramedical Council Act, and Pharmacy Council Act etc. were placed in the Manifestos of LDF.

Many proposals in connection with legal matters were proposed in the LDF. Analysis shows that no solid legislation was made out of the proposed manifesto. Many legislations were awaiting respective Departmental intimation. The objectives outlined in the manifesto were recommended by the Law Reform Commission and draft legislation was advised. New legislations were proposed for the following categories: (a) For the management of solid waste training will be given to the groups. Groups will be under the control of the local bodies. (b) legislation to ensure decent service-wage benefits to the teachers and non-teachers in the self-financing institutions. (c) A comprehensive law will be enacted regarding rights, working conditions, social security, preventing exploitations, etc. of domestic labor (d) People's participation and transparency which was absent in the democratic decentralization will be reintroduced. Gramasabhas will be made effective. For implementing these, Panchayat Raj Act and Municipal Act will

be amended. Even after the initiative from the Law Reform Commission, none of the draft legislation was considered by the Government.

The study of manifestos shows that election is a season of making broken electoral promises. Manifesto has become a tool in the hands of political parties as a device to prove themselves more trustworthy and credible than the others. One of the reasons for the victory is the fulfillment of promises enshrined in the election manifesto. It is claimed by the Chief Minister that they have fulfilled 570 Of 600 promises made in LDF's manifesto. However, The News Minute, did a status check on how far the LDF government in Kerala has succeeded in implementing major infrastructure promises it announced in 2016.[29] It concluded that while some of the projects are progressing and nearing completion, a few ambitious projects are in limbo. Though the LDF Government did not fulfill the promises as claimed, many of the projects and initiatives were implemented, which was welcoming for Kerala. Still, there is a long way to go.

While the loss of trust can lead to anti-incumbency, it also creates intangible cleavages in the institution of democracy.[30] There are two ways in which unchecked political promises undermine public trust and weaken democracy. Firstly, the political promises proposed in the manifesto often fail

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[29] Neethu Joseph, A Status Check on LDF Govt's 2016 Infrastructure Promises for Kerala, https://www.thenewsminute.com/article/status-check-ldf-govts-2016-infrastructure-promises-kerala-145340. (March 16, 2021, 3:20PM)

[30] Prakhar Misra and Kadambari Shah, *Unfulfilled Political Promises Weaken the Spirit of Democracy*, THE WIRE https://thewire.in/politics/election-2019-party-manifestos. (17 April, 2019, 11:00AM).

to weigh the realities of implementation.[31] Secondly, promises often fail to take into account the broader historical/institutional backdrops in which legislations were established.[32] The political parties of India continuously promise to increase quota or reservation to a particular class or sector. These political parties have repeatedly sought to increase quotas by including Acts in the Ninth Schedule of the Constitution. However, the Ninth Schedule which by itself is protected from judicial review to prevent legal challenges to land reform laws in the interest of nation-building is left un-accounted by the parties. In 2018, the Maharashtra government announced a 16% reservation for the Maratha community in jobs and education.[33] The previous Congress-NCP government had also approved a proposal for the same reservation quota (16%) for the same community (the Marathas) in Maharashtra, but the Bombay high court had stayed the order, noting that the cumulative increase in reservations would amount to 73%.[34]

In the present situation, the political parties must be made answerable for their promises by ensuring a legal responsibility for their fulfillment. As the erstwhile Chief Justice of India has noted, "manifestoes have become a mere piece of paper and political parties need to be held accountable for them."[35] The Standing Committee recommended that the model code should

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[31] *Id.*
[32] *Id.*
[33] THE HINDU, https://www.thehindu.com/news/national/sc-declares-maratha-quota-law-unconstitutional/article34487043.ece, 5th May 2021 at 5.
[34] *Id.* at 5.
[35] PRAHALAD RAO, A WAKE-UP CALL FOR EVERY INDIAN 104 (Blue Rose Publishers 2019).

be made legally binding and made a part of the Representation of the People Act, 1951.[36] It added that such a reform would add teeth to the Election Commission of India's powers, enabling it to deter political parties from making empty promises in manifestoes.[37] It also recommended that there must be a cost added to unfulfilled manifesto promises.[38] The Model Code of Conduct drafted by the Election Commission of India (ECI) for the 2014 general elections had guidelines that prohibited parties from making promises in their manifestoes that would exert an undue influence on voters.[39] However, the very fact that the code of conduct by itself is unenforceable by law had led to such guidelines being followed more in the breach than in the observance.

India's democracy has two paths- one leads it to a future where every political party offers variations on the same set of promises, transforming elections into investment decisions for rich individuals, where one's purchasing power plays its part; another has political parties kept in check from making outlandish promises by civil society, regulatory watchdogs and other political parties themselves.[40]

If democracy is a social contract between those elected and ordinary citizens, then manifestoes should be considered as a legal contract enshrining

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36 Standing Committee on Personnel, Public Grievances, Law and Justice (2013)

37 *Id.*

38 *Id.*

39 Compendium of Instructions on Model Code of Conduct, Election Commission of India (2014).

40 Political parties must be held accountable for their election manifestoes https://www.hindustantimes.com/opinion/political-parties-must-be-held-accountable-for-their-election-manifestoes-writes-varun-gandhi/story-B2r1PBSxNhqjqqeh38tvGL.html (last assessed on Sept. 4, 2021).

a country's purported development agenda. For the health of India's democracy, ensuring accountability for manifestoes remains a key reform to be pushed.

The matter of electoral manifesto has reached the courts challenging either its legality or non-fulfillment of the promises enlisted therein. In a PIL, Advocate Mithilesh Kumar Pandey questioned the political parties making false promises in their manifestos and not implementing them.[41] He pointed out that these parties were cheating the public and wanted the court to issue a direction to the Election Commission to enforce them. [42] The Supreme Court bench while rejecting its application said it is not within the domain of this Court to legislate or issue a direction, therefore, making the manifesto a legally binding document on the political party issuing the same.[43]

More recently in 2017, Justice J. S. Khehar, the then Chief Justice of India, lamented that election promises routinely remained unfulfilled and manifestos had become a mere piece of paper.[44] He added the manifestos contain many good promises but none of them indicate any linkage between electoral reforms and the constitutional goal of ensuring economic-social justice.[45] Though Supreme Court's directions to the Election Commission of India to form guidelines against electoral freebies, the Commission has been

[41] Mithilesh Kumar Pandey v. Election Commission of India & Ors. W.P.(C) No.1950/2014.
[42] *Id.* at 1.
[43] *Id.* at 2
[44] He gave his comments at a seminar titled 'Economic Reforms with Reference to Electoral Issues' organized by the Confederation of Indian Barat the Vigyan Bhavan, New Delhi, held on April 9, 2017.
[45] *Id.*

taking significant action against parties that violate the model code of conduct. However, he stressed that it was unfortunate that the political parties give brazen excuses like lack of consensus among their members to justify the non-fulfillment of their poll promises.[46]

There is also another reason why political parties make big promises in the manifestos and ignore them at will. A large number of voters neither read the manifestos in detail nor attach any significance to them. As Lord Denning observed in Bromley London Borough Council v. Greater London Council,[47] 'A manifesto issued by a political party - to get votes - is not to be taken as gospel. It is not to be regarded as a bond, signed, sealed, and delivered. It may contain- and often does contain - promises or proposals that are quite unworkable or impossible to attain. Very few of the electorate read the manifesto in full.' It is equally true that one voter may be influenced by one promise while another by others in a manifesto, and also some others never know what a manifesto contains while casting their vote. But if democracy is a social contract between those elected and ordinary citizens, then manifestoes should be considered as a legal contract enshrining a country's purported development agenda. For an electorate to vote for a certain party objectively in a democracy, then manifesto promises are required to be fair and practicable as far as possible. Manifestos should be considered on a serious note, since it is an open promise to the public and be made answerable.

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[46] *Id.*

[47] (1983) I1 AC 768, para 129.

5.4 PUBLIC ENGAGEMENT IN THE LEGISLATIVE PROCESS

Public accountability is a hallmark of our democratic republic.[48] A participatory democracy further needs a high level of participation from the citizen. The participatory democracy argues that all individuals must be consulted in the making of the laws that will affect them.[49] If they are not consulted, the laws should be considered invalid. Legislation has the power to effect great transformations if it is responsive to the needs of the poorest and most vulnerable sections.[50] Too often, however, the lawmaking process is dominated by ministers pursuing their agenda and technocratic civil servants and lawyers, all of whom combine to make the legislative process inaccessible to the general public.[51] Dialogue and deliberation form the fulcrum of the democratic process, and law-making ought to reflect these foundational democratic principles to create effective, collaborative, and representative legislations. [52]

A. International Human Rights Law

International law has recognized the right of public participation in the legislative process. International human rights law recognizes a general right to political participation that extends beyond the right to vote in elections

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[48] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 5-6 (World Politics 1980).

[49] The Principles of Democracy, www.sjsu.edu, (last assessed on Aug 20, 2021).

[50] Comparative Survey of Procedures for Public Participation in the Law-making Process- Report for the National Campaign for People's Right to Information (NCPRI), University of Oxford Pro Bono Publico, April 2011.

[51] *Id*.

[52] Dipika Jain, *Law-Making by and for the People: A Case for Pre-legislative Processes in India*. STATUTE L. REV. 189, 201(2020).

which are reflected in Article 21 of the Universal Declaration of Human Rights (UDHR) which reads:

Article 21

(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

(2) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.'

Article 25 of the International Covenant on Civil and Political Rights[53] (ICCPR) gives this right further content:

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

[53] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23March 1976) 999 UNTS 171.

As enumerated in the document, there is no specific entitlement to pre-legislative participation. Instead, the United Nations (UN) Human Rights Committee has held that it is for the legal and constitutional system of the State party to provide for the modalities of such participation.[54]

B. Content of the Right

The UN Human Rights Committee's General Comments (UNCCPR) assist the States in clarifying the content of rights contained in the ICCPR. They are not binding laws, though they have highly persuasive authority.

General Comment 25[55] on Article 25 right to public participation outlines the following key features of the right:

a) The right to take part in public affairs extends to all exercises of political power, including the exercise of legislative powers;[56]

b) This participation can take two possible forms: direct participation or indirect participation through representatives (the General Comment does not clarify whether both forms of representation must be present in a political system or whether the presence of representative governance obviates the need for direct participation);

c) Furthermore, citizens exercise their right to participation 'through public debate and dialogue with their representatives.'

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54 Marshall v. Canada, Communication No 205/1986, UN Doc CCPR/C/43/D/205/1986 (1991) para 5.

55 UNCCPR, 'General Comment 25: The right to participate in public affairs, voting rights, and the right of equal access to public service' (1996) UN Doc CCPR/C/21/Rev.1/Add.7.

56 *Id*. para 5.

d) States must take 'such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the right to take part in political processes.[57]

It is clear from the Commentary of Article 25 that the right to public participation [should] be viewed as a programmatic right, one responsive to a shared ideal but to be realized progressively over time in different ways in different contexts through invention and planning that will often have a programmatic character.[58] Thus the Article grounds for a strong principled argument for the States.

At the National level, Article 71 of the UN Charter provides that the Economic and Social Council of the UN may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence.[59]

5.5 PUBLIC CONSULTANCY IN THE LEGISLATIVE PROCESS

Public participation in the legislative process results in better laws and fewer amendments.[60] The International Association for Public Participation states that public participation in law-making is grounded on the rationale that those elected by a potential law ought to have the right to be actively involved

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57 *Id*, para 8.

58 HJ Steiner, *Political Participation as a Human Right*, Harvard Human Rights Yearbook 77, 130-2 (1998).

59 Alger, Chadwick, *The Emerging Roles of NGOs in the UN System: From Article 71 to a People's Millennium Assembly*: *Global Governance* 8 Lynne Rienner Publishers 93, 110(2002).

60 First report, Modernisation of the House of Commons Committee, 2006.

in the legislative process.[61] Public participation in the legislative process may take place over three stages: (i) the pre-legislative stage when the proposed law is in draft form, before its introduction in Legislature/Parliament (ii)the legislative stage which begins from the time the Bill is introduced and ends once it is passed and (iii) the post-legislative stage begins when the Bill is enacted.

5.5.1 Pre-Legislative Stage

The pre-legislative process involves holding consultations with interested groups and persons on the proposed policy before a Bill is drafted. "Not only does consulting and deliberating with citizens help bring greater democratic legitimacy to laws through a bottom-up approach; it also provides decision-makers with much-needed policy-related expertise to ensure that laws and policies will be effective once implemented."[62] Legitimacy is closely connected with efficient and authentic laws. Legitimacy is the pre-eminent theoretical explanation for requiring pre-legislative consultation.[63] Legitimacy flows from the following additional factors: (i) efficiency: consultation ensures that obstacles to the policy are identified at an early stage and are addressed, leading to greater understanding and implementation; (ii) expertise: relying on the expertise of stakeholders outside the government enhances the credibility of the policy, particularly when it involves technical aspects; (iii)

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61 International Association for Public Participation Core Values, https://www.iap2.org/page/corevalues (last accessed on April 20, 2019).

62 DIPIKA JAIN, supra note 51 at 189.

63 Stuart Bell and Laurence Etherington, *The Role of Consultation in Making Environmental Policy and Law* 8 NOTTINGHAM L.J. 51(1999).

elicitation of values from the public: the policy will thus be by public priorities and values; and (iv) negotiated consensus: negotiations between the stakeholders and the government to ensure that the outcome is most acceptable to the broadest range of interests.[64]

The pre-engagement of bills for public participation is still at a budding stage in India. The Manual of Parliamentary Procedures states that any legislative proposal must be formulated 'in consultation with all the interests and authorities concerned essentially from administrative and financial points of view' but makes no mention of public deliberation.[65] In January 2014, the Ministry of Law and Justice came out with a Pre-Legislative Consultation Policy which provided that the draft of the proposed law be placed in the public domain, for a minimum period of 30 days, along with supporting documents explaining the rationale, the broad financial implications, the likely impact and an explanation of the legal provisions in simple language.[66] Though the policy shows a well-outlined process, the Government's pre-legislative consultation policy has not been implemented uniformly. Many bills are not placed in the public domain. The 30-day window is not strictly followed.[67] The Government uses its discretion to decide whether it wishes to

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64 *Id.*

65 Ministry of Parliamentary Affairs Manual of Parliamentary Procedures in the Government of India (New Delhi: Ministry of Parliamentary Affairs (2004).

66 The government has used MyGov.in, an online portal, in some instances to undertake public consultation.

67 Model Panchayat and Gram Swaraj Bill, 2009 -21days, A Model Real Estate (Regulation of Development) Bill, 2009-days, 45, Mines and Minerals (Development and Regulation) Bill, 2010 -26days, 4th Mines & Minerals (Development & Regulation) Bill, 2010- 7, Citizens Right to Grievance Redress Bill, 2011 -21,Real Estate (Regulation & Development) Bill, 2011 -30, Port Regulatory Authority Bill, 2011 -39,The National

use the portal to undertake online consultation for a particular Bill. This is because the Ministry of Law and Justice, suffers from two significant failures: (i) consultation is not mandatory, and (ii) the Government is not required to deliberate on the feedback presented in public consultations. Thus, over the years, only a few bills have been published for eliciting public opinion. One of the best examples of this process is the drafting of the Karnataka Police Bill 2011, where wide public consultations were carried out and 290 suggested amendments were finally passed.[68] Legislations made through effective consultation are more effective and have greater legitimacy and acceptance. One such example is the Right to Information (RTI) Act 2005.[69]

In Kerala, no consolidated step has been taken for implementing a pre-consultation policy. However, in the 14th Kerala Legislative Assembly, in the Kerala Legislature Website, a provision is added for the pre-consultation of legislative bills. But it invites pre-consultative opinions via email option, along with the draft bill.

5.5.2 Legislative Scrutiny

Public participation during legislative scrutiny is usually conducted through Parliamentary Committees. Before 1993, Bills were occasionally referred to *ad-hoc* Joint or Parliamentary Select Committees. Later, the

Sports (Development) Bill, 2011 -30, Second National Sports (Development) Bill, 2011 -15, Land Acquisition and Resettlement & Rehabilitation Bill, 2011 -30 days.

68 Karnataka Police Act (2007), http://www.humanrightsinitiative.org/webstreaks/download/1460451378Karnataka%20Police%20Act,%202007.pdf. (last accessed on Feb.6, 2019).

69 The RTI is the result of a long campaign initially started by a group of workers of Rajasthan and later it received support from various social activists group and support of the press and gained momentum.

Department Related Standing Committees (herein after referred as DRSC) have been established to scrutinize Bills as a routine task. Though it is a well-accepted proposition in a parliamentary democracy that lawmaking is a deliberative and consultative process, even recently instances of important bills such as The Farmers' Produce Trade and Commerce (Promotion and Facilitation) Bill, 2020 and the Farmers' (Empowerment and Protection) Agreement of Price Assurance and Farm Services Bill, 2020, the Jammu and Kashmir Reorganisation (Amendment) Bill, 2021, which amends the Jammu and Kashmir Reorganisation Act, 2019, abrogating Jammu and Kashmir's special status, Citizenship (Amendment) Bill 2019, Muslim Women (Protection of Rights on Marriage) Bill, 2019, and Unlawful Activities (Prevention) Amendment Bill, 2019 were not referred to any of the committees[70] of Parliament for in-depth deliberation for inviting inputs from stakeholders. Despite constant demands from the opposition sides, the farm bills were neither referred to the concerned department-related Parliamentary Standing Committees nor were they referred to the Select Committee of the Rajya Sabha. In the absence of in-depth deliberation, the Bills or legislative proposals suffer from a serious deficiency of legislative scrutiny. Such procedural lapse is a subversion of democracy and an icon of democracy deficit.

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[70] To ensure that a Bill is scrutinized properly before it is passed, our law-making procedure has a provision for Bills to be referred to a Departmentally Related Standing Committees (DRSC) for detailed examination. Any Bill introduced in Lok Sabha or Rajya Sabha can be referred to a DRSC by either the Speaker of the Lok Sabha or Chairman of the Rajya Sabha.

The Bills are routinely referred to Subject Committees in the Legislative Stage. The effectiveness of Subject Committees in the scrutiny of the Bills had already been dealt with in Chapter IV. In Kerala, so far in the history of Kerala, only one Bill[71] has completed the circulation of the public opinion process, which is indeed a shame to democracy. The Kerala Hindu Religious and Charitable Institutions and Endowments Bill, 1997, The Kerala Dowry Prohibition Bill, and The Christian Succession Act (Repeal) Bill, were sent for public opinion but never became Acts. The provisions encapsulating reference to public opinion remain almost a dead letter.

5.5.3. Post-Legislative Scrutiny

Post-legislative scrutiny of laws is not mandatory in India. However, certain mechanisms exist for undertaking review of laws with the help of Commissions. Various Commissions, such as the Law Commission, conduct reviews of the legislation. At times, the Government appoints certain Ad-hoc commissions to review the implementation of laws. For example, In March 2011 the Ministry of Finance constituted the Financial Sector Legislative Reforms Commission for a review of Indian financial laws, which is also empowered to take evidence.[72]

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[71] Kerala Agrarian Relation Bill, 1957 (Act 4 of 1961).

[72] Resolution No. 18/1/2011-RE dated March 24, 2011, Ministry of Finance, Government of India.

5.6. PUBLIC ENGAGEMENT IN THE LEGISLATIVE PROCESS AROUND THE GLOBE- AN OVERVIEW

Countries such as South Africa, the United Kingdom, the United States, Canada, Austria provide for strong Public Consultation in the Legislative Process. Public Participation at the pre-legislative stage enumerates consultations over draft bills. Unlike India, in South Africa, draft Bills and Constitutional Amendments Bills are published for comments 30days before introduction mandatorily.[73] In the United Kingdom also Select Committees hold consultations and Ministerial events over approach papers are held. [74]In the public participation at the legislative stage, mandatory references of Bills to Committees are followed by the United Kingdom and the United States.[75] Though there is no mandatory reference of Bills to Committees, in the case of Australia, and Canada, Bills may be referred to the Committee, unlike the position of India where the Speaker decides whether to refer the Bills to the Committees.[76] In the United States, written submissions are compulsorily sought from the public.[77] In South Africa, Constitutional provisions require consultations with the public.[78] In India, there is no mandatory consultation with the public, but committees are empowered to take comments when referred. Regional consultations are often carried out in the United Kingdom, and in the case of Canada with the House's

[73] Public Participation in Legislation- India and the World, https://www.suolaw.com/public-participation-in-legislation-india-and-the-world/ (last assessed on 3rd Feb. 2021).
[74] *Id.*
[75] *Id.*
[76] The decision of the Speaker generally reflects the opinions of ruling party.
[77] PUBLIC PARTICIPATION, supra note 73.
[78] *Id.*

permission.[79] In South Africa, parliamentary democracy Offices collect public comments on behalf of Committees.[80] The decision of the South African Constitutional Court in the Doctors for Life case[81] is commendable. It held that the right to political participation is a fundamental human right. In this case, the Traditional Health Practitioners Act and the Termination of Pregnancy Amendment Act were declared invalid, as they were adopted in a manner inconsistent with the Constitution.[82] Order of invalidity was suspended for 18 months to enable Parliament to re-enact the statutes in a manner consistent with the Constitution, to incorporate the terms of public participation. [83]

In the United Kingdom and Australia, public meetings of committees are telecasted and webcasted.[84] In the United States and Canada also post public meetings with exceptions are conducted. In South Africa, public meetings of Committees are Constitutionally required. But in the case of India, usually, sittings of the committee are held in private and the report is only disclosed to the public. In the United Kingdom (UK), a deviation from the Committee's Recommendation had to be mandatorily recorded.[85] In the United States also the Committee plays a major role and the government has no direct role in the legislative process.

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[79] *Id.*

[80] Constitution of South Africa, 1996.

[81] Doctors for Life International v. Speaker of the National Assembly and Others 2006 (6) SA 416 (CC).

[82] *Id.*

[83] *Id.*

[84] Guide to procedures, fourth edition, House of Representatives, Australia.

[85] Modernization Committee, House of Commons, United Kingdom; Report on Parliament and the Legislative Process, House of Lords, United Kingdom.

Public participation at the post-legislative stage mandates strong post-legislative scrutiny in the UK and Australia, laws have to be reviewed in 3 years and they expire after 10 years. In the case of Canada, most statutes have sunset and review clauses.[86] And also, in the United States, Legislative Oversight Committees review laws continuously.[87] But in India, the post scrutiny of laws is poorly implemented. Special Commissions may be appointed to conduct the review.

5.6.1 Recommendations

The international comparison of the public engagement in the legislative process shows how loosely is India's public discourse in the legislative process framed. The provisions encapsulating reference to public opinion are yet to set their pace. Deficiencies in the legislative process can negatively affect the quality of legislation- an empirical study of some developing-world countries suggests that their failure to enact legislation capable of transforming the social and economic order can be attributed in part to the disproportionate influence of the elite during the creation of a bill.[88] A transparent, impartial, responsible, and participatory legislative process is needed to enact laws that will bring about real change. Reforms are required to strengthen the State's capacity to draw upon the expertise and experiences

[86] Fact Sheet, Senate of Canada.
[87] PUBLIC PARTICIPATION, supra note 73.
[88] Ann Seidman, Robert Seidman, *Beyond Contested Elections: The Processes of Bill Creation and the Fulfilment of Democracy's Promises to the Third World*, 34 HARV. J. ON LEGIS.1, 38 (1997).

of Indian citizens, and may, ultimately, help us take a few more steps towards evolving into a robust deliberative democracy.[89]

In recent public discourse over lobbying, two issues that have underscored the debate[90] are:

1. Greater transparency in the policymaking process, and
2. Equality of access for all stakeholders in engaging with the process.

There is a need to build linkages between citizens and the policymaking process, especially by strengthening scrutiny before a Bill is introduced in Parliament. “A strong nexus between the representatives and the represented introduces a collaborative and democratic process of incorporating social realities into legislative processes and builds firm foundations for an informed government that is responsive to contemporary legal and social issues”.[91]

Currently, few bills are circulated for citizens’ opinions, but the process is not mandatory. A Committee must be formed to analyze the views and inputs thus collected from the citizens and must duly be addressed and incorporated in the final bill.

Some of the guidelines for providing a platform for public participation:

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[89] Tarunabh Khaitan, *Reforming the Pre-Legislative Process* 46 EPW 1 (2011).

[90] Legal Regulation of Lobbying Activities In The Context Of Public Decision Making, Recommendation CM/Rec (2017)2 adopted by the Committee of Ministers of the Council of Europe on 22 March 2017.

[91] M ZANDER, THE LAW-MAKING PROCESS 32 (Cambridge University Press Cambridge 2004).

- These Bills must be published in simple language and they should be published where it is easily accessible to the general public.
- A summary of the object must be published along with the bill
- Make a report on the legislative priorities addressed by the Bill available for citizens.
- Form ad hoc committees or standing committees to scrutinize the Bill before it is piloted in the House.
- When comments are received on proposed legislation, they must be used to revise the legislation; when suggestions are rejected, adequate reasons must be provided.
- To ensure wide publication of bills, steps must be taken to circulate the bill in national and regional language media outlets, with translated versions of the bill, and it should also be published online for easy access.
- Eliciting public opinion must be made more meaningful and effective. When publishing such bills, steps must be taken to ensure that institutions of legal education, Bar associations, Advocate organizations, stakeholders, etc must respond.
- Media must act as a channel of communication between the legislature and the general public.

- Nowadays social media can also play a dominant role in creating awareness in this regard.

- The feasibility of holding consultations through gram panchayats, taluk offices, and other local administrative bodies needs to be explored so that the public is actively involved at every stage of the legislative process.

5.6.2. Post-Legislation Scrutiny

The post-legislative scrutiny (hereinafter referred as PLS) of a law passed by the Legislature needs to be introduced. Though India has numerous laws on its statute book, its implementation record is saddening, Post-legislative Scrutiny is the practice used to monitor and evaluate the implementation of legislation, ensuring laws benefit constituents in the way originally intended by the law-makers. The practice of PLS monitors the implementation of legislation and evaluates whether the laws have achieved their intended outcomes. PLS is a prominent feature of UK Parliamentary democracy.

In India, laws do not come with a sunset clause.[92] If a bad law is enacted, it would remain on the statute books for at least a century if not more.[93] Parliament passed a law[94] in 1993 prohibiting the employment of

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[92] Sunset clauses set an expiration date on a particular law or set of provisions. The expiration is either automatic or subject to a positive or negative authorisation by the legislature.

[93] THE HINDU April 30th, 2016 at 10.

[94] The Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act,1993.

manual scavengers.[95] About a decade later, the law's effectiveness was called into question in the Supreme Court of India. The Supreme Court issued an order asking the government to take immediate effective steps to end manual scavenging. Following the order, India's Parliament passed another law[96] in 2013, imposing further restrictions to curb the practice. This is a clear case where a law prevaled in India for more than 23 years without any steps to implement it.

Very often a law enacted by the legislature is not brought into force by a notification by the Government as required by law. This results in the law remaining dormant whereby nullifying the role of the legislature as a lawmaker. In some other cases even though the law is brought into force by a notification, rules are not made and the administrative machinery required for implementing the provision is not set up. In such cases also the law enacted by the legislature is not implemented in practice thereby weakening the role of the legislature as a lawmaker. This practice amounts to a negation of democracy.

The ultimate object of strengthening the democratization of law-making is the democratization of law, not just the process of making it. So what happens after a law is made must also be one of our concerns, though this aspect has not been discussed in the present study, it is considered relevant to advance a suggestion in this regard.

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[95] *Id.*

[96] The Prohibition of Employment as Manual Scavengers and their Rehabilitation Bill, 2012.

It is suggested that a committee be constituted by the legislature to monitor the implementation of the law enacted by it. The Government must be made accountable to this committee for failure to notify an Act, delay in making rules, or setting up administrative machinery necessary for the implementation of an Act. Thus, a periodic assessment of the functioning of post-implementation of law helps to gain valuable feedback and insights, which can help in plugging gaps and taking corrective measures for better implementation of the law.

CHAPTER – VI

ABUSE OF ORDINANCE MAKING POWER- A NEGATION OF DEMOCRATIC PRINCIPLES

Laws govern society. The process by which a law is made is important; after all the law of the land needs to be accepted uniformly, authoritatively, and without questioning. In India the process of law-making is a shared exercise between the executive and legislature and they partake in it. However, there are fundamental differences between the processes of law-making of both the wings, but once it is in force both of them have the same repercussions. The power to promulgate ordinances is conferred on the President[1] and the Governor[2] in special circumstances which require immediate action. Unless this power is exercised very cautiously in tune with intention of Constitutional makers, it may degenerate into an abuse of power and dilution of democratic principles. It is necessary to find out how the essence of democracy is whittled down in the case of ordinances.

As we have seen in the earlier chapters, legislation made by the legislature is the outcome of the roles played by different actors. The need for law often sprouts from the cabinet when the Government feels it necessary to enact a law. The demands for a law may also arise from society. Usually, necessity is based on two things, firstly, when a situation arises that a

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1 Article 123 of the INDIA. CONST.
2 *Id*. at art. 213.

particular aspect in the society needs to be regulated through the enactment of a law, and secondly, it can be a political urge that initiates the law-making process, whether necessary or not. Supporting this point, Shubhankar Dam had commented, "A cabinet's decision to introduce a bill may be evidence of compulsion, not a necessity."[3] Further, he adds that "it may be the price for keeping the coalition together in political maneuvering to secure new allies."[4] "And it may also be a grudging response to a populist outcry or a concession to a caste, religious, or trade lobby."[5]

Once the cabinet arrives at a consensus on the need, a bill is prepared and sent to the Parliament/Legislative Assembly for discussion and approval. The bill is designated to go through several readings, discussions, and debates before it is voted on. The bill may also be forwarded for committee hearings to conduct further study on the matter. When a bill receives the requisite majority in Parliament/Legislative Assembly, it is sent for the assent of the President/Governor and finally, when such assent is received, it becomes a law. This demarcated process of legislative lawmaking reveals a structure well played by different state actors designed with certain roles to make the process of law-making more of a democratic process. There are ample opportunities for scrutinizing the bill and to consider various opinions and views. The bill is tested on the floor of direct representatives of the people. It is believed that the representatives symbolize the will of the people and their

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3 SHUBHANKAR DAM, PRESIDENTIAL LEGISLATION IN INDIA: THE LAW AND PRACTICE OF ORDINANCES 39 (Cambridge University Press 2014).

4 *Id.* at 39.

5 ASGHAR ALI, THE SHAH BANO CONTROVERSY 23 (Ajanta Publishers 1987).

acts and opinions reflect the majority of the people. Scrutiny of the bills by the appropriate committees and inviting public opinions on specific bills make the legislative process more engaging. Parliament, in this view, is central to the legislative process, and "legislations are products of –amongst other things- rational-legal scrutiny and vote."[6]

However, from the preceding chapters, we have seen how the whole process of legislative engagement is happening in the Kerala Legislature, where it often fails to meet the essence of democratization in the law-making process. It is also agreed that loopholes in the process of law-making have in no way affected the authenticity of the laws. A further dilution of the structured legislative process is seen in the power of ordinance making by the President at the Centre and Governor at the State. Ordinance-making power is considered an important channel in the process of legislation. However, the promulgation of law by way of ordinance dilutes the legislative process and surrogates the process of debates and votes in form and substance. Whether this in any way affects the quality and outcome of our democracy is analyzed in detail in this chapter.

The apparent compromise of the legislative process through the Ordinance making power of the President and the Governor is found in Art 123 and Art 213 of the Constituion of India respectively. To clarify, the term compromise denotes the dilution of formal procedural lawmaking by the

[6] RAGHUNATH PATNAIK, POWERS OF THE PRESIDENT AND GOVERNORS IN INDIA, With Special Reference to Legislative and Ordinance-making 61(Deep & Deep Publications 1996).

legislature rather than any reference to deterioration of quality. Before moving on to the scope and outreach of the power of ordinance making, it is imperative to explore the history of the incorporation of the ordinance into our Constitution. This will give us a clear idea of what the founders intended to be the purpose of the ordinance on its application as a law.

6.1 GLIMPSE OF HISTORY OF ORDINANCE

The power made free entry to the Constitution since it already had its roots in the Government of India Act, 1935, and the Government of India Act, 1915.

The founding fathers wrote on a relatively clean chit and incorporated the power to promulgate the ordinance into the Constitution.[7] Constitutional Adviser B.N. Rau, who was designed to prepare a memorandum to report on the main principles of the Constitution for the Union Constitution Committee suggested the possibility of incorporation of the ordinance power. Borrowing from the previous scripts and experiences, his proposal granted ordinances as "If at any time, when the Union Parliament is not in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinances, as the circumstances appear him to require."[8] Keeping in line with previous versions, he added "that such ordinance shall have the 'same force and effect' and further added that the ordinance shall remain in force for a 'period not more than six weeks

7 Refer CAD, Part V, Chapter III.

8 II B.N. RAU, MEMORANDUM ON THE UNION CONSTITUTION in B. Shiva Rao(ed). The Framing of India Constitution 485 (Universal Law Publishing 2006).

from the reassembly of Parliament."[9] At that time, the ordinance-making power was under criticism in modern constitutions and Rau presented a pre-emptive note justifying the inclusion of ordinances.

When the provision came up for debate and discussion in the Assembly on May 23, 1949, there was hardly any word against the incorporation of the very idea of ordinances. The discussion was around the nature and scope of ordinances. The ordinance making power of the Governor of a State as provided in Article 187 of the Draft Constitution of India,[10] which became Article 213 of the Constitution of India, was taken up for discussion by the Constituent Assembly of India on June 14, 1949.[11] Pandit Hriday Nath Kunzru moved the following amendments to that Article:

That in sub-clause (a) of clause (2) of Article 187, for the words 'six weeks from the re-assembly of the Legislature' the words 'two weeks from the promulgation of any ordinances', be substituted'.[12]

Thus, Pandit Kunzru wanted an ordinance that should remain in force for not more than 14 days and it must be placed before the legislature within that period. He further stated that whatever the nature of the emergency might be, it would not justify the continuance if an Ordinance even for a day longer

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[9] HANS RAJ, EXECUTIVE LEGISLATION IN COLONIAL INDIA 1939-1947, A Study of Ordinances Promulgated by the Governor-General of India 42(Anamika Prakashan 1989).

[10] CAD, Drafting Committee: Draft Constitution of India, 1948.

[11] CAD Official Report, Volume VIII (1949), New Delhi, 1967 at 869-872.

[12] *Id.* at 870.

than was necessary to summon the Legislature and place the whole matter before it.[13]

Professor K.T. Shah, a representative from Bihar, was the most articulate voice against ordinances. “However, we may clothe it, it may be necessary, however much it may be justified, an ordinance, he said, was a negation of rule of law.” [14] However, he also acknowledged that ordinance is unavoidable and at times necessary under certain circumstances. He wanted to make the power of ordinance controllable that “an ordinance could not last a minute longer than such extraordinary circumstances require.”[15]Apart from this concern, more or less the discussion surrounded the scope of ordinances. Some members pressed for substantive limits on ordinances and also there were concerns about the duration of ordinances.

The draft articles, initially conceptualized by Rau and later debated, discussed, and agreed upon by the members of CAD, were incorporated into the Constitution without any skepticism. In writing the provision, the founding authors gave ordinances both vertical and horizontal equivalence.[16] Vertical equivalence was granted in Article 123(2): An Ordinance promulgated under the Article shall have the same force and effect as an Act of Parliament.[17] Art 123(3) granted horizontal equivalence: If and so far as an ordinance under this Article makes any provision which Parliament would not under this

[13] CAD official Report, Volume VIII (1949), New Delhi, 1967 at 870.
[14] CAD Bk.3.No.VII, 208 (23 May 1949).
[15] *Id.*
[16] ARUN SHOURIE, THE PARLIAMENTARY SYSTEM 36-49(ASA Rupa 2007).
[17] RAGHUNATH PATNAIK, supra note 6, at 17.

Constitution be competent to enact it shall be void. In other words, "ordinances and Acts have similar legislative width; the former can do everything that the latter has jurisdiction to do."[18] The Assembly's vote on the ordinance was a merely formal act – "the outcome was never in doubt."[19]

6.2 EXPLORATION OF THE POWER OF ORDINANCE MAKING UNDER THE INDIAN CONSTITUTION

Ordinarily, under the Constitution, the President or the Governor is not the repository of the legislative powers. But, to meet extraordinary circumstances which demand immediate enactment of the law, the Constitution empowers the President and the Governor with special legislative powers to promulgate ordinances. The power of Ordinance making is provided in Art 123 and Art 213 of the Indian Constitution. Art 123 confers power on the President to promulgate ordinances during the recess of Parliament. If at any time except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require.[20] To promulgate ordinances two conditions are necessary, most importantly, both houses of Parliament should not be in session and there must be circumstances that necessitate immediate action. By Art. 213, the Governor can promulgate ordinances if at any time except when the Legislative Assembly of a State is

[18] D. C. WADHWA, RE-PROMULGATION OF ORDINANCES, A FRAUD ON THE CONSTITUTION OF INDIA 34(Gokhale Institute of Politics and Economics 1983).

[19] SHUBHANKAR DAM, supra note 3, at 65.

[20] INDIA CONST. art. 123.

in session, where there is a Legislative Council in a State, except when both Houses of the Legislature is in session, the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action.

The power of the President and the Governor is structurally similar, though some additional conditions apply to the Governor in the exercise of his powers. That is the President may promulgate ordinances when the circumstances necessitate that there is a need for law and only when both Houses are not in session, whereas the Governor is capable of promulgating an ordinance even if either of the Lower House or upper House is still in session. Accordingly, an ordinance made when the two Houses are in session is void. An ordinance can be promulgated if only one House is in session because a law can be passed by both Houses and not by one House alone, and thus if only one House is in session there is an arrangement needed to meet immediate circumstances and the power of ordinance becomes necessary.

Clause (2) of this Article provides that an ordinance promulgated under this Article shall have the same force and effect as an Act of the Legislature of the State assented to by the Governor, but every such Ordinance (a) shall be laid before the Legislative Assembly of the State, or where there is a Legislative Council in the State, before both the Houses, and shall cease to operate at the expiration of six weeks from the reassembly of the Legislature, or if before the expiration of that period a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council, if any,

upon the passing of the resolution or, as the case may be, on the resolution being agreed to by the Council; and (b) may be withdrawn at any time by the Governor. There is an explanation at the end of the clause where the Houses of the Legislature of a State having a Legislative Council are summoned to reassemble on different dates, the period of six weeks shall be reckoned from the later of those dates for this clause.

Clause (3) of this Article says that if and so far as an Ordinance under this Article makes any provision which would not be valid if enacted in an Act of the Legislature of the State assented to by the Governor, it shall be void, provided that, for the provisions of this Constitution relating to the effect of an Act of the Legislature of a State which is repugnant to an Act of Parliament or an existing law concerning a matter enumerated in the Concurrent List, an Ordinance promulgated under this article in pursuance of instructions from the President shall be deemed to be an Act of the Legislature of the State which has been reserved for the consideration of the President and assented to by him.

Though in theory, the power to promulgate ordinance is conferred on the President (or Governor) as per the Constitution, in practice he acts in this matter, as he does in other matters, on the advice of the Council of Ministers. The Council of Ministers decides if an ordinance is necessary and also approves the ordinance, but the President formally promulgates it into effect. The nominal power exercised by the President to promulgate ordinance limits the scope of the discretion of the President in this regard; the extent of the so-

called discretion remains unclear. As the Supreme Court has stated, “the Ordinance is promulgated in the name of the President and a constitutional sense on his satisfaction: it is in truth promulgated on the advice of his Council of Ministers and their satisfaction.”[21] Thus it is the ruling government (the executive) that decides the need for an ordinance and initiates the proceedings.

The executive’s ordinance-making power is not unrestrained. Ordinances are circumscribed by certain controls. Firstly, as stated above, an ordinance is limited to circumstances where at least one of the Houses of Parliament is not in session and it is to be satisfied that immediate circumstances exist. Secondly, an ordinance will remain in force only for a short period and is to be brought under parliamentary scrutiny at the earliest possible opportunity. The duration of the ordinance as such is not stated in the Constitution. Art 174(1) of the Constitution of India, dealing with sessions of the State legislatures, provides that the House or Houses of the Legislature of a State shall be summoned to meet twice at least in every year, and six months shall not intervene between their last sitting in one session and the date appointed for the first sitting in the next session. Thus, the maximum life of an ordinance is for seven and a half months because the Constitution mandates that both Houses, at the Centre as well as at the State, must meet at least every six months. When the two Houses of Parliament assemble on different dates, the period of six weeks is to be reckoned from the latter of the two dates. It

[21] R.C. Cooper v. Union of India, AIR 1970 SC 564.

means that Parliament must pass a law to replace the ordinance within six weeks of its assembling. Thus, the validity of the ordinance cannot go beyond seven and a half months unless approved by the Parliament or Legislature as the case may be. Without such formal parliamentary approval, ordinances cease to exist.[22] The President and the Governor are also conferred with the power to withdraw ordinances at any time when the circumstances that existed before the ordinances die down and there is no need for a law to remain in urgency. Thus, the life of an ordinance can be shortened, but it cannot be prolonged.[23]

"Ordinances and Acts are considered to have similar substantive width."[24] The ordinance may be promulgated on any matters under the competence of Parliament or the State Legislature, as the case may be. The mechanism has since been used to introduce legislation in many fields including crime,[25] human rights,[26] finance,[27] national security,[28] property,[29] religion,[30] and taxation.[31] However, a careful reading through the provisions

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22 INDIA CONST. art. 123, cl.2.
23 DC WADHWA, supra note 18, at 4.
24 INDIA CONST. art. 123, cl.3.
25 See, e.g., Unlawful Activities (Prevention) Ordinance, 1966, No. 6 of 1966, Gazette of India (Extraordinary), section II(1) (June 17, 1966).
26 See, e.g., Protection of Human Rights Act, No. 30 of 1993
27 See, e.g., Conservation of Foreign Exchange and Prevention of Smuggling Activities (Amendment) Ordinance, 1976, No. 6 of 1976, Gazette of India (Extraordinary), section II (1) (June 16, 1976
28 See, e.g., Maintenance of Internal Security Ordinance, 1971, No. 5 of 1971, Gazette of India (Extraordinary), section II (1) (May 7, 1971).
29 See, e.g., Banking Companies (Acquisition and Transfer of Undertakings) Ordinance, 1969, No. 8 of 1969, Gazette of India (Extraordinary), section II (1) (July 19, 1969)
30 See, e.g., Ram Janma Bhumi-Babri Masjid (Acquisition of Area) Ordinance, 1990, No. 9 of 1990, Gazette of India (Extraordinary), section II (1) (Oct. 19, 1990).
31 See, e.g., Compulsory Deposit Scheme (Income-Tax Payers) Ordinance, 1974, No. 10 of 1974, Gazette of India (Extraordinary), section II (1) (July 17, 1974).

makes it clear that the ordinance and legislative law are structurally different, though the Constitution confers that ordinance like parliamentary legislation has the same force and effect as law of the land. They do not have public requirements similar to Acts.[32] An ordinance issued by the President partakes fully of the legislative character and is made in the exercise of legislative power.[33] The controls stated above differ from the checks that we apply to parliamentary legislation, which is purely tested on violation of constitutional provisions. More importantly, the control exercised by the parliament 'implies that parliamentary pre-eminence is still part of India's legislative design.'[34] But the practice shows that it is not so. After sixty years of constitutional practice, "these controls are redundant; aggressive political conduct and forgiving judicial interpretations made them so."[35] What was exceptional and temporary is now normal and permanent.[36] How India has effectively dealt with two Parliaments[37]-wherein thus, the President or the Governor acts as an Alternative Parliament or the State Legislature is discussed below.

6.2.1 Outreach of Ordinance

The ordinance is meant to be a tool to be used in exceptional circumstances. Generally, an ordinance is to be promulgated when the

32 HARVEY WALKER, FEDERAL LIMITATIONS UPON MUNICIPAL ORDINANCE MAKING POWER 126 (Ohio State University Press 1929).
33 A.K. Roy v. Union of India, AIR 1982 SC 710.
34 ARUN SHOURIE, supra note 3, at 56.
35 HANS RAJ, supra note 9, at 32.
36 SHUBHANKAR DAM, supra note 16 at 63.
37 The reference to this second Parliament must be understood in a limited sense. Arguably, parliaments do much more than merely legislate. To say that India's president effectively functions as an alternative Parliament is to suggest that the president legislates in the same way that Parliament does.

President (or Governor) is satisfied that the circumstances exist which render it necessary to take immediate action.[38] Whether or not there exists a circumstance that necessitates immediate action is a matter that is purely decided by the Executive. Whether this satisfaction is non-justiciable or subject to judicial review is an open question.

The question has been interpreted from the beginning of the Government of India Act 1935. Section 72 of the Government of India Act 1935 states that Governor-General can promulgate an ordinance for the peace and good governance of British India. Discussing the provision in Bhagat Singh v King-Emperor,[39] Lord Dunedin, observed:

> "Who is to be judged on whether a state of emergency exits? A state of emergency is something that does not permit any exact definition. It connotes a state of matters calling for drastic action which is to be judged as such by someone. It is more than obvious that someone must be the Governor-General and he alone. Any other view would render utterly inept the whole provision. Emergency demands immediate action, and that action is prescribed to be taken by the Governor-General. It is he alone who can promulgate the ordinance."

In Lakhi Narayan v State of Bihar,[40] the Court further went to the extent of stating that the ordinance is non-justiciable. The Federal Court observed:

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38 INDIA Const. art.123.

39 (1931) 33 BOM LR 950.

40 AIR 1950 FC 59.

> "Whether the requisite circumstances existed for promulgating the ordinance was a 'matter which is not within the competence of courts to investigate. The language of the provision clearly shows that it is the Governor and Governor alone who has got to satisfy himself as to the existence of circumstances necessitating the promulgation of an ordinance. The existence of such necessity is not a justiciable matter which the courts could be called upon to determine by applying an objective test."

Similarly, in King–Emperor v Benoari Lal,[41] the Privy Council emphasized that "the Governor-General was not required by the constitutional provision to state that there was an emergency, or what the emergency was, either in the text of the ordinance or at all, and assuming that he acts bona fide and by his statutory powers it cannot rest with the courts to challenge his view that the emergency exits."

Thus, the position before the coming into force of the Constitution clearly shows that the Governor-General had exclusive rights to determine the need of an ordinance, and the matter was unquestionable in a court of law. Even after the Constitution came into being, the matter repeatedly came into question before the courts, but the courts never undermined the power of ordinance conferred on the President (or Governor) but it only made a word of caution in using their powers.

[41] 1945 (47) BOM LR 260.

The first challenge to the matter of satisfaction came up in S.K.G. Sugar Ltd. v. the State of Bihar,[42] wherein the Supreme Court stated as regards Governor's satisfaction to make an ordinance under Art 213(which is similar to Art 123) that:

> "the necessity of immediate action and of promulgating an ordinance is a matter purely for the subjective satisfaction of the Governor. He is the sole judge as to the existence of the circumstances necessitating the making of an ordinance. His satisfaction is not a justiciable matter. It cannot be questioned on the ground of error of judgment or otherwise in a court."

The strict interpretation of Art. 213 gave rise to unencumbered powers to the Governor in deciding the state of immediate circumstances that led to the promulgation of ordinances. The 38th amendment to the Constitution added a provision making the satisfaction of the President to issue an ordinance non-justiciable.[43] Subsequently, after three years, the status quo was restored by deleting the provision through the 44th Amendment. The court, despite the express provision, held in the State of Rajasthan v. Union of India[44] that presidential satisfaction under Art. 123(1) can still be questionable on the ground of mala fides.[45]

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42 AIR 1974 SC 1533.

43 Art. 123(4).

44 AIR 1970 SC 564.

45 The Supreme Court in Rameshwar Prasad v Union of India (2006) 2 SCC 1 has disapproved the view expressed and reaffirmed the ratio in Bommai's case that the subjective satisfaction of a Constitutional authority including the Governor, is not exempt from judicial review.

The extent of the Court's jurisdiction to examine the satisfaction of the President was not expressed by the Court. However, Ray J., opined that "the satisfaction of the President is subjective and the only way in which the power of the President can be challenged is by establishing bad faith or mala fide and corrupt motive."[46]

In the Bank Nationalisation case[47] the constitutional validity of the Banking Companies (Acquisition and Transfer of Undertakings) Ordinance 1969, was challenged. The ordinance nationalized several private banks. The condition precedent to the exercise of the power under Art. 123 was questioned before the court. The argument was that Art 123 does not make the President the final arbiter of the exercise of an ordinance-making power. The Government in turn argued that the condition of satisfaction of the President was purely subjective and there is no obligation to disclose the existence of circumstances that led to immediate action.[48] However, the ordinance was replaced by an Act of Parliament, and hence the Supreme Court left the question open, saying that it had become more academic.

Again, in AK. Roy v. Union of India[49] the question of judicial review of the President's satisfaction to promulgate the National Security Ordinance, 1980, providing for preventive detention was raised. The court once again left the question open since the ordinance in question has been replaced by the Act

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46 R.C. COOPER, supra note 21.

47 *Id.*

48 *Id. at 72.*

49 AIR 1982 SC 710

of Parliament. Further, the court pointed out that a prima facie case must be established by the petitioners as regards the non-existence of the circumstances necessary for the promulgation of the Ordinance before the burden can be cast on the President to establish those circumstances.[50] A casual challenge is impermissible. The Court did however observe that "the power to issue ordinances is not meant to be used recklessly or under an imaginary state of affairs or mala fide against the normal legislative process."[51]

Thus, an analysis of these cases shows that the satisfaction of the President in promulgating an ordinance can only be challenged on the ground of mala fide or bad faith. This argument is further strengthened after the Supreme Court has ruled in Bommai[52] that a proclamation by the President under Art 356 can be challenged on the ground of mala fides, or that it is based on wholly extraneous and irrelevant grounds. Repeal of the 38th Amendment by the 44th Amendment of the Constitution also indicates that the argument of mala fides is not foreclosed to challenge an ordinance.[53] The strict interpretation given by the courts has restricted the development of law in this regard. In many cases, the courts have left the answer open. Thus, we can derive from these cases that under normal circumstances an inquiry into the question of satisfaction of the President about the need of promulgation of an ordinance is not a justiciable matter. This is because the ordinance as

[50] *Id.* at 710.
[51] *Id*. at 711
[52] S.R. Bommai v. Union of India, AIR 1994 SC 1918.
[53] MP JAIN, INDIAN CONSTITUTION 174 (Lexis Nexis 2014).

mandated in the Constitution is fully clad with features of an Act. An ordinance, standing on the same footing as an act of the legislature, can only be challenged when it transgresses constitutional limits. Supportive of this argument, we have the case of T. Venkata Reddy v. State of Andhra Pradesh[54] wherein the Supreme Court has ruled that since "the power to make an ordinance is legislative and not executive power, the exercise cannot be questioned on such grounds as improper motives or non-application of mind." As per law, an ordinance stands on the same footing as an Act. Therefore, an ordinance should be clothed with all the attributes of an Act of legislature. A statute can be challenged only if it transgresses the constitutional limits and any scrutiny based on propriety, expediency, and necessity of a legislative act is beyond the scope of inquiry of courts.

Similarly, the Supreme Court has observed in Nagaraj:[55]

> "It is impossible to accept the submission that the ordinance can be invalidated on the ground of non-application of mind. The power to issue an ordinance is not an executive power but is the power of the executive to legislate... This power is plenary within its field as the power of the State Legislature to pass laws and there are no limitations upon that power except those to which the legislative power of the State Legislature is subject. Therefore, though an ordinance can be invalidated for contravention of the constitutional limitations which exist upon the power of the State Legislature to pass laws it cannot be declared invalid for the reason of non-application of mind, any

[54] AIR 1985 SC 724.
[55] K. Nagaraj v. State of Andhra Pradesh, AIR 1985 SC 551.

> more than any other law can be. An executive act is liable to be struck down on the ground of non-application of mind. Not the act of a Legislature."

The only case where the ordinance was effectively challenged was in the case of B.A. Hasanahba v State of Karnataka,[56] in which a single judge of the Karnataka High Court declared "an ordinance promulgated by the State Governor as being mala fide and he ruled that power is used for sub-serving, conserving, and enhancing the constitutional process and should not be and cannot be used for purposes of bypassing it." He referred to the Bommai case in support of his decision. However, on appeal, a bench of two judges reversed the judgment by referring to the case of Nagaraj and held that the malafides cannot be attributed to the legislature as a body and the governor acts as the substitute of the Legislature while making the ordinance.

An analysis of these cases reveals that the Supreme Court in its decisions has gone too far in immunizing an ordinance from judicial review. The two - the ordinance and the Act of Parliament- cannot be equated in all respects. The legislation is a process wherein the law is tested on the floor of the House, which is considered to be an open and transparent body, whereas the power of ordinance making is purely an executive decision, neither transparent nor subject to any open criticism before its promulgation. Though we are not following a strict separation of powers between different organs, it is evident that powers are well demarcated and outlined in the Constitution.

[56] ILR 1998 Kar. 85.

And we adhere to the theory that the legislature makes the laws and the executive implements the laws. After all, in the case of ordinances, it is the legislative act of the executive but not the act of the legislature that is in question. It is only an exceptional power conferred on the executive wing. Therefore, challenging decisions on the ground of mala fides should always remain a possibility so that the executive is deterred from using its power to issue an ordinance improperly.[57]

From the discussion, it is clear that an ordinance becomes the law of the land as soon as it is promulgated. An ordinance would be made open to challenge on the following grounds mainly if it constitutes colorable legislation, or if it contravenes any of the Fundamental Rights as mentioned in our Constitution; or if it is violative of substantive provisions of Our Constitution such as an Ar. 301; or if it retrospectively is unconstitutional. Parliament's control over the Central Executive's ordinance-making power is thus ex post facto, i.e., it is exercised after the ordinance has been promulgated and not before.[58] This lack of pre-inspection does not in any way deteriorate the status of an ordinance in its application. They are asserted as legislation made in proper form. They are not rules, bye-laws, orders, or delegated legislation as commonly associated with the powers of the executive organ. When the President or the Governor promulgates ordinances, "they act as legislative surrogates; they are to ordinances what both houses of

[57] MP JAIN, supra note 53 at 175.
[58] *Id* at 176.

Parliament or State Assemblies are to legislation."[59] "They authorize a non-deliberative, non-majoritarian, and private legislative method –one that reduces legislation to fiats."[60]

The result is that an ordinance becomes the law of the land once promulgated. The effect of the promulgation is similar to that of legislation enacted by the Legislature. The only difference is that an ordinance has only limited life. If later the ordinance comes to an end for any reason, the status of the ordinance does not become void ab initio. Whatever valid transactions have been completed cannot be reopened once the ordinance ceases. Such a change of law temporarily may or may not result in justice depending on the circumstances.

In the case of Venkata Reddy,[61] an ordinance was promulgated abolishing posts of part-time village officers in the State. The ordinance was not succeeded by an Act of State Legislature though it was succeeded by four ordinances. The contention raised in this particular case was that the ordinance having lapsed, the posts which have been abolished should deem to have been revived. On appeal, Supreme Court rejected the argument and stated that an ordinance comes into effect as soon as it is promulgated and when later it comes to an end for any reason, the ordinance did not become void ab initio. The transactions which have been completed are valid and cannot be reopened

[59] RICHARD BELLAMY, THE RULE OF LAW AND THE SEPARATION OF POWERS 322 (Taylor & Francis 2017).

[60] *Id* at 323.

[61] T. VENKATA REDDY, supra note 54.

when the ordinance comes to an end. Supporting this argument is the provision of Art 123 and 213, wherein it specifically states that an ordinance shall only be void on disapproval of the Parliament or State Legislature. It means that the ordinance should be treated as effective till it ceases to operate. Thus, the abolishment of the part-time village posts is an accomplished matter and it becomes irreversible, and there is no question of their revival.[62] It means that even without legislative approval, the desired results could be achieved.

An instance where the immediate effect of the ordinance was used to meet political end is evident in this case. Elections were held for the Cuttack Municipality and 27 councillors were declared elected. A defeated candidate challenged these elections and the High Court voided them on the ground that the electoral roll has not been prepared according to law. Apprehending that on this ground, elections to municipalities other than those of the Cuttack Municipality might also be declared void, the State Government promulgated an ordinance validating the electoral rolls, and all elections held based on these rolls was held valid.[63] The ordinance was never placed in the Legislature and it lapsed. Later a writ petition was filed questioning the invalidity of the electoral roll as the ordinance has lapsed. However, the Supreme Court ruled that the invalidity of the elections was not intended to be temporary and the same did not come to an end as soon as this ordinance expired. [64]

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[62] *Id.* at 724.
[63] MP JAIN, supra note 53, at 248.
[64] Orissa v. Bhupendra Kumar Bose AIR 1962 SC 945.

Thus, from the above cases, we can see that the effect of the ordinance once promulgated has far-reaching consequences. Once it is in force, it will circumvent the situation, whether it is an emergency or for political gain. Objections to any ordinance can be questioned only once it is in force.

Krishna Kumar Singh and Another v. State of Bihar[65] is a landmark decision in the area of an ordinance making power of the President and the Governor. Stating that re-promulgation of ordinances is a fraud on the Constitution and a subversion of democratic legislative processes, the 7 judge bench held that the Ordinance making power does not constitute the President or the Governor into a parallel source of lawmaking or an independent legislative authority.[66] It was stated that the constitutional fiction which attributes Ordinance with the same force and effect as a law enacted by the legislature comes into being only if the Ordinance has been validly promulgated and complies with the requirements of Articles 123 and 213. Further, the Court observed that no express provision has been made in Article 123 and Article 213 for saving of rights, privileges, obligations, and liabilities which have arisen under an ordinance that has ceased to operate.[67] The question as to whether rights, privileges, obligations, and liabilities would survive an Ordinance that has ceased to operate must be determined as a matter of construction by applying an appropriate test of public interest and constitutional necessity.

[65] AIR 1998 SC 2288.
[66] *Id.* at para 80.
[67] *Id.* at para 81.

6.2.2 The Practice of Re-Promulgation and Framing of National Policies

During the pre-constitutional period, for the first time, the power to promulgate ordinances was used as a parallel legislative arrangement.[68] The Public Safety Ordinance, 1929 is a classic example.[69] A Public Safety Bill which purports to authorize the removal from British India of certain persons engaged in subversive propaganda was introduced in the then Legislative Assembly. After some deliberations, the Assembly cast it out. Lord Irwin's government introduced a new version of the bill in the Assembly, but then-President Vithabhai Patel objected to it. He did not give assent to the bill thereby creating a constitutional crisis. Further, he proposed some alternatives which were not acceptable to the Government. Lord Irwin's government promulgated the ordinance that incorporated the provisions that were rejected in the assembly. This was the first instance where the ordinance was used as an alternative to Parliament legislation. He justified his action by invoking the support of the vast majority of India's people while promulgating it. He added as a statement, attached to the ordinance, that the 'serious character of (his) personal decision', claiming that he did not doubt that his action would "command the approval of a vast majority of India's people which have faith in India's future and whose first desire to see their country prosperous, contented and secure."[70]

[68] SHUBHANKAR DAM, *An Institutional Alchemy: India's Two Parliaments in Comparative Perspective* 39 BROOK. J. INT'L L. 629(2014).
[69] Ordinance 1 of 1929.
[70] Anon, *Viceroy's Action Public Safety Ordinance*, TIMES OF INDIA, 15 April 1929.

Another development during this era was the stricter understanding of emergency in the promulgation of ordinance gave way to interpretation such as administrative difficulty. The state of affairs leading to the promulgation of the Lahore ordinance is a good example, where administrative inconvenience is counted as an emergency. The trial of the assistant superintendent of police, John Saunders, and a head constable, Vhanan Singh, began in Lahore on 11 July 1929. Lord Irwin promulgated an ordinance to overcome the delay caused by repeated adjournments due to the hunger strike led by Bhagat Singh and several of his colleagues. Lord Irwin justified that his action on public policy, as he understood it, required that the grave charges be thoroughly scrutinized and finally adjudicated upon with the least possible delay, and he set up a tribunal of three judges, investing them with powers to deal with the wilful objection.[71] The above circumstances did not amount to anything more than mere administrative challenges in enforcing ordinary law. While doing so, Lord Irwin "used the power of ordinance to invoke the legislative power closer to that of primary legislation."[72]

The trend before coming into force of the Constitution was favorable to the ordinance. What was earlier authoritarian, undemocratic, and humiliating, they now believed was necessary.[73] By 23 May 1949- the date on which ordinances were debated and voted upon- Nehru's cabinet had already promulgated as many as sixty-three ordinances in Independent India. These

[71] Statement of Lord Irwin appended to the Lahore Conspiracy case Ordinance, 1 May 1930, Shimla.
[72] Bhagat Singh and others v. The King-Emperor 1931 33 BOMLR 950.
[73] HANS RAJ, supra note 9, at 68.

developments made ordinance increase both in numbers and status. The use of this extraordinary power was vehement and already in practice and there was no going back. Thus, not as a surprise, the CAD debates on ordinances were favorable to ordinances because of the existing trend set in the past. The CAD also shows that the ordinance was never intended to be an independent power of legislation and unlike, sec 43 and 44 of the 1935 Act, it is not a parallel power with that of the Parliament. Dr. Ambedkar who strongly supported the introduction of Ordinance, along with Rau, believed that ordinance is necessary and there may arise a situation where at any particular moment the law may be deficient to deal with a situation, which may suddenly and immediately arise, and the idea of arming the President with powers to make a new law was justified. The outcome of the ordinance was never in doubt. The data reveals that Ambedkar's claim as well as the belief of members of CAD that the ordinance will never be misused proved wrong.

However, usage of the power of ordinance was rarely made with clean hands. One of the most glaring instances in the case of Ordinance Raj where the power to promulgate an Ordinance, primarily used to meet an extraordinary situation, was allowed to be perverted to serve political ends.[74] The petitioner, Dr. D.C. Wadhwa was a professor of economics in Pune and had filed a PIL challenging the general power of the Governor to re-promulgate various ordinances. The petitioner had extensively researched and published about the misuse of the ordinance making power of the governor of

[74] D.C. Wadhwa & Ors vs State of Bihar & Ors AIR 1987 SC 579.

Bihar because the government of Bihar had promulgated 256 ordinances between 1967 and 1981 and these 256 ordinances were kept alive for periods ranging between one and fourteen years by mechanically re-promulgating the ordinances without changing any content of the ordinance or trying to turn it into an Act.[75] In this case, the State of Bihar had promulgated ordinances on a massive scale without enacting any legislation on the subject matter.[76] After each prorogation of the assembly session, the same ordinance containing substantially similar or same provisions was re-promulgated on a routine matter for years. This practice along with the constitutional validity of three different ordinances issued by the Governor of Bihar, namely, (1) Bihar Forest Produce (Regulation of Trade) Third Ordinance 1983; (ii) The Bihar Intermediate Education Council Third Ordinance 1983; and (iii) The Bihar Bricks Supply (Control) Third Ordinance 1983 came up before the Court.

The court held that the petition is of the highest constitutional importance and the executive in Bihar has taken over the role of the legislature for years which is a disregard of the constitutional limitations. The court further stated that Ordinance promulgated by the Governor to deal with the situation which requires immediate action must necessarily have a limited life and struck down the ordinance which was still in force.

The book of D.C. Wadhwa entitled 'Re-promulgation of Ordinances: A Fraud on the Constitution of India' in 1983 is hailed with such a wealth of

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[75] DURGA DAS BASU, COMMENTARY ON THE CONSTITUTION OF INDIA 980(Lexis Nexis 2017).

[76] D.C. Wadhwa, supra note 74.

documented detail as to leave no room for two opinions.[77] The book exposed the unwarranted, unconstitutional practice of re-promulgating ordinances that not even a vehement critic could oppose him. Yet, the practice of re-promulgation is extensive, and at times unchecked.

The judgment in Wadhwa's case[78] is still considered as authoritative however, it does little credit rather than the impugned ordinance being struck down as unconstitutional. As correctly pointed out by the author, there has been hardly any improvement after the prominent judgment in restricting/controlling the 'towering power of bureaucrats which is generally unwarranted'.[79]

This case is not just one of the kinds. In Gyanendra Kumar v Union of India,[80] a similar situation was presented to the Delhi High Court wherein several ordinances had been reissued over and over again during the period October 1995 to March 1996 without being brought before the Parliament. However, the Court desisted from declaring the ordinance unconstitutional, following the Wadhwa ruling, and accepted the plea of Parliament that they had been very busy with urgent and emergent public business and so it could not find sufficient time to enact the laws to replace the ordinances. The Supreme Court has itself recognized such a contingency. The verdict in the Wadhwa case had an exception. It says that re-promulgation is permissible on

[77] Gokhale Institute of Politics and Economic (2007).
[78] D.C. WADHWA, supra note 76.
[79] *Id.*
[80] AIR 1997 Del. 58.

the satisfaction that the Parliament had 'too much legislative business' and in such cases, the President can legitimately re-promulgate an ordinance. At times, the Government resorts to this saving clause to protect them against liability. This is clear in the case of Gyanendra Kumar v. Union of India. It seemed that reiterating the exception without any basis or any check on veracity was sufficient in this case.

Cabinets may resort to ordinances to further specific policy preferences that do not enjoy parliamentary support.[81] Indeed, they may do so because they lack majority support. For example, the draconian provisions of the Prevention of Terrorism Act (POTA) failed to pass as a law in the Parliament but it easily got re-promulgated into an ordinance. The very provisions of the POTA are considered a threat to the life, liberty, and democratic rights of the people of India. The re-promulgation of POTA after having failed to introduce it in parliament is a subversion of the Constitution and a usurpation of the powers of the legislature by the executive.[82] The President re-promulgated POTA after introducing minor changes in the provisions to avoid the settled position of law that once a bill failed to get through the Parliament it cannot be introduced as law. The extraordinary power conferred on the President to legislate law, only when the Parliament is not in session and there is a dire need for that particular law, was misused while tinkering with the ordinance and re-promulgating them. The strategic approach taken by the Government is a clear example of how the power of ordinance can be misused for political

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[81] SHUBHANKAR DAM, supra note 68, at 630.

[82] D.Nagasaila, *Re-Promulgation of POTO: Is It Legal*? 37, EPW 371 (2002).

gains. There had been ample opportunity and convenience to introduce POTA in the then winter session of Parliament. But the cabinet deliberately avoided placing POTA in the Houses in fear of rejection on lack of a majority. Instead, it waited till the validity ceased and re-promulgated, once the parliamentary sessions were over.

Occasionally, "cabinets may promulgate anti-majoritarian ordinances not by choice but under compulsion."[83] India became TRIPS (Trade-Related Aspects of Intellectual Property Rights) compliant when it became a founding member of WTO in 1995. This mandated several amendments in Indian Patent Law to meet new obligations. The Government slept over it for more than eight months seeking a consensus on the proposed changes. Finally, with an impending deadline it came up with an ordinance- The Patents (Amendment) Ordinance, 1994- on December 31, 1994, which proposed to amend Indian Patent laws in conformity with TRIPS. The move raised sharp criticism. As the Times of India editorial put it, rather than make any conciliatory moves, the government gambled on the opposition supporting it to save face abroad.[84]

Cabinets also resort to the ordinance as a convenient legislative method. They are convenient in the sense that the ordinance in question is a relatively uncontroversial one- and unlikely to generate objections. [85] The National Human Rights Commission (NHRC), a statutory body to enquire

[83] Jeremy Waldron, *The Dignity of Legislation* 54 MD. L. REV. (1995).
[84] Patent Myopia, TIMES INDIA, Apr. 1, 1995, at 14.
[85] SHUBHANKAR DAM, supra note 68 at 629.

into allegations of human rights violations was created through an ordinance.[86] Senior officials claimed that it was "an entirely new kind of legislation," and "drafted after sixteen months of intense discussions."[87] "All shades of public opinion" were heard, including consultations with federal ministries and state governments.[88] If true, these expansive briefings take away the very justification for the ordinance.[89]

Thus ordinances, in practice, have an extensive presence in India's parliamentary annals.[90] The power of ordinance was considered exceptional and limited but relevant literature reveals that it is not. Rather, they are a convenient and –distressingly at times-the preferred legislative method.[91]

6.3 THE MISSING LITERATURE ON ORDINANCE IN KERALA

A power not usually found in the Constitution of democratic countries is found in the Constitution of India- a power to promulgate ordinances having the force of law for a temporary duration.[92] Most democracies including the United Kingdom, the United States of America, Australia, and Canada do not give the executive such powers to issue Ordinances.[93] In cases of any urgent

[86] The Protection of Human Rights Ordinance, 1993, No. 30 of 1993.
[87] Human Rights Body to Be Set Up, TIMES INDIA, Sept. 30, 1993, at 1.
[88] *Id.*
[89] *Id.*
[90] B.L. SHANKAR AND VALERIAN RODRIGUES, FOR A DEFENCE OF INDIA'S PARLIAMENTARY CREDENTIALS., The Indian Parliament: A Democracy at Work 371-386(Oxford University Press 2011).
[91] *Id.* at 385.
[92] DC WADHWA, supra note 18, at 198.
[93] Parliament as a Law-Making Body, 4 PRS Legislative Research (2014).

situation that requires the passing of a new law, they summon an emergency session of the legislature.[94]

This statement does not make the power of ordinance by itself undemocratic. The Constitution makers intended to use the power to deal only with unforeseen or urgent matters and analysis of Articles 123 and 213 shows that it is subject to proper parliamentary controls. Further, if the executive misuses its power, the Lok Sabha can pass a vote of no-confidence to remove the government from office. However, all said, it cannot be denied that a government enjoying majority support in the House can misuse or abuse this power.[95] Thus, the underlying problem with the power of ordinance arises when the power is being misused. In such cases, the power of ordinance becomes undemocratic; a negation of democratic principle.

There is no clear systematic account of ordinances in Kerala. Ordinances raise a large number of constitutional issues with implications for the legislature's legislative power. We do not have a fully worked-out analysis. The statistical study on ordinances of Kerala, which follows, is intended to fill that void at least to some extent.

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[94] *Id.*

[95] MP JAIN, supra note 53 at 246.

TABLE 6.1

Legislative Assembly –Wise Breakdown of Ordinances

Legislative Assembly	Ordinances
I 1957-1959	21
II 1960-1964	18
III 1967-1970	36
IV 1970-1977	122
V 1977-1979	63
VI 1980-1982	19
VII 1982-1987	322
VIII 1987-1991	53
IX 1991-1996	52
X 1996-2001	114
XI 2001-2006	84
XII 2006-2011	265
XIII 2011-2016	190
XIV 2016-2021	274

Source: Data collected from Kerala Legislative Assembly

Of the 60 years, 1965 is the only year without an ordinance. 1959, 1960, 1964, 1966, 1966, and 2004 have the second-best records: all these years saw no more than five ordinances each. Conversely, 1984 has the worst

record (as many as 103 ordinances were promulgated that year) and 1985 was close behind with 100 ordinances.

Measured in absolute numbers, the 1980s and 2010s are the worst affected decades. The 1980 account for substantially more ordinance i.e., 382 than any other decade. Whereas, counting from 2010 (number of years taken from 2010 to 2017), the number of ordinances has already reached its peak i.e. 315. It is interesting to note that only 77 ordinances were promulgated during the year from 1957 to 1969. Whereas in the remaining five decades even if we take them separately, it drastically outnumbers the double-digit number i.e., 77 (1957 to 1969). This may be for the reason that the State of Kerala on its formation started promulgating its ordinance in the year 1957. If it had a backdating history the number would have been close to the decade of the 1990s (110). Nevertheless, even if we take the decade 1960s alone the number of ordinances seems less when compared to other decades. This is counterintuitive. If the point of ordinances were to resolve moments of immediate legislative crisis, the 1960s would have the best record of alternative arrangements since it had the challenges of putting a State and legal system in order and conversely, it would have thrown up more ordinances. Despite the Covid-19 pandemic, the 2018-2021 period had not witnessed a peak in ordinances. However, we can see that ordinances have increased as the nation matured, peaking in the 1980s at 382- the most ever promulgated during any decade. To conclude that numbers are unacceptably

high, a perspective on several ordinances compared with the Legislature's performance is imperative.

TABLE 6.2

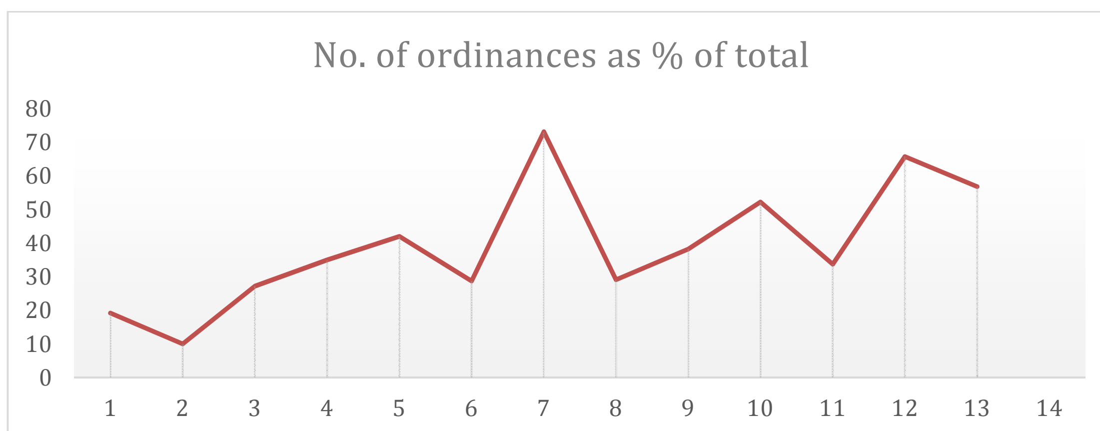
Legislative Assembly-Wise Breakdown of Ordinances and Acts

Legislative Assembly	Ordinances	Acts	Total	No. of ordinances as % of total
1st KLA	21	88	109	19.2
2nd KLA	18	161	179	10.05
3rd KLA	36	102	138	27.2
4th KLA	122	226	348	35.0
5th KLA	63	87	150	42.0
6th KLA	19	47	66	28.7
7th KLA	322	118	440	73.1
8th KLA	53	129	182	29.1
9th KLA	52	84	136	38.2
10th KLA	114	104	218	52.2
11th KLA	84	165	249	33.7
12th KLA	265	138	403	65.7
13th KLA	190	144	334	56.8
14th KLA	274	287	561	48.8

Source: Data collected from Kerala Legislative Assembly

The table shows the number of ordinances in comparison to Acts enacted during each Kerala Legislature Assembly. The graph depicts ordinances promulgated during the tenure of each Kerala Legislative Assembly as % of the total number of Acts and Ordinances. The 7th KLA shows the highest % record of ordinances wherein of the total of 440 Acts and Ordinances, 322 were ordinances. The 12th KLA gives a picture of 65% of the total number of ordinances during those periods. The data of 13th KLA, 14th KLA, and 10th KLA also gives the number of % ordinances above 50, which is clearly against democratic principles. The overall picture also shows that except during the period of the first two KLAs, the ordinances enacted during the tenure of subsequent KLAs were high.

Figure 6.1 No. of Ordinances as % of Total



Source: Data collected from Kerala Legislative Assembly

TABLE 6.3

Top Ten years with the Largest Number of Acts and Corresponding Ordinances

Year	Acts	Ordinances	Total	No. of ordinances as % of total
1958	48	9	57	15.7
1961	43	7	50	14.0
1963	42	4	46	8.6
1971	39	25	64	39.0
1976	48	14	62	22.5
1979	36	13	49	26.5
1986	37	73	110	66.3
1989	36	11	46	23.9
2005	47	30	77	38.9
2018	39	59	98	60.2

TABLE 6.4

Top Eleven years with the Smallest Number of Acts and Corresponding Ordinances

Year	Acts	Ordinances	Total	No. of ordinances as % of total
1959	17	4	21	19.0
1964	17	3	20	15.0
1982	3	6	9	66.6
1992	9	11	20	55.0
1995	18	16	34	47.0
1997	18	19	37	51.0
2010	16	57	73	78.0
2011	15	60	75	80.0
2012	17	65	82	79.2
2020	8	81	89	91.0
2021	3	49	52	94.2

Source: Data collected from Kerala Legislative Assembly

Throughout the 60 years, there is no statistical correlation between the legislature's legislative performance and the likelihood of ordinances. Contrary to common belief, ordinances in any given year do not necessarily

rise with a fall in the number of Acts enacted that year. Tables 6.3 and 6.4 make this assessment clear.

TABLE 6.5

Years Where Ordinances Outnumbered Acts

Year	Ordinances	Acts	The ordinance as multiple Acts
1983	41	20	2.05
1984	103	21	4.90
1985	100	30	333.3
1986	73	37	1.97
1992	11	9	1.22
1997	19	18	1.05
2001	37	20	1.85
2006	60	26	2.30
2007	63	34	1.85
2008	41	34	1.20
2010	57	16	3.56
2011	60	15	4.0
2012	65	17	3.82
2013	38	30	1.26
2018	59	39	1.51
2019	43	23	1.86
2020	81	8	10.12
2021	49	2	24.5

Source: Data collected from Kerala Legislative Assembly

There were 18 years where the ordinances had outnumbered the Acts. In the year 1985, there were only 30 Acts, whereas 100 ordinances were enacted. It records the highest number of ordinances as multiple of Acts. In the year 2021, only two legislations were made, but there were 49 ordinances.[96]

The statistical data depicted in the above Tables show a stark reality of Kerala. It is a disturbing fact that in a parliamentary democracy such humiliation of the legislative process is consistently taking place. While the Supreme Court in D.C. Wadhwa v. the State of Bihar,[97] vehemently stressed that the legislative power of the Executive to promulgate ordinances is to be used *only* in exceptional circumstances and not as a substitute for the law-making power of the Legislature, it has been observed that the government's ordinance-making powers have turned what were supposed to be exceptional powers into a procedural device to out-maneuver the Parliament.[98] The State of Kerala is no exception to this trend. The data clearly shows that in the initial years, that is in the decades of the 1960s and also in the first few KLAs, ordinances did not outnumber Acts, and further the number of ordinances passed each year was minimal. But there is a sharp rise in the number of ordinances subsequently. By the end of 2013, the number of ordinances had drastically increased when compared to legislation. The marginal difference between the number of ordinances and Acts has slowly grown to a sufficiently

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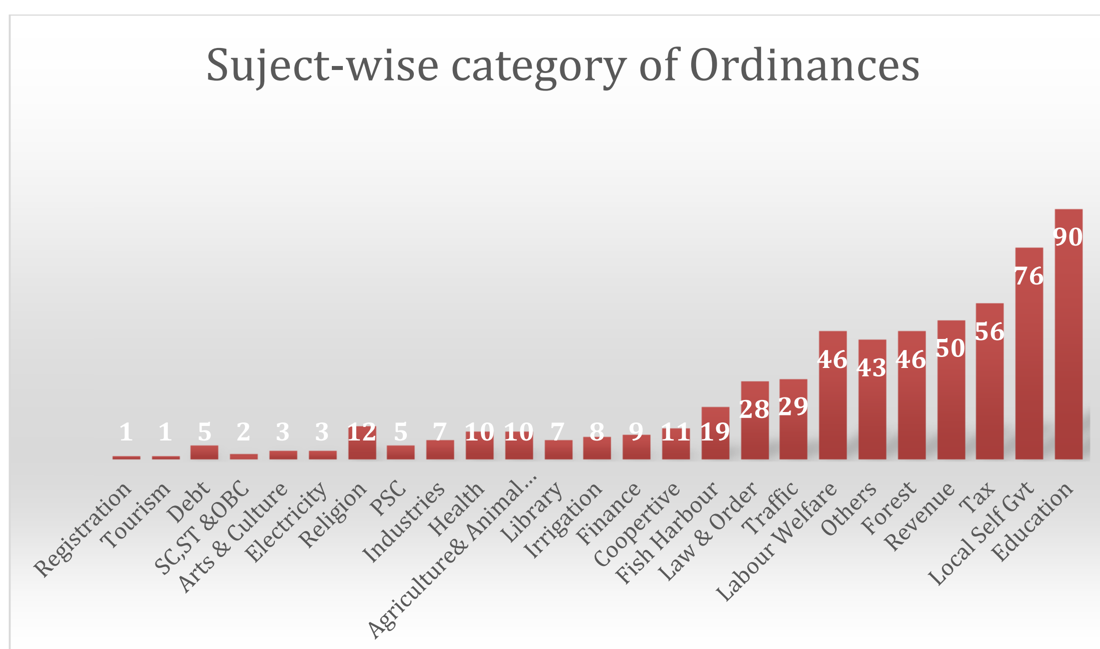
96 The period of the 14th KLA ended in May 2021.
97 D.C. Wadhwa, supra note at 77.
98 Hewitt and Rai, *Parliament*' in Jayal and Mehta (eds.), The Oxford Companion to Politics in India (2010).

large number to make governance by ordinance evident. It must be added that despite the Covid-19 pandemic, the 14th KLA had not superseded the % of the ordinance of the 11th and 12th KLA.

FIGURE 6.2

Subject –Wise Classification of Ordinances



Source: Data collected from Kerala Legislative Assembly

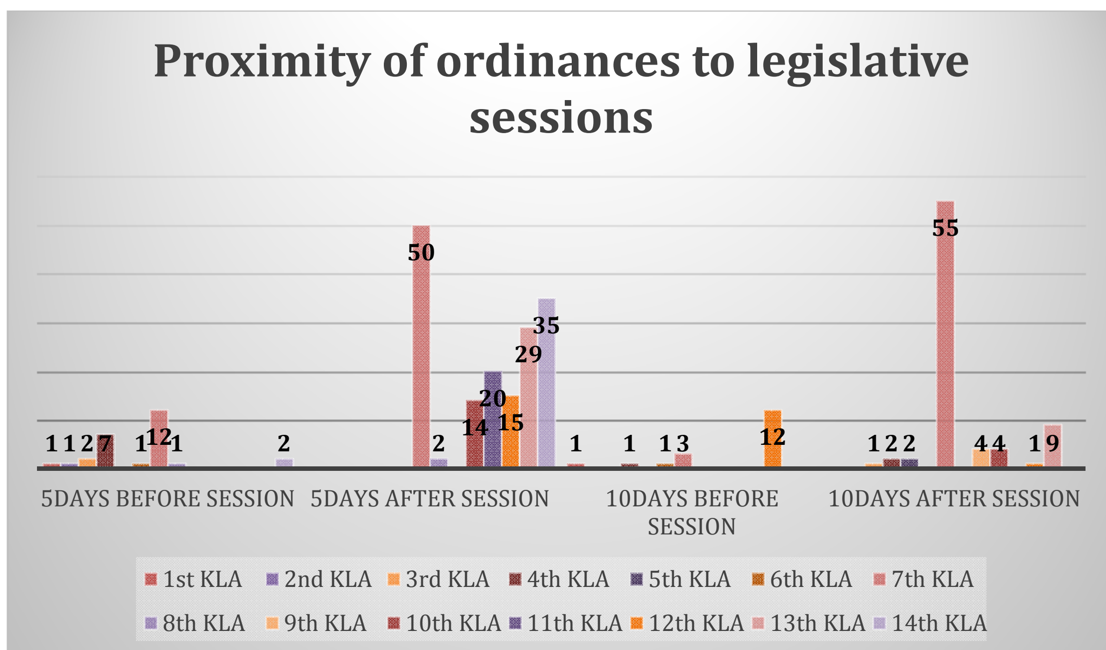
The ordinances enacted during different legislative assemblies, categorized subject-wise are shown in the above table. The Table shows that the greatest number of ordinances were passed in the subject of education. Every Act which establishes Universities was initially enacted as an ordinance. For example, important Universities such as Calicut University, Cochin University, Kannur University, Malabar University, National University of Advanced Legal Studies, etc were first established through ordinances. Next to the subject of Education, is the subject of Local Self

Government. It is evident that Local Self Government is an important subject needed in the administration of the State and at every juncture, interference was made to control the local administration. Important legislations on Panchayat, Municipality, Panchayat Raj, Abolition of Village officers' posts, etc were all enacted as ordinances before the enactment of proper legislation. The ordinances on the subject of revenue were very much higher before 2001, especially during the formation of the State. Similarly, ordinances on the subject of tax continue to increase day by day. Other subjects like tourism, debt, electricity, religion, etc have only very few ordinances during the entire period. This is because legislations are comparatively less when compared to other subjects and also such matters are considered less important to take up as an urgent matter. Though health is an important matter, only a few ordinances have been enacted on the particular subject.

From an analysis of the subject matter of the ordinances, we can see that there is no uniform practice in re-promulgating ordinances. Most of the legislations are initially enacted as ordinances, before being introduced in the Assembly. This shows that laws come into force before being scrutinized in the public forum of elected representatives. Many ordinances are further re-promulgated, (Fig.6.6), which shows that the laws govern the society without proper scrutiny by the representatives of the people.

FIGURE 6.3

The Proximity of Ordinances to Legislative Sessions



Source: Data collected from Kerala Legislative Assembly

The power of ordinance making is to be used in extraordinary circumstances when both Houses of Parliament/State Legislative Assembly is not in session and there must be a circumstance that necessitates immediate action. The above figure shows that this rule is generally not followed. The Ordinance is taken as a convenient means of enacting a law, deviating from the democratic means of enacting legislation. The figure depicts the legislations that were made near to the dates of the sittings of the House. It may or may not be a deliberate intention to avoid the public forum, but the record shows that such ways are practiced more often.

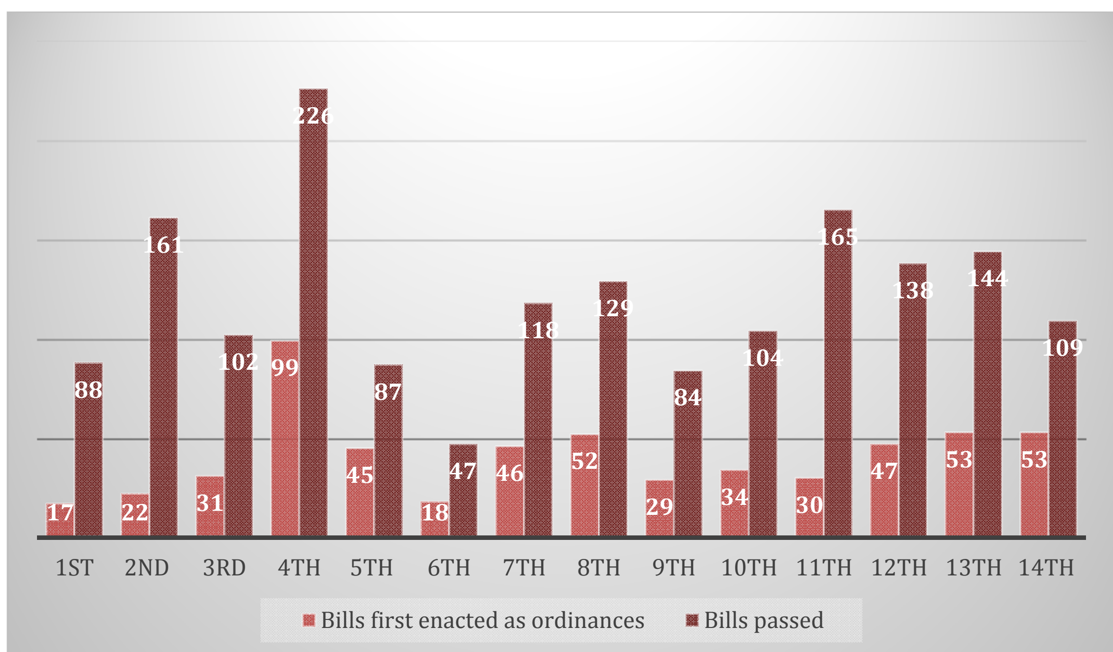
There are several instances of promulgation of ordinances close to the date of the sittings of the Assembly which clearly outlines the undemocratic

evolution of law. In the 7th KLA, many ordinances were promulgated in proximity to the sittings of the Assembly. Around 15 ordinances were promulgated on 28th July 1984, just after one day of the sitting. Similarly, 29 legislations were promulgated just after two days of a sitting in the 7th KLA. The decision of the Wadhwa case may have influenced the undemocratic promulgation of ordinances and from the 8th KLA, the number of ordinances close to the date of sitting had shown a decrease. The 11th KLA also shows a high number, that is around 20 ordinances were promulgated, but it could be justified since the House was dissolved after two days of sitting. But contrary to the findings, around 31 legislations were enacted with proximity to the date of the sittings in 12th KLA. Around 15 ordinances were promulgated on 30th March 2007 just one day after the sitting ended on 29th March 2007. Similarly, 16 ordinances were promulgated on 30th July 2007 soon after the session which ended on 26th July 2007. It is justified that one or two bills may fail to get introduced in the session of the legislature, due to lack of time. But bulk enactment of ordinances soon after the sittings raises an apprehension on the means to divert the democratic ways of enacting legislation. In the 7th KLA, bulk enactment of 28 and 20 ordinances was seen after 5 and 6 days respectively after the prorogation of the session. However, apart from the series of promulgation of ordinances of 12th KLA, the practice has been reduced. In the 13th and 14th KLA, the data shows that only a few ordinances were promulgated close to the session. In the 14th KLA, only two ordinances were promulgated 5days before the session, whereas in the 13th KLA, none.

After the sitting, in the 13th KLA, 29 ordinances were promulgated soon after the session and in the 14th KLA, 35 ordinances had been promulgated shortly after the sessions. Such practices are a matter of concern and stand against the democratization of legislation.

FIGURE 6.4

Legislations First Enacted as Ordinances



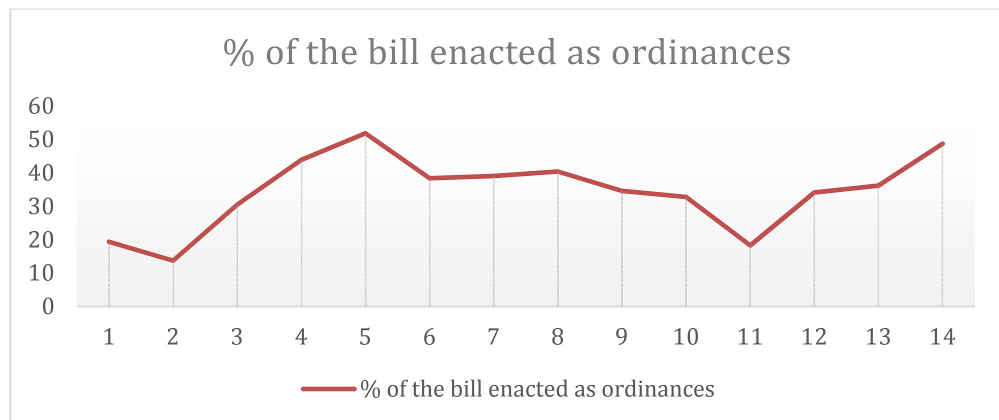
Source: Data collected from Kerala Legislative Assembly

The figure 6.4 clearly shows that many legislations were enacted as ordinances at the first instances and later on becomes an Act. Initially, during the 1st, 2nd,3rd, and 4th KLA the number of legislations that were first enacted as ordinances were very few. Later on, the number started as legislations that came via the route of ordinances began to increase. Again, there was a decrease in the number of legislations that came as ordinances during the 10th

and 11th KLA. From the 12th KLA, it began to rise. The table below shows the % of the bill enacted as ordinances as of % the total bills passed.

FIGURE 6.5

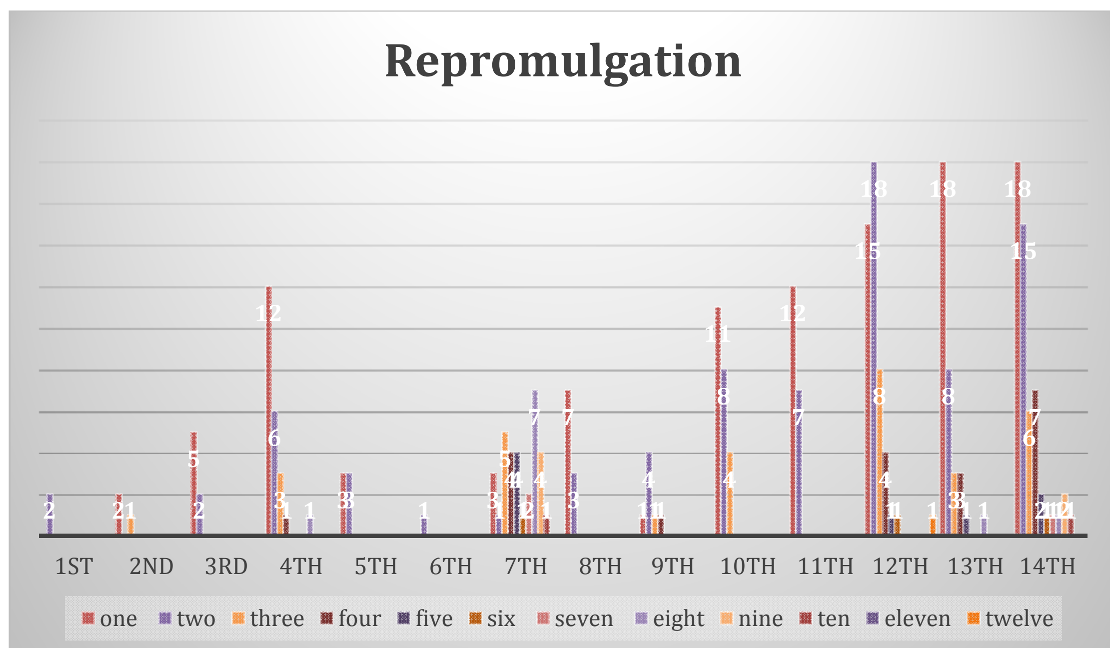
Percentage of Bills as Ordinances



Source: Data collected from Kerala Legislative Assembly

FIGURE 6.6

Repromulgation of Ordinances



Source: Data collected from Kerala Legislative Assembly

During the initial period that is during the first, second, and third Kerala Legislative Assembly the number of ordinances that were re-promulgated was very few. From the 4th KLA, the number of ordinances that were re-promulgated began to rise slowly. From the 7th KLA, governance by re-promulgation is evident. Though the number of ordinances that were re-promulgated in the 12th and 13th KLA was not less, the ordinances that were re-promulgated in the 14th KLA show a great number. This is mainly because the sessions of the legislature were affected by Covid- 19 pandemic, but still, the number is a matter of concern.

The ordinance was meant to be an exceptional tool that can be used only in case of legislative emergency and when the Parliament/State Legislature was not in session. It was never intended to be an independent power. The startling record of re-promulgation shows that re-promulgation is the most convenient method resorted to by the Government. The data from the figure shows that the ordinances have been re-promulgated numerous times before becoming an Act. The data includes ordinances that are re-promulgated every year repeatedly. [99] The Kerala Private Forests (Vesting and Assignment) Ordinance, 1967 is one such example where the ordinances were re-promulgated till 1999 till it became an Act of Legislature. Similarly, there are several other ordinances, to name a few, the Kerala Stay of Eviction Proceedings Ordinance 1958, Kerala Weights and Measures (Enforcement) Ordinances 1958, Kerala Municipalities Ordinance and Kerala Municipalities

[99] The ordinances are re-counted every year when re-promulgated.

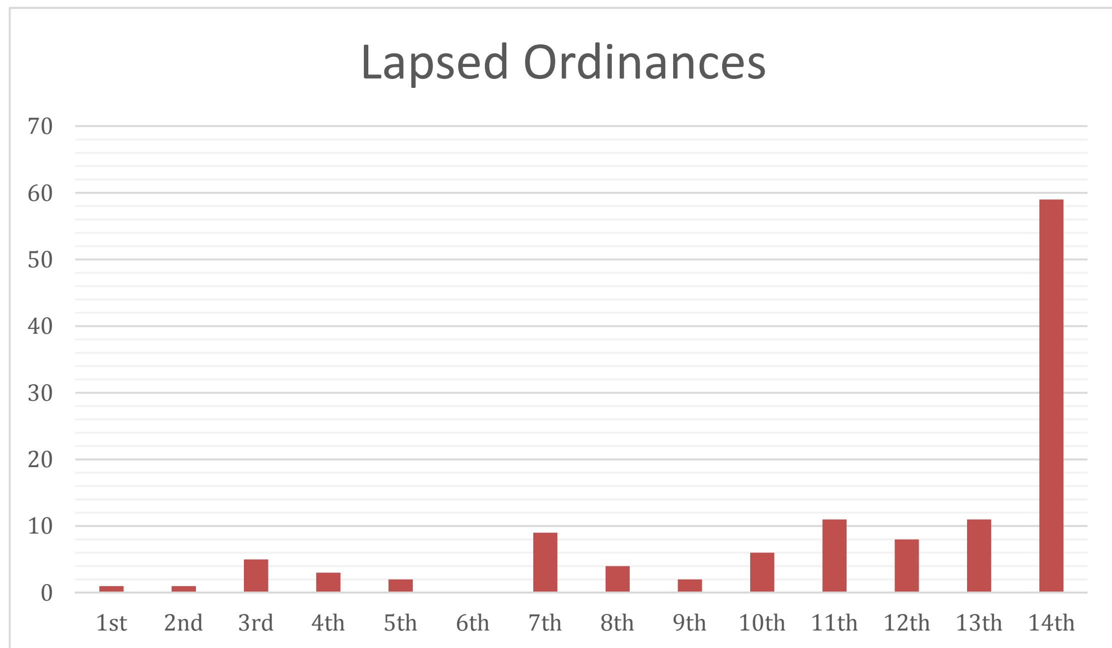
(Amendment) Ordinance, Kerala Panchayats Ordinances, The Abkari (Amendment) Ordinances, etc were re-promulgated more than 5 times before they finally attained the status of Acts. For deviating the tag of re-promulgation, in some cases, the ordinances are re-promulgated as the first amendment, second amendment, third amendment, etc. without much changes. The Kerala Fishermen Welfare Societies (Second Amendment) is a classic example of such a practice. Most of the establishment of University Ordinances such as Gandhiji University, Calicut University, Cochin University, University Laws (Amendment) Ordinance, Kerala University, etc were re-promulgated more than 4 times before it became Acts of Legislature. Considering recent data, in the 14th KLA, The Kerala University (Alternate arrangement temporarily of the Senate and Syndicate) Ordinance, 2018 was re-promulgated 6 times. The Madras Hindu Religious and Charitable Endowments (Second Amendment) Ordinance, 2018, The Kerala Cooperative Societies (Amendment) Ordinance, 2018, The Kerala Cooperative Hospital Complex and the Academy of Medical Sciences (Taking over the management and administration) Ordinance, 2018, The Kerala Veterinary and Animal Sciences University (Amendment) Ordinance, 2018, The Kerala Epidemic Diseases Ordinance, 2020 And The Kerala University of Digital Sciences, Innovation And Technology Ordinance, 2020 were re-promulgated 3 times each. Some of the other ordinances that were re-promulgated were The Kerala Jewellery Workers' Welfare Fund (Amendment) Ordinance, 2020, The Kerala Private Forests (Vesting and Assignment) (Amendment)

Ordinance, 2020, The Kerala Minerals (Vesting of Rights) Ordinance, 2020, The Kerala Disaster And Public Health Emergency (Special Provisions) Ordinance, 2020, The Sree Sankaracharya University of Sanskrit (Amendment) Ordinance, 2018, The Kerala High Court (Amendment) Ordinance, 2018, etc. Depending on the convenience of the executive ordinances are re-promulgated, discarding the cardinal principle of democracy and salutary provisions of the Constitution. Until the legislative section comes with a draft of the proposed Act, which in most cases is similar to that of ordinances, the ordinances are re-promulgated without any hesitation. During the 12th, 13th, and 14th KLA, the numbers are so high that, a few ordinances were promulgated 9 times and one even for 12 times. This is a serious threat to democratic practice.

We can see that though the Kerala Legislature is not resorting to promulgating ordinances as a matter of routine, at times the normal democratic legislative process is supplanted. The executive assuming the role of the legislature, except in an emergency, disregards the constitutional limitations and undermines the values of democracy

FIGURE 6.7

Lapsed Ordinances



Source: Data collected from Kerala Legislative Assembly

Allowing the ordinance to lapse is a serious phenomenon wherein the ordinances promulgated are not placed before the Parliament/State Legislature within a period of 6months and will not be treated as valid law anymore. This creates a major issue. On the lapse of an ordinance, the old law which was in work before coming of this ordinance will take the position.

The ordinances which lapsed created lasting rights. A seven-judge bench of the Supreme Court recently passed a judgment in Krishna Kumar Singh and Another v. State of Bihar and Others[100], holding that actions taken under an ordinance will not necessarily survive if the ordinance lapses or ceases to operate. This decision is to curb the recurrent practice by the

[100] (2017) 3 SCC 1.

Parliament and State Legislatures to impose laws without going through the constitutionally prescribed mechanism of having the bills pass through the body of Parliament or the State legislature; the government seeks to circumvent this procedure by issuing ordinances instead.

The practical impact of this judgment is that the rights or position modified under any ordinance issued by the government may not be permanent and may only persist for the duration of the ordinance unless the legislature comes with a statute. Thus, in the case of lapsed ordinances, there is always a chance that the rights may abate once the ordinance lapses. Also, there are chances that the Government may purposefully allow an ordinance to lapse after achieving the intended purpose.

The foregoing study on ordinance making in Kerala shows that lapsed ordinances are not new to the State. From the very first legislative assembly, ordinances were allowed to lapse, though few. The number of lapsed ordinances has increased lately.

With the Assembly sessions getting impacted by the Covid-19 pandemic, States used the Ordinance route more for making laws in 2020. And most of the laws that were enacted were without any scrutiny. And most shocking is that the report[101] published by PRS Legislative, a non-profit organization, reveals that the Kerala Assembly promulgated the highest number of ordinances in the COVID-hit 2020. According to the report, Kerala

[101] DAILY PIONEER, https://www.dailypioneer.com/2021/india/more-ordinances--less-bills-in-pandemic-year-by-states.html (last visited on 12th August, 2021 8:00PM).

tops the list by promulgating 81 ordinances. It is followed by Karnataka (24), Uttar Pradesh (23), Maharashtra (21), and Andhra Pradesh (16).

It is high time we interfere with the wide misuse of a ordinance-making power. The issuing of such a large number of ordinances in these years is a wide misuse of ordinance-making power. The judiciary too, in terms of the scheme of the Constitution, cannot enquire into the motives of the government in issuing ordinances or question the propriety of issuing them.[102] It can intervene only if an ordinance is ultra vires the legislative powers of Parliament, or the State Legislative Assembly, is unconstitutional or the power has been exercised by the executive in a mala fide or perverse manner. Bypassing the normal legislative procedure very often, it should be treated as an anomaly rather than a norm. The practice is a clear subversion of the democratic process which lies at the core of our constitutional scheme; for then, the people would be governed not by the laws made by the legislature, as provided in the Constitution, but by-laws made by the executive.

It is suggested that a standing committee must be formed by the Government to analyze and scrutinize the need for ordinances. In the case of non-urgent matters, the introduction must be postponed to the upcoming legislative session. Further, the committee must also keep a close watch of the re-promulgation and must set reminders to the legislative wing in case law needs to be enacted. When ordinances accumulate, a special session of the

[102] India Legal Live, https://www.indialegallive.com/cover-story-articles/il-feature-news/ordinances-parliament-executive-legislature/, (last visited 16th Oct. 2021 11:00 PM).

Assembly may be convened for transacting legislative business alone. This is suggested to overcome the situation where the people are not governed by the laws made by the legislature, as provided in the Constitution, but by-laws made by the executive by following the route of promulgating ordinances.

CHAPTER – VII
JUDICIAL REVIEW OF LEGISLATION: JUXTAPOSITION WITH DEMOCRATIC PRINCIPLES

The previous chapters sought to outline the significant role of the elected majority in upholding the true meaning of democracy in a parliamentary system of government. We have also examined the practical limitations in performing that role and how and to what extent those limitations constitute a democratic deficit. Now we move on to a deep introspection of the area of Indian Constitutionalism i.e., legislations being nullified by the Judiciary in the exercise of the power of judicial review and to examine the impact of judicial review on democracy, more specifically the question whether this amounts to a democratic deficit. When a law enacted by the legislature is declared ultra-virus the Constitution by the Judiciary, it may appear to be act against the will of the people expressed through legislation. The question whether judicial review of the legislation itself is anti-democratic or whether excessive or activistic expression of power of judicial review may become a negation of democratic element in law-making, assumes significance.

An American Lawyer, Archibald Cox observes:[1]

> "The principal source of legitimacy, I believe, is the all-important fragile faith that the Courts apply to current constitutional controversies as a continuing body of law. By law, I mean a set of governing principles- that have a separate existence and command an allegiance greater than that due to any individual merely by the office or personal prestige."

7.1 DEMOCRATIC CONTENT OF LEGISLATURE

Defining law is baffling since the law has many theories and facets. "It is a concept that includes in itself many things, different from each other."[2] The question, 'what is law' is theoretical, not a question of law but a question about the law. Some say, all rules, of whatever nature or origin or character, which the Courts of law recognize and normally enforce are law. By Art. 13(3) of the Indian Constitution, "Law includes any ordinance, order, by-law, rule, regulation, notification, custom or usage having in the territory of India the force of law." This states that law means the law made by the legislature, expressly as in the case of legislation or impliedly as in the case of ordinances and subordinate legislation.

The importance of legislation was ordained in the distinctive array of powers which Constitutions put in the legislative branch- "the authority to determine standards and rules of conduct in any area of social life legislators found to be of public interest, to allocate economic resources by taxing,

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[1] Archibald Cox, THE FIRST AMENDMENT ENCYCLOPEDIA (2009) https://www.mtsu.edu/first-amendment/article/1393/archibald-cox.

[2] UMESHWAR PRASAD SHARMA, LAW, LEGISLATURE, AND JUDICIARY 1(Mittal Publications 1996).

borrowing, and spending, to create or legitimize forms of public and private organization for collective effort, and to investigate matters of fact which legislators decided might be relevant to the general welfare."[3] Contrary to this view, lies the approach of the historical school of law. According to it, "legislation is the least creative source of law."[4] Various schools of law treat legislation from different perspectives. In the view of the analytical school, "legislation is considered as the normal process of lawmaking."[5] The believers of the school, do not even admit the claim of custom to be considered as a source of law. Whatever be the status of legislation in the past, in the contemporary era, legislation is considered a significant source of law since modern constitutions consider legislation as the most important source of law.

Legislation is considered an important source of law because of the very fact that on the one hand it lays down the rules and regulations through the legislature and on the other hand it has the authority of the State as such. To quote John Austin, "there can be no law without a legislative act"[6] meaning that the law is made by a supreme or a sovereign authority which must be followed by every stratum of the society.[7]

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3 James Willard Hurst, *The Legislative Branch, and The Supreme Court*, U. ARK. LITTLE ROCK L. REV. 487(1982).

4 LUC J. WINTGENS, THE THEORY, AND PRACTICE OF LEGISLATION, Essays in Legisprudence, 121 Taylor & Francis (2005).

5 *Id.* at 121.

6 JAMES WILLARD, supra note 3, at 487.

7 Sangeetha, *Analysis of Law and Sources of Law* 3 INT'L. J. L. 138, 138-142 (2017).

It is indeed difficult to precisely define legislation. Legislation may be defined as the promulgation of legal rules by an authority that has the power to do so.[8] According to Gray, legislation means the formal utterances of the legislative organs of the society.[9] In the words of renowned jurist Sir John William Salmond, "legislation is that source of law that consists of the declaration of legal rules by a competent authority."[10]

Legislation, one of the main functions of the government, is considered as the expression of the general will of the people. Normally elected representative assemblies are the principal agencies to determine general public policy. The magnitude of legislation is evident from the very fact that it is a reliable source of law and carried out by the elected representatives of people who are designed to raise the voice of the common people. The legislature is deemed to be a representative body that echoes the voice of the public. Professor Hogg describes the proper role of the Court and legislature as follows:

> "A legislature acts not merely based on findings of fact, but upon its judgment as to the public perceptions of a situation and its judgment as to the appropriate policy to meet the situation. These judgments are political… It is not for the Court to disturb political judgments…"

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8 *Id.* at 138.

9 Dorsett, Shaunnagh & Mcveigh, Shaun, *The Persona of The Jurist in Salmond's Jurisprudence: On the Exposition of 'What Law Is...'* WELLINGTON L. REV. 771, 771-796(2007).

10 *Id*. at 778.

John Rawls, for example, takes the Supreme Court "as the exemplar of the sort of public reason that ought to govern the public arena."[11] Gutmann and Thompson also "draw a direct parallel between the idealized decision-making of judicial actor and the decision-making deliberative democracy requires of political actors, rejecting the idea that pluralist interest-based bargaining ought to typify the political arena."[12] They contend that deliberative democracy calls into question "the contrast between the principled decision making of Courts and the prudential lawmaking of legislatures in which a judge seeks to give meaning to our constitutional values perhaps even [is]force[d] to be objective- not to express his preferences or personal beliefs, or those of the citizenry, as to what is right or just . . .whereas legislatures . . . see their primary function in terms of registering the actual, occurrent preferences of the people- what they want and what they believe should be done; this contrast is problematic both empirically and normatively."[13]

7.1.1 The Concept of Judicial Review

An overemphasis on the democratic content of legislature raises concerns about the vital aspects of the judicial power of the State. The judicial assessment is considered the cornerstone of democracy. The judicial review broadly covers three aspects; judicial review of legislative action, judicial

[11] JOHN RAWLS, THE IDEA OF PUBLIC REASON IN DELIBERATIVE DEMOCRACY 108-44 James Bohma & William Rehg eds. (1997).

[12] AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 19 (Belknap Press 1996).

[13] Owen Fiss, *Foreword: The Forms of Justice*, HARV. L. REV. 1-93, 10 (1979).

review of judicial decision, and judicial review of administrative action. The scope of judicial review has evolved in three dimensions –firstly, to ensure fairness in administrative action, secondly, to protect the constitutionally guaranteed fundamental rights of citizens, and thirdly, to rule on questions of legislative competence between the Centre and the States.[14]

The judicial review encompasses "the power of the Judiciary to review actions of the legislature and thus enshrining the principle of the rule of law and maintaining a separation of power principle."[15] Judicial review in its most widely accepted meaning is the power of the Courts to consider the constitutionality of acts of organs of Government (the executive and legislature) and declare it unconstitutional if it violates or is inconsistent with the basic principles of the Constitution. In short, judicial power "is used as an enforcement mechanism of the people's rights because the Courts can be called upon at any time, by any individual, to adjudicate the legality of an action."[16] For a country whose path is democratization, it is necessary to consider (and even interrogate) what institutions are in place to ensure that the democratization process is thorough, genuine, and progressive. The rule of law is the bedrock of democracy, and the primary responsibility for the

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[14] SHEIKH JAVAID AYUB, UNDERSTANDING INDIAN POLITICS 38 (Partridge India 2015).

[15] The doctrine is a part of the basic structure of the Indian Constitution even though it is not specifically mentioned in its text. Kumar, Virendra. *Basic Structure of The Indian Constitution: Doctrine of Constitutionally Controlled Governance* 49 J.ILI.365,365–98(2007).

[16] SALMAN KHURSHID ET. AL., JUDICIAL REVIEW, PROCESS POWERS AND PROBLEM, ESSAYS IN HONOUR OF UPENDRA BAXI 22 (Cambridge University Press 2020).

implementation of the rule of law lies with the Judiciary.[17] Here the road to the role and relevance of the judiciary commences.

Whenever a discussion on judicial review arises, judicial review in the United States (U.S.) is hailed as a model for other countries. It seems appropriate to devote some discussion to it and to some other jurisdictions that follow the concept of judicial review.

Despite its overwhelming importance, judicial review is not explicitly mentioned in the U.S. Constitution, whereas, it is itself a product of judicial construction. The U.S. Supreme Court heroically articulated the power of judicial review in 1803 in Marbury v. Madison.[18] However, before 1789, state Courts had already overturned legislative acts which conflicted with state constitutions.[19] Moreover, many of the founding fathers expected the Supreme Court to assume this role regarding the Constitution.[20] Hamilton had written, for example:

> "The interpretation of the laws is the proper and peculiar province of the Courts. A Constitution is, in fact, and must be regarded by the judges, as a fundamental law. It, therefore, belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between two, that which has the superior obligation and validity ought, of course, to

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[17] Justice A.S. Anand Justice N.D. Krishna Rao Memorial Lecture Protection of Human Rights — Judicial Obligation or Judicial Activism, 7 SCC (JOUR) 11(1997).

[18] Marbury v. Madison, 5 US (1 Cranch) 137 (1803).

[19] THE COURT AND CONSTITUTIONAL INTERPRETATION https://www.supremeCourt.gov/about/constitutional.aspx. (last visited Dec. 23, 2020).

[20] *Id*. at 2.

> be preferred; or, in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents."[21]

It was Chief Justice Marshall's achievement, without doubt, that had "carried the device for the future, which, though questioned, has expanded and become solidified at the core of constitutional jurisprudence."[22]

By the second half of the century, the judicial review began to spread around the globe. It was a time when the decision of Marbury has been a model for the world's democracies. In the half of the twentieth century, "the hope of Marbury (the promise of constitutionalized rights) became fused with the fear of Lochner (the possibility that Courts might run amok)."[23] "In seeking to thread a needle between Marbury and Lochner, the American assumption that a constitution is a species of law was rejected in favor of a very different baseline assumption that constitutions are neither law nor politics, but an entirely new genus of political law."[24]

Judicial review has flourished in the United States mostly because it has been used sparingly.[25] Those judges entrusted with the power to strike down the state congressional statutes on the ground that they offend the Constitution have done so carefully, knowing that their decision must be respected. This approach has ensured that the public generally maintained a

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[21] W. Crosskey, *Politics and The Constitution, In the History of The United States*, HARV. L. REV. 1456, 1460(1954).
[22] *Id.* at 1456.
[23] *Id.* at 1466.
[24] Mark Tushnet, *Marbury v. Madison Around the World* TENN. L. REV. 251 (2004).
[25] W. CROSSKEY, supra note 21 at 1465.

substantial degree of confidence in the federal Judiciary and, therefore, in the legitimacy of judicial review.[26] Support for the distinctly American style of judicial review may also be due to several landmark cases that have used the tool of judicial review to protect the constitutional rights of individuals. The symbolized decisions of Brown v. Board of Education[27] and Obergefell v. Hodges[28] have reinforced the great value that can be derived from the country's version of judicial review.[29]

The main differences between the American political system and the tradition of Parliamentary government which has evolved over the centuries at Westminster in London deserve some consideration at this juncture. Parliamentary sovereignty has been regarded as the core and the most basic principle of the British Constitution for a long time. In Britain, it is understood that the executive and the legislative branches of government are somehow fused in a single body called Parliament. British Courts do not review acts of parliament and declare them unconstitutional. "No law is more fundamental than any other."[30] A.V. Dicey has elaborated on the concept in great detail and was of the view that "the sovereignty of Parliament is (from a legal point of

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[26] *Id.* at 1465.
[27] 347 U.S. 483
[28] Obergefell v. Hodges, 135i S. Ct. 2584 (2015).
[29] Brown v. Bd. Of Educ., 347 U.S. 483 (1954).
[30] DOUGLAS V. VERNEY, PARLIAMENTARY SUPREMACY VERSUS JUDICIALREVIEW: IS A COMPROMISE POSSIBLE? 64 (New York University 2008).

view) the dominant characteristic of our political institutions."[31] Further, he went on to describe the doctrine classically as:

> "The principle of parliamentary sovereignty means neither more nor less than this, namely, that Parliament… has, under the English constitution, the right to make or unmake any law or whatever; and, further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament."

Thus, from the above proposition of Parliamentary sovereignty, one could cull out two components. First, only Parliament has the authority to enact or repeal any legislation and secondly, no one (not even the Courts) has the authority to question the legislations so made or set aside them. Even the Judiciary abides by the reconciliation and the views of the Parliamentary sovereignty, can be recounted by looking into various judgments and they have made it clear time and again, that the "Courts are not concerned with the making of the Acts of Parliament; their task is to merely apply the legislation that has been passed by both the Houses and has received Royal Assent."[32]

The idea of Parliamentary sovereignty that Dicey placed at the center premise of the British Constitution is an ordinary law of England. He identified parliamentary sovereignty as the fundamental norm of the British Constitution.[33] A non-insignificant circumstance of the British Constitution

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[31] Mark D. Walters, *Dicey on Writing the Law of the Constitution*, OXFORD JOURNAL OF LEGAL STUDIES, 29 (2012).

[32] His approach has been crystallized with numerous decisions and the same was confirmed in British Railways Board v. Pickin, (1974)1 All ER 608.

[33] Rivka Weill, *Dicey Was Not Diceyan*, 62 THE CAMBRIDGE L.J. 473, 474–93(2003).

being supreme law is that these legislatures cannot be said to be sovereign in the way that term is used in the classical Diceyan teaching on the doctrine of United Kingdom Parliamentary sovereignty, in whatever other sense they might be sovereign,[34] "for an essential trait of such a legislature is that there is no marked or clear distinction between laws which are not fundamental or constitutional and laws which are fundamental or constitutional."[35]

This concept of parliamentary sovereignty was prevalent till recently, but, similar to the influence of the decision in Marbury's case, a certain change has been brought about by some different developments. The enactment of the Human Rights Act, 1998 which was passed based on The European Convention for the Protection of Human Rights and Fundamental Freedom, heralded a new era for judicial review. The White Paper of the Act [36]specifically mentions in its introduction that:

> "Although the Courts will not, under the proposals in the Bill, be able to set aside Acts of the United Kingdom Parliament, the Bill requires them to interpret legislation as far as possible by the Convention. If this is not possible, the higher Courts will be able to issue a formal declaration to the effect that the legislative provisions in question are incompatible with the Convention rights. It will then be up to the Government and Parliament to put matters right."

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[34] Phillips, O. Hood. *The Modern Law Review* 24 MODERN LAW REVIEW, WILEY 807,807–809 (1961).

[35] F. R. Alexis, *The Basis of Judicial Review of Legislation in the New Commonwealth and the United States of America: A Comparative Analysis*, U. MIAMI INTER-AM. L. REV. 567 (1975).

[36] A Government White Paper in October 1997 proposed the introduction of a Human Rights Bill. The proposed Bill incorporated the ECHR into UK law.

Thus, the concept of judicial review has indirectly become an accepted norm in the modern United Kingdom. The impact of the Human Rights Act, 1998 is reflected in the following words of Lord Steyn in the case of Jackson and others v. Attorney General:[37]

> "Moreover, the European Convention on Human Rights as incorporated into our law by the Human Rights Act, 1998, created a new legal order. One must not assimilate the European Convention on Human Rights with multilateral treaties of the traditional type. Instead, it is a legal order in which the United Kingdom assumes obligations to protect fundamental rights, not about other states, but towards all individuals within its jurisdiction. The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom."

The question that follows is how the judicial review was absorbed by the concept of the sovereignty of Parliament. In the case of Jackson and others v Attorney General,[38] the case of constitutional significance, it was opined that as Parliamentary sovereignty is a common law tradition, i.e. it was created by the judges, therefore it is also open to the judges to change the concept. Also, the judges expressed a view that the Courts might have the power to strike down a law if the same is incompatible with fundamental values. Thus, it can be that the judge's role is extended and the increasing role keeps checks on the executive. It might still be early to decide the impact on the Judiciary and the Parliament, but it can easily be said that "the orthodox view of absolute

[37] Jackson And Others v. Her Majesty's Attorney General, (2005) UKHL 56.

[38] *Id*. at para 73.

Parliamentary sovereignty cannot survive in modern times when every individual is concerned with human rights and fundamental rights."[39]

Similar to many other European Countries, there was no judicial review of legislation in France. It adhered to the principle of parliamentary supremacy and it is the representation of people's will, and could not be challenged. The development of the *Conseil Constitutionnel* under the Fifth Republic represents an attempt to graft the practice of constitutional control onto a long tradition of parliamentary supremacy.[40] In this respect, it parallels recent developments in Canada, which in 1982 abandoned its tradition of British-style parliamentary supremacy by amending its Constitution to include a written 'Charter of Rights and Freedoms.'[41] Canada sought to preserve the role of Parliament in interpreting the Constitution. Similar to India, this model provides a stronger mechanism by which citizens can hold Courts accountable than does the American model. Canada "sought to constitutionalize rights while avoiding the pitfall of the political backlash occasioned by some Court decisions with two constitutional innovations: a general limitations clause that informs Courts that rights are not absolute but must be balanced,"[42] and "the

[39] Anthony Bradley, *The Sovereignty of Parliament—Form or Substance? In The Changing Constitution* 6 J. JOWELL & D. OLIVER EDS 25, 31-32(2007).
[40] Cf. Morton, The Impact of the Charter of Rights; The Judicialization of Canadian Politics 20 CANADIAN J. POL. SCI.31-35(1987).
[41] *Id.* at 32.
[42] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982.

notwithstanding clause that allows legislatures to override judicial decisions."[43]

The Supreme Court of Canada was keen on the protection of its responsibility to safeguard constitutional integrity. "A State is sovereign", said Dickson J., "and it is not for the Courts to pass upon the policy or wisdom of legislative will."[44] He continued, "the Courts will not question the wisdom of enactments which, by the terms of the Canadian constitution are within the competence of the Legislatures, but it is the high duty of this Court to ensure that the Legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power."[45]

In the landmark constitutional fact case, Crowell v. Benson,[46] the U.S. Supreme Court was equally precise: "It is rather a question of the appropriate maintenance of the federal judicial power in requiring the observance of constitutional restrictions…". "In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function."[47]

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[43] Lee Epstein et al., I*deological Drift Among Supreme Court Justices: Who, When and How Important?* 101 NW. U.L. REV 127(2007).

[44] Amax Potash V. Gov't of Sask. (1977) 2 SCR 576.

[45] *Id.* at 577.

[46] 285 U.S. 22 (1932).

[47] *Id*. at para 54-55.

7.1.2 THE POSITION OF JUDICIARY IN THE CONSTITUTION

A glimpse of the origin and practice of judicial review in different jurisdictions shows how settled is judicial review in the Indian Constitution. The Preamble to the Constitution declares one of its objectives as the attainment of justice, social, economic, and political. These are elaborated in the Directive Principles of State Policy. One of these enjoins a duty on the State to promote a social order in which justice, social, economic, and political, shall inform all the institutions of the national life.[48] The Indian Constitution gives utmost importance to economic freedom and social justice. In explaining the aims of the Draft Constitution to the Constitution Assembly, Dr. Ambedkar, the Minister of Law and the Chief Draftsman of the Constitution, said: "our object in framing this Constitution is two-fold i) to lay down the form of political democracy, and ii) to lay down that our ideal is economic democracy."[49]

There are specific attributes that must be found in a democratic society. One of these is the presence of an accountability mechanism whereby "public officials are heard accountable by, and answerable to, the public for both their actions and decisions."[50] This ensures that public officials are "constantly watched to avoid bad governance or instances of abuse of power."[51]

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[48] INDIA. CONST. art. 38.
[49] Constituent Assembly Debates (Proceedings)- Volume VII (December 1948).
[50] Patrick Lenta, *Democracy, Rights Disagreements and Judicial Review* 20 AFR.J. HUM. RTS.154(2004).
[51] *Id.* at 154.

Granville Austin in his book, The Indian Constitution - Corner Stone of a Nation said[52]

> the Judiciary was to be an arm of the social revolution upholding the equality that Indians has longed for during colonial days, but had not gained not simply because the regime was colonial and perforce repressive, but largely because the British had feared that social change would endanger their rule… The Courts were also idealized because, as guardians of the constitution there would be an expression of the new law created by Indians for Indians. Judicial review, assembly members believed, was ' an essential power for the Courts of a free India, with a federal constitution.

The scope of judicial review before Indian Courts has emerged in three dimensions- firstly, to establish fairness in administrative action, secondly, to protect the guaranteed constitutional fundamental rights, and lastly, to rule on questions of legislative competence between the Centre and the States.[53] Vast and radical measures of social and economic reform which have been introduced by the Judiciary sought to be justified as being in the public interest. As such, the Judiciary, as the organ empowered to protect the Constitution, can determine whether the legislature and executive are performing their duties as spelled out in the Constitution.

The Constitution of India provides an express provision for judicial review in Article 13 which states:

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52 GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION 3 (Oxford 1999).

53 PYLEE, M.V., CONSTITUTIONAL GOVERNMENT IN INDIA 501(Asia Publishing House 1965).

13(1) All laws in force in the territory of India immediately before the commencement of the Constitution shall be void to the extent to which they are inconsistent with the provisions of Part III of the Constitution.

13(2) State shall not make any law which takes away or abridges the fundamental rights conferred by part 3rd of the constitution and any law made in contravention of fundamental rights shall to the extent of the contravention, be void.

The core of Article 13 provides for the judicial review of all legislation in India, past as well as future. By Art 13(2), the laws which take away or abridge fundamental rights are liable to be struck down as ultra vires.

Any law may be declared unconstitutional by the competent court if any of the following conditions are satisfied.

1. The first situation in which the law would be declared void is if it contravenes any of the fundamental rights granted under Part III of the Constitution.
2. Secondly, if legislation is formed that exercises any power not present with the legislature passing it as provided under the Seventh Schedule of the Constitution or seeks to operate beyond the boundaries of the state passing it would be invalid to that extent as held in the case of State of Bombay v. Bombay Education Society, it is liable to be held unconstitutional.[54]

[54] AIR 1954 BOM 561.

3. The third situation under which a law is to be declared unconstitutional is when the legislature has delegated essential functions to some other body. The Apex Court has held in the case of Atiabari Tea Co. v. State of Assam[55] that such excess delegation renders the Act liable to be struck down as unconstitutional.[56]
4. Fourthly, any law is to be held invalid to the extent of its contravention of any mandatory provision of the Constitution, say, e.g., Article 301[57]

In the Keshvananda Bharati Case,[58] the judicial review was ultimately held to be the basic structure of the Indian Constitution. The same view was reiterated in S.P. Sampath Kumar v Union of India.[59] Justice PN Bhagwati, relying on Minerva Mills Ltd.[60] declared that it was well settled that judicial review forms the basic structure of the Indian Constitution. In L. Chandra Kumar v. UOI,[61] the Supreme Court held that the power of judicial review under Articles 32 and 226 is an integral and essential feature of the basic structure of our Constitution. Any act of the ordinary law-making bodies which contravenes the provisions of the supreme law must be void and there must be some organ which is to possess the power or authority to pronounce

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55 AIR 1961 SC 232.
56 *Id.*
57 Art 301 says Freedom of trade, commerce and intercourse Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free.
58 Kesavananda Bharati v. State of Kerala AIR 1973 SC 1461.
59 AIR 1987 SC 386.
60 Minerva Mills Ltd. v. Union of India AIR 1980 SC 1789.
61 AIR 1997 SC 1125.

such legislative acts void.[62] The judicial review thus formed a specific and special tool in the hands of the judges whereby unlawful actions of the legislature and executive could be quashed. It is the role of judicial review, to ensure that democracy is inclusive and that there is accountability for everyone who wields or exercises public power. As Edmund Burke said:

"all persons in positions of power ought to be strongly and impressed with an idea that they act in trust, and must account for their conduct to one great master, to those in whom the political sovereignty rests, the people."[63]

The importance of the Judiciary, as a guardian of our Constitution, lies in the theory that a constitutional regime must be susceptible to democratic re-constitution. One of the factors that explain why the Parliaments should be subject to judicial scrutiny is the ease with which the Constitution can be amended.

Article 368 of the Indian Constitution provides for the power of the Parliament to amend the Constitution. The amending process is threefold. Certain provisions of the Constitution, which are of a minor or transitory character, can be amended by a simple Act of Parliament. Most of the provisions, including those relating to fundamental rights, can be amended by the Parliament by a majority of 2/3rd members present and voting, while the remaining provisions which deal with the federal structure require in addition

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62 DURGA DAS BASU, COMMENTARY ON THE CONSTITUTION OF INDIA, Covering Articles 1 to 369 to Schedule XII, 102 (Lexis Nexis 2017).

63 AJAY PRATAP SINGH, DICEY'S RULE OF LAW: PERSPECTIVES AND RELEVANCE TO A JUST LEGAL ORDER https://cervellopages.com/journal1-author1.aspx. (last accessed Dec 22, 2020).

the concurrence of at least half the legislatures of the country. The fact that the Parliament can amend most of the provisions by the simple majority has a two-fold effect. Firstly, compared to the US Constitution, where it is much more difficult to amend the Constitution, in India, there have been less willingness to accept the judicial change. Secondly, there is room for the legislature to nullify judicial decisions using constitutional amendments, as in the case of India where the ruling party always has a majority in Parliament as well as in State Legislatures and whatever decisions are made in the political platform are bound to pass with the support of the parliamentary majority. This means that "in addition to recognizing basic rights of political participation, it must have some institutional mechanism(s) in place designed to allow citizens to trigger, deliberate, and decide on fundamental constitutional changes; it must have an outlet for constituent power to manifest when important constitutional transformations are needed."[64]

7.1.3 Judicial Review of Legislations- Principles

Judicial review of legislation assumes "the existence of supreme or fundamental law constituting a yardstick by which other laws are measured for their validity."[65] It is well-accepted that the Constitution being the supreme law of the land, every action of the government shall be by the provisions of the Constitution and principles laid down by it. Where a Constitution is a body

[64] Colon-Rios, Joel, *The Legitimacy of the Juridical: Constituent Power, Democracy, and the Limits of Constitutional Reform* OSGOODE HALL L.J.199-245 (2010).

[65] F. R. Alexis, *The Basis of Judicial Review of Legislation in the New Commonwealth and the United States of America: A Comparative Analysis* 7 U. MIAMI INTER-AM. L. REV. 567 (1975).

of supreme law whence state agencies derive their authority, the power of the legislature, being a state agency, must be subject to the provisions of the Constitution. Some Constitutions may state it expressly, as most of those under review do, others may not.[66]

As discussed earlier, Art 13 checks the law-making power of the state and renders any act, ordinance, order, bye-law, rule, regulation, or notification infringing the fundamental rights to be void. Judiciary, by Art 13(2), checks the constitutional validity of the impugned Act and declares it void if it contravenes any of the fundamental rights granted under Part III of the Constitution. This constitutional invalidity covers both substantive and procedural checks. If the Constitution violates certain substantive norms such as Art. 14, reasonable classification, it is struck down or invalidated by the Court. Similarly, any procedural impropriety also leads to the constitutional invalidity of the legislation. However, these two kinds of constitutional invalidity are not watertight compartments- there can, arguably, be overlaps.

Though an allegation of constitutional invalidity is brought before the Court, the Court takes several steps to uphold the validity of the legislation. While interpreting the impugned provisions, the Court applies important doctrines such as the presumption of constitutionality and doctrine of severability. The term presumption of constitutionality is a legal principle that is used by the Courts during statutory interpretation. The Supreme Court in

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[66] INDIA. CONST. art. 245, cl.1.

the case of ML Kamra v New India Assurance[67] held that a presumption lies in the constitutionality of every legislation.

The Courts exercise the doctrine of severability to determine if the unconstitutional part of the Act can be severed from the rest of the Act so that "the valid part can independently survive, then only the invalid parts are to be declared unconstitutional and not the whole statute."[68] The Court formulated three principles governing severability in the case of R.M.D. Chamarbaugwalla v. Union of India.[69] The principles are:

1. "Firstly, if the legislature had omitted the invalid part if it had known it to be unconstitutional and passed the valid part, this test is satisfied."
2. "The second principle holds that when the invalid and the valid parts are so inextricably mixed up that they cannot be separated then the whole statute has to be declared unconstitutional."
3. "The third principle states that if the valid part though separate and distinct but is part of a single scheme intended to be operated as a whole, even then the whole Act would be held void."

Thus, there is always a presumption in favor of the constitutionality of legislation or statutory rule unless ex facie it violates the fundamental rights guaranteed under Part III of the Constitution. However, the presumption is not absolute, and it does not stand when there is a gross violation of the

[67] AIR 1992 SC 1072.
[68] Observed in Mahendra v. State of Uttar Pradesh 2007 CRILJ 324.
[69] AIR 1957 SC 628.

Constitution. This has been said in Githa Hariharan v. RBI[70], wherein Justice Banerjee said:

> "it is to be noted that validity of legislation is to be presumed and efforts should always be there on the part of the law Courts in the matter of retention of the legislation in the statute book rather than scrapping it and it is only in the event of gross violation of constitutional sanctions that law Courts would be within its jurisdiction to declare the legislative enactment to be an invalid piece of legislation and not otherwise.[71]"

In determining the constitutional validity of a statute, Indian Courts have been guided by two main principles of interpretation, which are presumptive. The first is the presumption of constitutionality of a statute and the second is the presumption of the so-called legislative wisdom. The presumption of constitutionality doctrine has been expressed by the Supreme Court in these terms: "there is always a presumption in favor of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles."[72] This is the principle applied by the Courts whenever the constitutionality of a statute is challenged. The application of this principle works from two perspectives, under the Indian Constitution, a statute may be invalid either because the particular legislature has exceeded its power or because it is violative of some other constitutional limitation, the most important being the fundamental rights. The State is not called upon to justify

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[70] Ms. Githa Hariharan &Anr v. Reserve Bank of India &Anr., (1999) 2 SCC 228.
[71] *Id.* at para 22.
[72] Ram Krishna Dalmia v. Justice Tendulkar, AIR 1958 SC 538.

every exercise of legislative power. The statutory principle presumes that the legislature, which is charged with exceeding its powers, knows the limits of its competence, and thus the burden of proving the violation is on the individual petitioner. In dealing with welfare legislation, Indian Courts follow what is known as the presumption of legislative wisdom.[73] This had been explained by the Supreme Court as follows:

"It must be presumed that the Legislature understands and correctly appreciates the needs of its people, that its laws are directed to problems made manifest by experience, and that its discriminations are based on adequate grounds (or the restrictions it imposes are reasonable)."[74]

Whether the unconstitutionality of legislation arises out of a lack of competence on the part of the legislature or because of contravention or violation of fundamental rights, the resultant invalidity is the same. Similarly, the unconstitutionality of legislation is the same whether it contravenes the provisions of Part III which are specifically protected by Art. 13, 32, and 226, or whether it contravenes the rest of the provisions of the Constitution which are not so specifically protected about the Supreme Court. In all the above cases, the Judiciary as a custodian of the Constitution protects the fundamental rights of the citizens and the principles laid down by the Constitution. When the so-called principles are followed by a Judiciary in a strict sense, hardly they are subjected to any criticism. However, while exercising the power of

[73] Irani, Phiroze K, *The Courts and the Legislature in India* 14 INT'L AND COMP. L.950, 968(1965).

[74] Namit Sharma v. Union of India, (2013) 10 SCC 389.

judicial review of legislative action, it may transgress its powers and run into the domain of other governmental organs, the actions of the Judiciary become undemocratic. This is because, as S.P. Sathe believes, "it is a dispute between democracy and judicial review because the judicial review power is inherently counter-majoritarian, such a dispute is inherent in it."[75]

7.2 ARGUMENTS FOR AND AGAINST JUDICIAL REVIEW

Unlike other democratic nations, the power of judicial review is specifically given in the mandate of Art.13 of the Constitution. With the immense contribution of the Supreme Court towards asserting the supremacy of the Constitution, the rightful limits of judicial intervention in the legislative domains have been a matter of debate in juristic writings. The supporters of wider judicial review often consider it as strengthening the rule of law. "It is not seen as being anti-democratic by emphasizing that it rises from the Constitution itself- the social contract that reflects the will of the people."[76] Those who favor judicial restraint, argue that "in a democracy, people exercise their sovereignty through elected representatives and not through the unelected judges who must defer to the wisdom of parliamentary majorities."[77] It is argued that legislators represent the will of the people and this must not be allowed to be frustrated by the Judiciary. But on the contrary, it has been pointed out that the Constitution had explicitly recognized the role

[75] T R ANDHYARUJINA, ARTICLES BY S P SATHE JUDICIAL AND CONSTITUTIONAL DEMOCRACY IN INDIA 39 (N M Tripathi 1992).

[76] Marco Verschoor, The Democratic Boundary Problem and Social Contract Theory, EUROPEAN JOURNAL OF POLITICAL THEORY 126(2015).

[77] Jeremy Waldron, *The Core of the Case against Judicial Review* 115 YALE L.J.1346, 1349(2006).

of the judiciary as the watchdog of the fundamental rights of the people. These conflicting propositions had raised several conflict stories.

Many have believed that judicial review is not consistent with the spirit and form of democratic government. Jefferson hardly considered judicial review as democratic. "The purest republican features... in the House of Representatives. The Executive still less, because not chosen by the people directly. The Judiciary is seriously anti-republican, because [appointed and] for life..."[78] This argument has been raised repeatedly throughout the history of the country.[79] One of the earliest advocates of this position was Robert Yates, a judge of the New York Supreme Court, who wrote the Letters of Brutus. "His opposition to judicial review was not because of the nature and extent of the power but because judges were placed in an unprecedented situation in a free country: they were independent of control by either the people or the legislature, concerning both their terms of office and their salaries."[80]

It has been observed that judicial review may be a bad idea; it may be maddening at times; it may be counter-majoritarian, but it is not some extra-constitutional or unconstitutional institution.[81] Critics of the Court articulated "what has become familiar to us today as the counter-majoritarian problem -

[78] George Mace, *The Antidemocratic Character of Judicial Review* 60 CALIF. L. REV. 1140 (1972).
[79] *Id* at 1141.
[80] Barry Cushman, *Rethinking the New Deal Court* 80 VIRGINIA LAW REVIEW 201, 213-214(1994).
[81] Saikrishna B. Prakasht, John C. Yoot, *The Origins of Judicial Review* 70 CHI.L.REV.893(2003)

judicial review frustrated the will of the majority and hence was anti-democratic."[82] According to one-dimensional democratic theory, these institutions are presumptively anti-democratic.[83] Others argued that "judicial review posed a problem for democracy by allowing unelected judges to substitute the rules of an old Constitution over the preferences of the current majority."[84]

Drawing a line between legislative power and judicial authority is a difficult problem in any system of Government where the Judiciary is the final arbiter of legislative action. There are dangers and apprehension on one hand, of the judiciary overstepping its bounds and nullifying important social and economic measures of majority decisions of the representative bodies. On the other hand, the possibility of the legislature surpassing and undermining the basic tenets of democracy and implementing decisions against public interests has also been highlighted. Even after 70 years, a happy compromise between these two extremes is still at its embryonic stage. The key question that arises during the journey is whether the Courts of law through its Judicial review have legitimacy in nullifying the decisions of the majority? This is because there are no principles ahead of the time when the Courts undertake the work of judicial review; they frame the principles at the spur of the moment and apply them to the facts of the case before them. The judicial quorum, being

[82] Barry Friedman, *The History of the Counter Majoritarian Difficulty, Part Three: The Lesson of Lochner* 76 NYU L REV. 1383 (2001)
[83] *Id.* at 1384.
[84] SAIKRISHNA, supra note 81, at 895.

unelected and unaccountable, can overrule the decisions rendered by the elected representatives, who represent the voice of the people of India.

Now the question is why is there a need for checks on the decisions of majoritarians, either as a way to defend against democratic erosion or as a way to send a loud signal about the importance of core constitutional values. Chief Justice Patanjali Shastri in State of Madras v. V.G. Row[85] observed:

> "Our Constitution contains express provision for judicial review of legislation as to its conformity with the Constitution........ the Courts in this country face up to such an important and none too easy task, it is not out of any desire to tilt at legislative authority and a crusader's spirit, but in the discharge of duty laid upon them by the constitution. This is especially true as regards the fundamental rights as to which the Court has been assigned the role of a sentinel on the qui vive. Judicial review is part of an ongoing interpretive process by which we live out our commitments."[86]

Chief Justice Kania in A.K. Gopalan v. the State of Madras,[87] pointed out "that it was only by way of abundant caution that the framers of our Constitution inserted the specific provisions in Art. 13". Many recent works of political science have documented how the category of democracy is complex and possesses considerable variation.[88] Many newer democracies suffer from several different kinds of problems with their political systems; viz., (i) they

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85 AIR 1952 SC 196.

86 Christopher L. Eisgruber, Dimensions of Democracy 71 FORDHAM L. REV. (2003).

87 AIR 1950 SC 27.

88 For a classic study of the variation in the term democracy, see generally David Collier & Steven Levitsky, *Democracy with Adjectives: Conceptual Innovation in Comparative Research,* 49 WORLD POL. 430 (1997).

are likely to face erosion towards authoritarianism, or in other words, are particularly fragile; (ii) they suffer from problems in political representation, accountability, and capacity that make them function poorly even if they do not lead to democratic breakdown; and (iii) they suffer from a general absence of constitutional culture—neither politicians nor the public care about constitutional values.[89] Art 13 of the Indian Constitution addresses these three points in turn.

The Indian and Colombian High Court Justices have been particularly clear in this regard. In Colombia, Constitutional Court justices "openly treat the weaknesses in political institutions—and particularly in the Congress—as a justification for their choice to take on a protagonist's role."[90] In one famous decision striking down a national security law because of weaknesses in democratic deliberation, the Court complained that "Congress should be a space of public reason."[91] In another case striking down tax reform, the court noted that "a measure expanding the VAT tax to necessities had not been the product of a minimum of rational deliberation."[92] One Justice, pointing across the main square in Bogotá from the Constitutional Court, explained that "the Court, rather than the Congress, is the center of public protest because the

89 Mainwaring, Scott, and Matthew S. *Shugart. Juan Linz, Presidentialism, and Democracy: A Critical Appraisal,* COMPARATIVE POLITICS 456 (1997).

90 Rachel E Barkow., *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, COLUM.L.REV. 237–336(2002).

91 Corte Agosto, Constitutional (2004) available at http://www.corteconstitucional.gov.co/relatoria/2004/c-816-04.html (accessed on Nov 10.2020).

92 *Id.*

Court is more relevant to people's lives."[93] Likewise, Nick Robinson argues that "the Indian Supreme Court's perception of systematic problems in elected democratic institutions has led it to seek an expanded mandate and to become a kind of good governance Court."[94] For example, then-Chief Justice K.G. Balakrishnan stated that "arguments in favor of judicial restraint fail to recognize the constant failures of governance taking place at the hands of the other organs of State and that it is the function of the Court to check, balance, and correct any failure arising out of any other State organ."[95] In both of these systems, the justices are giving voice to broadly-felt perceptions about the low quality of democratic institutions.

Courts have invented the doctrine that the basic structure of the Constitution shall not be changed by amending the Constitution. "Invalidation of a constitutional amendment is an act that expresses much more disrespect of political institutions than ordinary exercises of judicial review."[96] From a standard theoretical perspective, "striking down constitutional amendments is a much more difficult act to justify than ordinary judicial review."[97] As commentators have often noted, declaring a constitutional amendment unconstitutional, poses a kind of ultimate counter-majoritarian difficulty because "there is no real way for democratic actors to override the decision to

93 GEORGE MACE, supra note 79, at 1141.

94 Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court* 8 WASH. U. GLOBAL STUD. L. REV. 1, 8–17 (2009).

95 *Id.* at 16-17

96 Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism* 49 AM. J. COMP. L. 707,707-760(2001).

97 *Id*. at 755

strike down the constitutional amendment."[98] This doctrine of unconstitutional constitutional amendments is a stunning display of judicial overreach, but it has been adopted by Courts. In 2001, for example, the Court declared a structural interdict involving the right to food in India, over which it continues to retain jurisdiction.[99] The Court found that there were sweeping problems concerning the access of the poor to food in India, and has since issued a series of wide-ranging orders in all Indian states.[100] These orders have required, for example, the creation of programs to give grain to poor families, allowing poor workers to act in work-for food programs, and giving schoolchildren access to lunch during the school day.[101] The Court set up a Commission to monitor compliance and to make policy recommendations, and the Commission consults widely with civil society groups, viewing them as a key source of policy and compliance information.[102] In particular, the Commission has worked very closely with the Right to Food Campaign, a network of civil society groups that helped to launch the litigation.[103] The

[98] Gary Jeffrey Jacobsohn, *The Permeability of Constitutional Borders* 82 TEX. L. REV. 1763, 1799 (2004).

[99] For a list of ongoing orders in the case through 2012, see Supreme Court Orders, RIGHT TO FOOD CAMPAIGN, http://www.righttofoodcampaign.in/legal-action/supreme-Court-orders, archived at http://perma.cc/3FD8-G5RX (last visited Oct. 20, 2020).

[100] For an overview of this sprawling case and its major orders, see generally Lauren Birchfield & Jessica Corsi, *Between Starvation and Globalization: Realizing the Right to Food in India* 31 MICH. J. INT'L L. 691 (2010).

[101] *Id.* at 692.

[102] The Commission more closely resembles the United States special master—the commissioners are a pair of legal experts rather than a confluence of civil society groups.

[103] BARKOW, supra note 91 at 246 (explaining how the campaign works to establish grassroots support, publicize the issue, and pressure different levels of the state bureaucracy)

campaign itself holds regular public hearings throughout the country to raise awareness about the problem.[104]

All these measures are taken by the Supreme Court to achieve two different goals. The first is strengthening sectors of civil society where it has been historically weak. The Courts provide a framework to organize themselves with an institutional structure through which they can influence policy, and a public forum in which to air their grievances. Court through these actions reminds us to pay attention to policy ideas and certain issues may be taken seriously. It argues that "the Court has expanded its role, often in ways it is ill-equipped to handle, in an attempt to combat the perceived governance shortcomings of India's representative institutions."[105] Further that Parliament's inability to successfully promote the Constitution's broad vision of a controlled revolution has led the Supreme Court to take on a larger mandate. The original, narrow judicial role of the Court, however, sits in incongruity with the Constitution's transformative vision for Indian society.

Most work in the United States, for example, has "started from some variant of the counter-majoritarian difficulty, or the problem of justifying judicial interventions in the face of electoral majorities."[106] A significant strain of this work argues that Courts are often said to lack the legitimacy and the

[104] STEPHEN GARDBAUM, supra note 96, at 724.
[105] NICK ROBINSON supra note 95, at 12.
[106] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–17 (Indianapolis, New York 1962). When the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority but against it.

capacity to make decisions that are better left to elected officials. In the traditional formulation of James Bradley Thayer, "a Court should not substitute its judgment for that of nationally-elected officials unless it believes that they are not reasonable."[107] Modern Thayerians are often popular constitutionalists, arguing that "the determination of constitutional meaning is properly left to the public or their elected representatives, rather than to the Court."[108] In the clearest and most extreme formulation, judicial review is unjustifiable in well-functioning democratic systems.[109]

Another major argument in the United States tradition seeks to justify judicial review despite the counter-majoritarian difficulty, sometimes by claiming that it is pro-democratic rather than anti-democratic. The best-known formulation is John Hart Ely's political process theory, which has spawned a massive follow-up literature elaborating on and critiquing his claims. Ely's core claim "is that judicial review can be justified if Courts help to reinforce democratic representation and increase participation, primarily by increasing access to the political system for minority groups that are systematically excluded from it."[110] Ely, of course, envisioned his theory "as a justification for the decisions of the Warren Court in the United States and their impact on

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[107] James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law* 7 HARV. L. REV. 129, 151 (1893).

[108] MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 193 PRINCETON UNIVERSITY PRESS (1999). Arguing that the development of constitutional meaning should be left primarily in the hands of political rather than judicial actors.

[109] Jeremy Waldron, *The Core against Judicial Review,* YALE L.J.1348(2006). Judicial review of legislation is inappropriate as a mode of final decision-making in a free and democratic society.

[110] JOHN HART ELY, DEMOCRACY, AND DISTRUST: A THEORY OF JUDICIAL REVIEW 29 Cambridge: Harvard University Press 109 (1980).

African-Americans, primarily with a view towards civil-rights era jurisprudence."[111] But his theory has broader resonance in comparative constitutional law as a possible justification for judicial action.[112]

The Indian jurisprudence shows a similar tendency towards cases where the unconstitutional constitutional amendment doctrine is not necessarily playing a role in democratic defense. The origins of the doctrine focus on the protection of private property, rather than on democratic protection.[113] And during Mrs. Indira Gandhi's period of national emergency (1975-77), which posed a significant threat of democratic erosion, "the Court undertook only very cautious and limited efforts at stopping Mrs. Gandhi from insulating her actions entirely from judicial review."[114] These decisions played a modest but perhaps meaningful role in preventing the erosion of democracy. More recent judgments, pronounced after the political system fragmented, have also focused on the insulation of activity from judicial review, but within quite different contexts. For example, in 1997, in L. Chandra Kumar v. Union of India,[115] the Indian Supreme Court held that "constitutional amendments shunting cases concerned with the civil service away from the ordinary Judiciary and into newly created administrative tribunals were violations of the basic structure doctrine and thus unconstitutional constitutional

[111] *Id.* at 110.
[112] HEUNIS ROUX, THE POLITICS OF PRINCIPLE: THE FIRST SOUTH AFRICAN CONSTITUTIONAL COURT, 334 Cambridge Studies in Constitutional Law (2013).
[113] Golaknath v. State of Punjab 1967 AIR 1643.
[114] Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461.
[115] AIR 1997 SC 1125.

amendments."[116] Indeed, one commentator has argued that the main thrust of the doctrine, in terms of its actual use, has been to allow the Judiciary to act as a "closed shop by cutting off other avenues of redress like special tribunals and arbitration panels."[117] If it is the dialogue with the people that helps legitimate the Court's power of judicial review in a democracy, the quality and nature of the Court's dialogue depend on the quality of the democracy in which it operates. If it is the people who hold and exercise power, then dialogue with that power holder will enhance the democratic accountability of the Court and address the counter-majoritarian difficulty.[118]

A dynamic perspective of judicial role offers the groundwork for a reasonable defense of the doctrine.[119] Descriptively, it explains why the use has become so routinized across certain countries. Usage of the doctrine is based both on a distrust of existing democratic institutions, which are seen as capable of producing flawed constitutional amendments, and concern about the effects that certain amendments might have on the democratic order.[120] Normatively, the fact that certain democracies are relatively fragile gives some justification for using the doctrine to defend against democratic erosion.

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[116] L. Chandra Kumar v. Union of India, AIR 1995 SC 1151.

[117] Rohit De, Jurist's Prudence: The Indian Supreme Court's Response to Institutional Challenges, CONNECT (Dec. 12, 2012), http://www.iconnectblog.com/2012/12/jurists-prudence-theindian-supreme-Courts-response-to-institutional-challenges (accessed on Nov 23, 2020).

[118] Vicki C. Jackson, *Democracy and Judicial Review, Will and Reason, Amendment And Interpretation: A Review Of Barry Friedman's The Will Of The People* 13 PENN LAW 413, 418(2010).

[119] Carlos Bernal, *Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine* 11 INT'L J. CONST. L. 339, 347 (2013).

[120] NICK ROBINSON, supra note 83, at 17.

Where judges have good reason to believe that a set of constitutional changes raises a significant risk of democratic erosion, they may be on solid ground in striking down constitutional amendments.[121] But the fact that political institutions sometimes function badly does not imply that the system of governance always functions badly. This suggests that the use of the doctrine should be restrained.

The case against judicial review requires the assumption that democratic institutions must be working in reasonably good working order. In systems with strong constitutional cultures, it is plausible that political actors will value the constitutional cultures in their actions. There are three possible claims justifying the practices of the Judiciary. Firstly, judicial action would be permissible when the Court steps in and carries out an activity that the political branches themselves either cannot do or cannot do well wherein the democratic institutions fail to do their tasks.[122] The dynamic effects of judicial intervention would appear to abandon problematic democracies to a permanent state of dysfunction, and it would view that permanent dysfunction as a durable mandate for extraordinary judicial intervention. This view is very similar to one long promoted in Latin America, where the supposed absence of democratic values or well-functioning political systems was taken to allow

[121] Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment* 13 INT'L J. CONST. L. 606, 609(2015).

[122] *Id.* at 610.

strong presidencies to rule via emergency powers or states of siege.[123] The use of these emergency powers in turn may have helped to perpetuate abnormality by weakening the development of legislative institutions and constitutional values.[124] Further, when the ruling party may not have a majority in the States, this itself nullifies the argument that the views of an elected majoritarian government are hampered by judicial review.

A second possible focus for a theory of judicial role would be the process of constitutional transformation itself. It has become commonplace to note that constitutions in new democracies are often transformative rather than a preservative.[125] Transformative constitutionalism seeks to remake a country's (supposedly deficient) political and social institutions by moving them closer to the sets of principles, values, and practices found in the constitutional text. One might argue that judges in poorly-functioning political systems should focus on realizing the constitutional project. But a constitutional transformation theory is problematic because it again slides institutional considerations: it ignores the question of which institution is tasked with Constitutional mandates are contestable; they are open to interpretation. As Waldron argues, "it is often more reasonable to have

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[123] Jorge Gonzalez-Jacome, *Emergency Powers and the Feeling of Backwardness in Latin American State Formation* 26 AM. U. INT'L L. REV. 1073, 1074 (2011).

[124] Miguel Schor, *Constitutionalism Through the Looking Glass of Latin America* 41 TEX. INT'L L.J. 1, 34 (2006).

[125] Karl E. Klare, *Legal Culture and Transformative Constitutionalism* 14 S. AFR. J. HUM. RTS. 146, 150 (1998).

democratic processes rather than Courts make determinations about constitutional meaning."[126]

Thus, a dynamic theory makes much more sense. Courts in democracies do make efforts to protect democratic orders, correct for weaknesses in party systems, and build civil society and constitutional culture. Further, recent scholarly work has emphasized the dynamic effect that Courts might have in new democracies.[127] Samuel Issacharoff on the enforcement of socioeconomic rights in the developing world, argues that "Courts should aim to play a 'catalytic role,' in particular focusing on empowering civil society groups in contexts where they have historically been weak."[128] Such a theory of judicial role is related to both the political process and majoritarian strands of constitutional theory.[129] Finally, a dynamic theory is flexible, consistent with a range of specific judicial tasks.[130] Its main value is in suggesting a somewhat different set of questions for evaluating exercises of judicial power. Constitutional theorists would also ask whether the Court is extra limiting by taking on essentially legislative tasks, reaching beyond its capacity and legitimacy.[131] But this assumption of fixed differences between legislative and judicial roles again may make little sense to judges and citizens in many new democracies, because it suggests that Courts should defer to institutions that

[126] Jeremy Waldron, *The Core of the Case Against Judicial Review* 115 YALE L.J. 1346, 1362 (2006).
[127] *Id.* at 1362.
[128] Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405, 1406 (2007).
[129] David Landau, *A Dynamic Theory of Judicial Role*, 55 B.C.L. REV. 1501 (2014).
[130] RICHARD POSNER, LAW, PRAGMATISM, AND DEMOCRACY 130–57 (Harvard University Press 2005).
[131] Adrian Vermeule, *Judging Under Uncertainty: An Institutional Theory of Legal Interpretation,* YALE L.J. 1406(2006).

are themselves functioning poorly.[132] Interventions like those involved might be justifiable if they help to build up the strength of civil society, the density of constitutional culture, and the capacity of the bureaucracy. On the other hand, they would be harder to justify if they tended to slow or reverse improvements in the quality of political institutions through time, perhaps by diverting citizens' attention and resources away from representative institutions and towards Courts.

7.3 EMPIRICAL ANALYSIS-JUDICIAL REVIEW OF LAWS ENACTED BY THE KERALA LEGISLATURE

In an attempt to study the extent of judicial review of legislation enacted by the KLA, I have framed three questions. Firstly, whether the action of the Judiciary amounts to the usurpation of legislative power? Secondly, whether judicial review assumes an undemocratic dimension? Thirdly, whether it strengthens democracy? The answers to these questions entail at the end of the analysis. History shows that at some points in time, the exercise of the power of judicial review had generated considerable controversy and criticism. While many had come to the limelight, some had created precedents that remain as binding and some others had been overruled without much damage.

The analysis naturally revolves mostly around the exercise of the power of judicial review of legislation by the High Court of Kerala Around 125 laws enacted by the legislature were brought before the High Court

[132] RICHARD POSNER, supra note 130 at 135.

challenging their validity, of which 36 were struck down by the Court. In other words, by invalidating the laws, the Judiciary tends to replace the will of the people with the will of the Judiciary. The theoretical part which seeks to defend judicial review based on the conception of democracy had already been elaborately analyzed above but only a practical sketch of the grounds on which such laws are questioned will reveal whether the Judiciary entrench rights and are themselves democratic. The researcher here had attempted to find out the reach of judicial review on legislative acts during the period from 1956 to 2021. Over the period, 97 Acts were brought before the High Court of Kerala alleging unconstitutionality, violation of fundamental rights, and alleging colorable legislation.

In the case of Yogesh Trading Co., Kotachery v. The Intelligence Officer of Sales Tax Cannanore and Anr.,[133] the Constitutional validity of Section 29 (5) of the Kerala General Sales Tax Act was questioned. The Court went into a detailed analysis and found that the provisions of Section 29 and 35 operate as unreasonable restrictions on the fundamental right to freedom of trade. The Court held the provisions of Section 29 (4) and (5) and Rule 35 (5) to (12) and (15) violative of rights guaranteed by Article 19 (1) (f) and (g) and ultra vires the Constitution.

In Krishna Pillai Govinda Pillai v. Sankara Pillai Govinda Pillai and Anr.,[134] Section 106 (Special provisions relating to leases for commercial or

[133] WP. (c) No. 8314 of 2011(L).
[134] AIR 1971 Ker 295.

industrial purposes) of Kerala Land Reforms Act, 1964 was challenged. The re-enacted section cannot receive the protection of Article 31B of the Constitution, as the Act, unlike the main Act has not been included in the Ninth Schedule. The Court held Section 106 cannot be saved as agrarian reform or as a reasonable restriction under Article 19(5) and said re-enacted provision violates the fundamental right under Article 19 (1) (f). The Court delivered a pretty long judgment by examining the provisions applying the test of reasonableness, the presumption of Constitutionality, and protection under Article 31B and IX Schedule of the Constitution. In this case Kerala Land Reforms Act, 1964 is included in the IX Schedule of the Constitution and is protected by Article 31B and is therefore outside the plea of attack.

The case of Manattillath Krishnan Thangal and Ors. v. The State of Kerala,[135] is a clear example where the Judiciary has avoided nullifying the Act and asked the Legislature to review the provisions of the Act to make it constitutional. Section 5 of the Kerala Land Tax Act, 1961 was challenged in this case. Section 5 is a charging section that imposes liability to pay basic tax by the landholder. However, the impugned section fails to specify the authority by whom tax is charged. This is a clear violation of Article 265, wherein no tax can be levied or collected except by authority of law. The Court held that levy and collection of basic tax under the Act of 1961 were invalid and asked the legislature to review the impugned provision.

[135] AIR 1971 Ker 65.

Section 35(k) of the Kerala Panchayath Raj Act, 1994, hereinafter referred to as the Act, to the extent of limiting the period of absence for disqualification to not less than three meetings have been challenged on the ground that it is arbitrary and unconstitutional.[136] While interpreting the provision, the Court in detail analyzed the object stated in the Preamble, the functions and powers of a Panchayat, etc. The Court agreed with the Counsel for the Petitioner that there is an attempt to eliminate and marginalize minority members or independent members. Further, the Court agreed that no prescribed period of notice is formulated for the various committee meetings and therefore, it is possible to hold committee meetings at short notice and intervals and disqualify a member for his/her absence. Again, no procedure has been prescribed for obtaining permission for absence, there is an automatic disqualification under Section 35(k) of the Act if three meetings are held during that period. Also, there is no notice or hearing, or consideration by the Panchayat for disqualification. Considering the serious conditions required for disqualification under clause (a) to (j) to Section 35(k) of the Act the legislature would not have intended that an absence of the member for three consecutive meetings which is possible within the 15 days to deprive the membership of a duly elected member. The classification here is arbitrary and unreasonable and hence Section 35(k) of the Act to the extent it includes and combines committee meetings and limits the period of absence for disqualification to if within the said period not less than three meetings have

[136] Mary John v. Vallathol Nagar Grama Panchayath and Ors. AIR 1999 Ker 161(1998).

been held is violative of Article 14 of the Constitution of India and hence unconstitutional.

In the case of Narayanan Damodaran and Ors. v. Narayana Panicker Parameswara Panicker and Ors,[137] once again an amendment to Kerala Land Reforms (Amendment) Act, 1969 was challenged. The constitutional validity of Section 4A and 4A (1) of the Kerala Land Reforms (Amendment) Act,1969, was challenged as violative of Articles 13 and 31B of the Constitution of India. The Court after an elaborate consideration of the provisions indicated that the definition of estate in clause (2) (a) of Article 31A is wide enough to cover all lands in the State and if the Article is read according to its apparent tenor, it would mean that the fundamental rights saved by Article 19(1)(f), Article 14 and Article 31 would be of no avail in respect of one form of property, land. Full Bench also pointed out that it would virtually mean that the Constitution was taking away by Article 31A the rights it gave by Article 19(1)(f). Article 14 and Article 31 are about land.[138] The Court here opined that that could not have been the intention of the legislature. As a result, Clauses (a) and (b) of Section 4A(1) were held unconstitutional as they do not get the protective mantle of Article 31A of the Constitution.

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[137] AIR 1971 Ker 314.

[138] *Id.* at para 7.

In the case of The Gwalior Rayon Silk Mfg. (Avg.) Co. Ltd., Birlakootam Mavoor, Kozhikode, Kerala and Ors. v. The State of Kerala,[139] Sections 2 and 3 of Kerala Private Forests Vesting and Assignment Act, 1971 were alleged to violate Articles 31 A and 254 of Constitution of India and Section 115 of Evidence Act, 1872. Apart from the specific provisions, the constitutional validity of the Kerala Private Forests Vesting and Assignment Act itself is challenged. The Court concluded that forest lands in the State of Kerala, cannot generally be regarded as agricultural lands and therefore cannot be the subject of agrarian reform and that the scheme of agrarian reform envisaged by the impugned Act is not real or genuine but only illusory. The Court held that the provisions of the Act are not protected by Article 31-A of the Constitution and therefore the Kerala Private Forests Vesting and Assignment Act 26 of 1971 was declared unconstitutional and void.

Again, the case of John Cherian and Others v. the State of Kerala and Another challenged a special provision of S.21[140] of the Kerala Motor Vehicles Taxation Act, 1963 based on unintelligible classification. The Court here applied the test of reasonability. When a law is challenged as violative of Art. 14 of the Constitution it is necessary in the first place to ascertain the policy underlying the statute and the object intended to be achieved by it.[141]

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[139] AIR 1973 Ker 36.

[140] The tax fixed by the Government in the case of a stage carriage is Rs. 160/- per seat per year, and also an additional levy of Rs. 40/- for every standing passenger. The special provision contained in S.21 of this Act, provides that a registered co-operative society that has got the characteristics specified in that section shall be liable only to 50% of the tax payable under the Act.

[141] Harichand v. Union of India, AIR. 1970 SC 1453.

Having ascertained the policy and object of the Act the Court has to apply a dual test in examining its validity, viz., (1) whether the classification is rational and based upon an intelligible differentia which distinguishes persons or things that are grouped from others that are left out of the group; and (2) whether the basis of differentiation has any rational nexus or relation with its avowed policy and object.[142] By applying the above principle to the relevant provisions of the Kerala Motor Vehicles Taxation Act 1963, the Court held that S.21 of the Act which gives a partial exemption from the tax imposed by the Act in favor of co-operative societies of the kind mentioned therein has to be struck down.

In KadalayaManakkal Moorthi Narayanan Nambudiripad Vs. State of Kerala and Ors,[143] the question before the Court was whether Sections 2 and 25 (2) of Trippuvaram Payment (Abolition) Act, 1969 imposes a reasonable restriction on rights guaranteed to Thiruppuholders by Article 19 (1) (f) and whether Section 25 (2) is in the interest of the general public or for protection of interests of Scheduled Tribe. The Court stated that the Stat has failed to discharge their onus to establish that the provision is saved by Article 19(5) of the Constitution and hence the provision was held unconstitutional. The Court justified its holding by citing the case of Saghir Ahmad v. The State of U.P.,[144] wherein the Supreme Court laid down the proposition that once the invasion of the fundamental right under Article 19(1) is proved, the State must

[142] *Id.*
[143] AIR 1976 Ker 51.
[144] AIR 1954 SC 728.

justify its case under Clause (6) which is like an exception to the main provisions contained in Article 19(1). The Court also referred to Narayanan Nair's case [145]which held that the onus lay on the State to justify the provision as a reasonable restriction.

The validity of several provisions of the Guruvayoor Devaswom Act, 1978 was challenged as unconstitutional in K.V. Narayanan Namboodiri and Ors. v. State of Kerala and Ors,[146] The Court analyzed in detail the hereditary trusteeship, religious rights, and matters connected therewith. After an elaborative analysis, the Court held Section 4 of the Act as unconstitutional for reason that the Committee constituted thereunder need not necessarily be representative of denomination and hence it was a serious infringement of right of denomination to administer temple and its properties and was found to be in clear violation of Article 26(d) of Constitution. [147] Power of supersession of Committee for a short period not exceeding six months vested in Government for any of reasons mentioned in Section 6(1) of Act was not assailed as arbitrary.[148] The Superseded Committee was also given the right of the suit under Section 6(3) of Act and hence it was held that Sections 5 and 6 of Act were not invalid for any of the reasons. Section 32 of the Act invested the Government and Commissioner with naked and arbitrary power to interfere in the administration of Devaswom. The investiture of such arbitrary powers was held invalid as opposed to Article 14 of the Constitution. The

[145] V.N. Narayanan Nair and Ors. v. State of Kerala and Ors. AIR 1971 Ker 98.
[146] AIR 1985 Ker 160.
[147] *Id.* at para 5.
[148] *Id.*

remaining provisions of the Act were held valid and perfectly within the competence of the State Legislature

The verdict in United Konari Mills and Ors., V. State of Kerala and Ors.[149] stands out as an illustration of the self-restraint of the Judiciary. The constitutional validity of the Madras Commercial Crops Markets Act, 1933 as amended by the Kerala Crops Markets (Amendment) Act, 1964, and the Kerala Crops Markets (Amendment) Act was challenged. It was contended that impugned cess continued to be levied only in the erstwhile Malabar District. It was pointed out that the initial application of the Act to a particular area may not be discriminatory but its continued application in that very area without extending it to other parts of the State may violate Article 14. The Court clearly stated its view in the following words:[150]

> "twenty-three years have gone by since the States Reorganisation Act was passed but unhappily, no serious effort has been made by the State Legislature to introduce any legislation apart from two abortive attempts in 1963 and 1977 to remove the inequality between the temples and Mutts situated in the South Kanara District and those situated in other areas of Karnataka. Inequality is so clearly writ large on the face of the impugned statute in its application to the District of South Kanara only, that it is perilously near the periphery of unconstitutionality. We have restrained ourselves from declaring the law as inapplicable to the District of South Kanara from today but we would make it clear that if the Kerala Legislature does not act promptly and remove the inequality arising out of the application of the Madras

[149] AIR 1993 Ker 248.

[150] *Id.* at para 31.

Commercial Crops Act (Act XX of 1933) to the Malabar District of the erstwhile Madras State only, the Act shall suffer a serious and successful challenge in the not distant future."

With the hope that the Government of Kerala will act promptly and with all speed and move appropriate comprehensive legislation that will afford a satisfactory solution to the problem within one year, the Court dismissed the matter.

One of the Acts which was fully declared as ultra vires in the Constitution of India is the Kerala Raw Cashew Nuts (Procurement and Distribution) Act, 1981. In 1976, the State of Kerala promulgated the Kerala Raw Cashew Nuts (Marketing and Distribution) Order of 1976. The State issued a declaration that cashew nut is an essential article under Clause (2) of Section 2 of the Kerala Essential Articles Control (Temporary Powers) Act, 1961. The Supreme Court held that the raw cashew nut is a foodstuff within the meaning of Section 2(a)(v) of the Essential Commodities Act and hence it cannot be declared as an essential article under Section 2(a) of the Kerala Act.[151] The Court held that no order can be passed by the Government of Kerala under Section 3 of the Kerala Act in respect of raw cashew nut and the court held that the action of the Government is beyond the power conferred on it by the Kerala Legislature.

The Government implemented its policy decisions, within 10 days of the Supreme Court delivering the judgment, issued the Ordinance, and passed

[151] K. Janardhan Pillai v. Union of India AIR 1981 SC 1485.

the Kerala Raw Cashew Nuts (Procurement and Distribution) Act, 1981. Various amendments were made in due course. The 1988 Amendment Act was preceded by the Kerala Raw Cashewnuts (Marketing, Transport, and Fixation of Minimum Price) Ordinance, 1988. After the 1988 amendment, the situation became too difficult for the cultivators of cashew crops, and then Writ Petitions were filed. The validity of the entire Act and the arbitrary and unreasonable character of the various provisions of the Act were challenged.

Here some fundamental mistakes were made by the Government. The State Government presumed that the competent Legislature is the State Legislature and hence no prior sanction was taken from the President of India as provided under Article 304(b) of the Constitution of India.[152] The State enacted this legislation in haste. It is a common legislative practice to examine the legislative competence aspect before a bill is sought to be drafted for bringing in legislation. It is also liable to be struck down as unconstitutional because the avowed object of the legislation is to create a monopoly trade in raw cashew nuts for the State. The Act does not carry out that avowed object. On the other hand, the Act appears to have been enacted with the ostensible excuse of employing a large number of cashew workers, but in reality, it benefited only cashew factory owners and the agents and sub-agents.[153] In the present case, the agent and the sub-agent who purchased the raw cashew nuts are not obliged to pass on their profit to the State. Several provisions were

[152] Under Article 304 the proviso contemplates that no bill or amendment for the purpose of Clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President.

[153] B. Sundaresan v. State of Kerala and Ors AIR 1995 Ker 307.

found violative of the provisions of the Constitution of India. Sections 3 to 5 impose unreasonable restrictions and they violate Article 19(1)(g). They also violate Article 301 under which freedom of trade throughout India is guaranteed. Sections like 10 and 11 impose unreasonable restrictions and prevent the purchaser of the cashew nuts from processing it himself. Section 15 which deals with the transport of cashew nuts contemplates a cumbersome procedure and the grower obtaining permits. Sections 19, 20, 21, 23, and 25 are very oppressive in their effect. Section 29 makes the offenses cognizable. To summarise the whole thing here is an enactment that is meant to harass the grower and the cultivator.[154] Thus the Court struck sections 3 to 5, 10, 14, 15, and 19 to 21, and 25 were struck down as violative of Art 19(5) of the Constitution.[155] Since the principal provisions of the Act were struck down, the remaining portion of the Act cannot stand and has to be struck down entirely. An analysis of the role of the Judiciary here clearly shows that the Court struck down a monopoly law that hardly benefits a large number of cashew owners. In case the Judiciary had not stepped in, the Act would have stood as a tool for the sole benefit of owners, agents, and sub-agents.

The Court referred to the decision of the Supreme Court in Kunnathat Thathunni Moopil Nair v. the State of Kerala.[156] Dealing with the land tax, what their Lordships said is: A tax on land or land revenue is assessed on the actual or the potential productivity of the land sought to be taxed. In other

[154] *Id.* at para 40.
[155] *Id.*
[156] AIR 1961 SC 552.

words, the tax has reference to the income actually made or which could have been made with due diligence, and, therefore, is levied with due regard to the incidence of taxation.

As per the cited decision, the base of the tax is either the capital value of the land and the buildings or the annual letting value of the land and buildings. And the theory of taxation appears to be that so that there may be an equitable distribution of the burden of taxation, it is necessary to resort to some such method.[157]

Here the imposition of tax by the statute was held to be arbitrary and discriminatory for the following reasons:

(a) The classification of buildings into those that came into existence, after 2-3-1961 and those before that date, taxing the former and not the latter is discriminatory.

(b) The imposition of a uniform tax merely on the floorage basis on buildings situated in different locations whose capital value and whose letting value have no similarity is discriminatory.

(c) That the uniform rate of tax applied to all buildings merely on the 'floorage' disregarding its quality and/or usefulness is also discriminatory.

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[157] *Id.* at para 8.

In response to these specific averments, the only answer given by the State to these averments seems to be in paragraph 9 of the counter affidavit filed on behalf of the 1st respondent, the State of Kerala., which reads:

Fixing the tax based on the floor area of the building is also reasonable and legal. The buildings situated under the same circumstances are treated alike and no discrimination is shown. Such provisions do not in any way offend Article 14 or 10(1) of the Constitution.

The Court concluded that the Act purports to impose an arbitrary levy. It had correctly explained the proposition as such:[158]

> "Though the floorage has been defined in the statute, this has reference only to the basement except when there is a first or second floor. The basement has nothing to do with the quality of the building, its location, its usefulness, and much less its value or for that matter, the income that can be derived from that building. A building may be located in a busy town or city. Its value will be much higher than its counterpart elsewhere due to various reasons (the cost of construction, the cost of land in which it is built, etc.) and the letting value will also be different from that of a similar building situated in the country. Both have been taxed in the same manner. This has resulted in inequality. The inequality arises from a lack of classification."

The Court has described the discretion of the legislature in the matter of taxation. The Court said it is for them to decide the person or the property to be taxed. It is for them to decide the incidence of tax, who should be taxed,

[158] *Id.* at para 13.

and in what manner. But large as these powers are, they are still subject to the provisions in the Constitution, and if they are violative of Article 14, they are discriminatory and violative of Articles 14, 19, and 31 of the Constitution.[159] This is one of the cases wherein lack of classification created inequality. Further, it was not possible to severe the valid from the invalid provisions in the statute for the provisions in the Act are intertwined with the charging section, Section 4, which cannot stand for the reasons stated above. Hence the Court struck down the Kerala Buildings Tax Act, 1961.

A question of general public importance involving the constitutional validity of Sections 5[160], 6[161], and 8[162] of the Kerala Buildings (Lease and Rent Control) Act, 1965, was raised in the case of Issac Ninan v. The State of Kerala.[163] The petitioner challenged the three provisions on the basis that they would affect his livelihood under Art 21 and are unjust, unreasonable, and arbitrary under Art 14 and offensive under Article 19(1)(g). The Court took its time in analyzing various provisions with previous judgments and interpreted words such as 'control', 'fair rent', and the ambit of the term 'business' in the light of previous decisions.[164] The Court took the view that rent control legislation cannot be used to make the rent amount remain static always

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[159] *Id.*

[160] Section 5 of the Act deals with determination of fair rent for a building leased to a tenant either for residential or non-residential purpose.

[161] Section 6 has imposed a ban against further increase of the rent from what has been fixed by the Court as fair rent except in one contingency where some additions or improvements or alterations are made by the landlord to the building

[162] Section 8 has imposed a restriction on the landlord from claiming or receiving or even stipulating for payment of rent in excess of the fair rent

[163] 1995(2) KLJ 555.

[164] The Court referred cases such as Sodan Singh v. New Delhi Municipal Committee AIR 1987 SC 1988, State of Madras v. V.G. Row AIR 1952 SC 196.

unmindful of the vicissitudes in economic conditions, plummeting money value, and improvements of the locality from commercial angles and if the effect of the provision is to keep the rent static by fixing fair rent, it would not be fair rent at all when the situation changes on account of the factor mentioned above. The Court explained the magnitude of the unreasonableness through a hypothetical illustration and held that Sections 5, 6, and 8 cannot stand the test of reasonableness.

In the case of Ratna Bai v. the State of Kerala,[165] the petitioner raised serious allegations regarding the constitutional validity of the Kerala Land Reforms (Amendment) Act, 1999. The petitioners contended that on 1st January 1970 their right regarding the karma holding vested with the Government and thereafter there is no landlord-tenant relationship with the karma holders or karma holdings.[166] Those who had already purchased karma holders' rights cannot reopen the matter again. Secondly, it was contended that the present provisions are unreasonable and arbitrary, and violative of Article 14 of the Constitution of India. Unlike the earlier Acts, this Amendment Act was not included in the Ninth Schedule. Provision to take away their land and to give it to somebody else without any reasonable compensation will amount to arbitrary exercise of power and, in any event, passing an Act in 1999 to grant ownership right to somebody else considering the possession as on 1st January 1970 is unreasonable and illegal and there is a

[165] 2004 (1) KLT 632.
[166] *Id.* at para 4.

violation of Articles 14 and 21 of the Constitution of India.[167] It was further stated that the Presidential assent has not been obtained specifying a reference to Article 31A of the Constitution of India and even if such assent has been received, Article 31A itself is unavailable as it has no relation to the agrarian reforms and no compensation at the market value was paid as per the second proviso to Article 31A of the Constitution of India. Therefore, the contention was that the present Amendment Act is wholly unconstitutional and violative of Article 14 of the Constitution of India and is liable to be set aside. On behalf of the State, it was argued that the constitutionality of the amended provisions cannot be raised as the assent of the President is received as provided under Article 31A of the Constitution. Though the assent of the President had not been shown in the counter-affidavit, while dictating the Judgment, the file was shown to the Court. The Court here dealt with the question of constitutionality. The Court acknowledged that it is settled law that if the matter is covered under Article 31A and the assent of the President is received, legislation cannot be struck down on the ground that it is violative of Articles 14 and 19 of the Constitution. And also, the propriety of the President in granting the assent cannot be looked into as it is a matter outside the judicial review. But the Court carefully looked into whether the benefit of Article 31A applies to this case and whether the enactment in question is covered under Article 31A. The Court by citing the Constitution Bench of the

[167] *Id.*

Apex Court in State of Maharashtra & Anr v. Chandrakant Anant Kulkarni.[168] held that it is true that under Article 300A, the Government can pass a law to acquire the land without providing for compensation. But that does not mean that Government can act arbitrarily violating Article 14 and acquiring lands of citizens without paying compensation according to its whims and fancies discriminating against citizens. The Government must show that such legislation is not offended Article 14 of the Constitution of India in the absence of protection under Article 31A or B. The facts of the case also show that real hardship and prejudice are caused on the part of the landowners and hence the impugned Amendment Act was struck down as unconstitutional and unreasonable.

The constitutional validity of certain provisions of the Kerala Tax on Entry of Goods into Local Areas Act, 1994 (Act of 1974) was under challenge in the case of K.A. Jose. R.T.O. and Anr.[169] The Court held that State has not discharged its burden by providing quantitative data based on which compensatory tax is sought to be levied and the working test laid down in Automobile Transport's case,[170] Jindal Stainless Ltd's case,[171] or Vijayalakshmi Rice Mills case[172] is not satisfied in these cases for levying entry tax. There is no connection or nexus with the collection of entry tax and its utilization for the benefit of traders/manufacturers from whom such tax is

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[168] MANU/SC/0381/1977 (See paragraphs 8 and 40). ADD IN TABLE OF CASE
[169] 2008 (1) KLJ 128.
[170] Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan AIR 1962 SC 1406.
[171] Jindal Stainless Ltd. v. The State of Haryana and Ors. 2006 (7) SCC 241.
[172] Vijayalakshmi Rice Mill and Ors. v. Commercial Tax Officer (201) ELT 329 (SC) (2006).

collected. Held levy of entry tax is not compensatory, therefore discriminatory and the impugned levy is violative of Articles 14, 301, and 304 of Chapter XIII of the Constitution of India.

In the case of Babu Oomen Thomas (Dr.) v. State of Kerala and Anr, the Kerala Temporary Stay of Eviction Proceedings Act, 2007, and related ordinances[173] were challenged as invalid, void, and non-est and ultra vires of the powers. While analyzing the case before it, the Court reminded that the creamy layer principle laid down in the Indra Sawhney case cannot be ignored by the Kerala Legislature. It reiterated that the legislature can change the basis on which a decision is given by the Court and thus change the law in general, which will affect a class of persons and events at large. It cannot, however, set aside an individual decision interparty and affect their rights and liabilities alone.[174] Such an act on the part of the legislature amounts to exercising the judicial power of the State and virtually exercising judicial functions. It is pointed out that in the face of an unambiguous direction to evict the encroachers, it is not open to the legislature to make a law, be it as an Ordinance or plenary legislation defying the Court and setting at naught the judgments of a Court made in exercise of the judicial function of the State vested with the Courts.[175] The Court struck down the provisions. Despite the

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[173] WP. (C) No.24984 of 2009 (P). The Kerala Temporary Stay of Eviction Proceedings Ordinance, 2006 (Ordinance No. 41 of 2006) and the Kerala Temporary Stay of Eviction Proceedings Ordinance, 2006 (Ordinance No. 52 of 2006) and the Kerala Temporary Stay of Eviction Proceedings Ordinance, 2007 (Ordinance No. 14 of 2007) and the Kerala Temporary Stay of Eviction Proceedings Ordinance, 2007.

[174] T.P. Sobhana v. Deepak Krishnan, C.P.(C) No. 1 of 2012.

[175] Babu Oomen Thomas (Dr.) v. State of Kerala and Another, WP. (C) No.24984 of 2009 (P).

severe criticism of the Court, the Court had provided an opportunity to the State to act in conformity with the principles already laid down in previous judgments, which by itself is an example of respecting the separation of powers.

In Pushpagiri Medical Society v. The State of Kerala,[176] the Court in deciding the law, Kerala Professional Colleges (Prohibition of Capitation Fee, Regulation of Admission, Fixation of Non-Exploitative Fee and Other Measures to Ensure Equity and Excellence in Professional Education) Bill 2006, struck down chief provisions of the bill. The Court observed that the Government in an 'extreme hurry', 'simply to fulfill its electoral promise' took steps to bring in the proposed legislation.[177]

It is submitted that the approach adopted by the Judiciary is not commendable. The legislature must fulfill its electoral promise. In the case of Tharamel Krishnan v. Guruvayoor Devaswom Managing Committee and Ors,[178] the constitutional validity of Sections 3, 4, 11, 12, 14, and 24 (1) of Kerala Guruvayoor Devaswom Act, 1971 were challenged. Kerala State Legislature enacted the impugned Act to make provision for the proper administration of Guruvayoor Devaswom. The Court examined in detail the true scope and effect of the provisions of the Act. The Court was of the view that the real purpose and intendment of Articles 25 and 26 of the Constitution was to guarantee freedom to profess, practice, and propagate their religion, to

[176] WP(C). No. 18899 of 2006.
[177] *Id.* at para 91.
[178] AIR 2008 Ker 245.

establish and maintain institutions for religious and charitable purposes, to manage its affairs in matters of religion and own and acquire properties and to administer by law. The provisions contained in Section 24 (3) (f) empowering secular authority to sanction diversion of Devaswom funds for purposes unconnected with its affairs are unconstitutional and void. A fuller and detailed examination of the provisions of the Act as amended shows that the administration of the Guruvayoor Devaswom and properties is completely taken out of the Hindu denomination and hence the Act violates Article 26 of the Constitution.[179] Since the operative provisions of the Act were held to be invalid and since it was not possible to effectuate the object, purpose, and scheme of the Act with the aid of the remaining provisions alone the result is that the entire statute was rendered ineffective and void. The Court, in the interests of justice, directed that the operation of the judgment be stayed for two weeks to allow reasonable time to the State to take such steps as it may deem fit. This is a very positive approach by the Judiciary to overcome the difficulties faced by the verdict and such an approach helps the State to prepare itself to make adequate changes and uphold the constitutional values.

The constitutional validity of Section 2(k)(ii) of the Plantation Labour Act, 1951 (hereinafter referred to as the Act) fixing the ceiling of the monthly wages as Rs.750/- to make a 'worker' eligible to claim the benefits under the Act has been subjected to challenge in Kerala Plantation Workers Federation

[179] CF. MORTON, supra note 40 at 34.

& Another v. Union of India & Another.[180] The Court found that there is no rationale for leaving the maximum ceiling of Rs. 750/- as stipulated under Section 2(k)(ii) of the Act, which has resulted in substantial injustice negating the intention of the original lawmaking authority, who took pains to bring about the relevant enactment as a welfare measure.[181] Exclusion of the workers included in the plantation sector, based on an obsolete stipulation as to the ceiling on maximum wages does not stand the test of law and time and does not align with the directive principles as envisaged under the Constitution of India and the Court declared 2(k)(ii) as ultra vires.[182] The Court here made it clear that the appropriate Government is very much at liberty to invoke its power to legislate on the subject, providing an appropriate ceiling to the maximum wages under Section 2(k) of the 'Act' by way of appropriate amendments to be brought out at the appropriate time, as the Government finds it fit and proper.

In the case of Paul Varghese v. Commissioner of Commercial Taxes and Others,[183] when section 17(5A) of the Kerala General Sales Tax Act specifically provides for a penalty on failure to return the correct figures in a case covered by section 17(4) of the Act, whether levy of penalty again under section 45A of the Act would amount to double jeopardy and hence unconstitutional, was the moot point. After a thorough analysis of various provisions, the Court declared that, when punishment under section 17(5A) is

[180] 2009 (2) KLJ 724.
[181] *Id.* at para 11.
[182] *Id.* at para 11.
[183] (2013) 64 VST 6 (Ker).

imposed, further punishment under section 45A in respect of the same offense/ingredients is not correct or proper and the Court struck down the provision.

In James Varghese v. the State of Kerala,[184] the Court examined the constitutional validity of Kerala Revocation of Arbitration Clauses and Reopening of Awards Act, 1998. The Court addressed the question whether the impugned legislation is an encroachment into the judicial power of the State which is exercised through the Courts. Such encroachment amounts to the exercise of colorable legislation. The Court held that the impugned provisions are irrational classification without any intelligible differentia and are arbitrary. The Court reached its conclusion after elaborately considering the scope and application of the impugned Act and was of the view that since the impugned Act is not retrospective and it cannot be treated as applicable to contracts to which the 1940 Act and Arbitration & Conciliation(A&C) Act stood applied. It is nothing but the creation of provisions repugnant to the A & C Act.

In Cheers Structural Engineers & Contractors v. Commercial Tax Officer (Works Contract), the Court analyzed the efficacy of the first proviso to S. 8(a)(ii) of the Kerala Value Added Tax Act, 2003, hereinafter referred to as the K.V.A.T. Act.[185] The question raised is as to whether the said proviso, after the amendment made to the K.V.A.T. Act as per the Kerala Finance Act,

[184] OP(C). No. 3082 of 2013.
[185] Cheers Structural Engineers & Contractors v. Commercial Tax Officer (Works Contract),2017 (2) KLT 711.

2009 with effect from 01.04.2009, hereinafter referred to as "the Amending Act", would compel any works contractor in respect of works contracts awarded by Government of Kerala, Kerala Water Authority or Local Authorities to pay four percent of the whole contract amount as value-added tax, under the Compounding Scheme.[186] The Court wondered as to why the laborious exercise of considering the issue of constitutionality had arisen on a plain reading of the statute, and no unconstitutionality or arbitrariness could be sustained even on the face of Article 14 of the Constitution. Consequently, the Court held that the proviso to S. 8(a)(ii) of the K.V.A.T. Act as it stood before 01.04.2009 became redundant as a consequence of such Amending Act and the said proviso cannot be applied to any dealer falling under the provision of the K.V.A.T. Act.

In the case of Radhakrishna Kurup v. Namakkal Service Co-Operative Bank Ltd. and Ors.,[187] a petition challenging the constitutional validity of Section 56A of the Kerala Co-operative Societies Act, 1969, and an order directing the Bank to reconvey property after receiving the principal amount was considered. The question is whether Section 56A of the Act was unconstitutional being violative of Article 14 of the Constitution. The Court held that classifying Co-operative Bank as a distinct banking entity for purpose of denying its right to set up a property could not be said to be

[186] The conflict is that while S. 8(a)(ii) prescribes a rate of three percent of the contract amount, after enumerated deductions as the compounded tax with effect from the coming into force of the Amending Act, the proviso which had stood earlier continues to remain to require payment of tax at four percent. *Id.*

[187] 2016 (4) KLT 82.

founded on intelligible differentia. Therefore, Section 56A of the Act was held unconstitutional being violative of Article 14 of the Constitution. Further, impugned order to take steps to re-convey property after receiving the principal amount was set aside.

The constitutional validity of Section 7(1) (c) of the Kerala Co-operative Societies Act vis-a-vis Article 19(1)(c) as amended by the 97th Constitutional Amendment was at issue in Kalpetta Co-Operative Urban Society Ltd. v. Joint Registrar Co-operative Societies (General) Office of the Joint Registrar of Co-Operative Societies and Ors.[188] The Court elaborately considered the scope of the provision by elaborately considering the ambit of the functions and fundamental freedoms of a cooperative society. The Court said establishing a co-operative society, under Art. 19 (1) (c) is subjected to only those limitations specified under Art. 19 (4), and none else.[189] While interpreting, the Court added the intention to maintain public order cannot by itself save Section 7(1)(c) from unconstitutionality. The Court emphatically held that Parts III and IV are supplementary and complementary to each other and the Court may not entirely ignore the directive principles of State policy laid down in Part IV of the Constitution but should adopt the principle of harmonious construction and should attempt to give effect to both fundamental rights and directive principles as much as possible.[190] To sum up, as to reasonable restrictions, even in the name of public order and morality,

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[188] 2017(1) KLJ 106.
[189] *Id*. at para 57.
[190] Unnikrishnan v. State of A.P. AIR 1993 SC 2178.

Section 7 (1) (c) of the Act offers very little as justification to sustain it in the face of Article 19 (1) (c) of the Constitution of India and hence, the impugned provision was held unconstitutional.

The challenge[191] on the constitutional validity of the Kerala Tax and Luxuries Act,1976 reminds the legislature that the classification must be based on an intelligible differentia that bears a rational nexus with the object sought to be achieved by the legislature. The object of the levy under the Kerala Tax on Luxuries Act,1976 is to tax a luxury, and it is established that the luxury, of the same content, is provided by both cable operators and DTH operators, there cannot be a further sub-classification among persons who come within the ambit of the levy based solely on technological differences in the system of delivery of entertainment in both the services. Hence the impugned levy is discriminatory and violative of Article 14 of the Constitution of India.

The writ[192] raises a question about the validity of the Kerala Buildings Tax Act, 1961(hereinafter called the Act). The validity of the Act has been questioned mainly on two grounds, firstly, it was argued that entry 49 of List II to the Seventh Schedule of the Constitution of India under which it is claimed the Act has been passed, does not enable the State Legislature to pass such a law. it is urged that in any view of the matter, the Act is discriminatory and is violative of Articles 14, 19, and 31 of the Constitution.

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[191] Bharati Telemedia Ltd. v. Union of India and Ors., W.P.(C) 6345/2018.
[192] NelliyilKunhali Haji v. State of Kerala and Anr. AIR 1966 Ker 14.

In the case of Seafood Exporters Association of India v. State of Kerala and Ors.,[193] the constitutional validity of Section 3(1), 3(2), and 3(3) of the Kerala Fishermen's and Allied Workers Welfare Cess Act, 2007 was in issue. According to the petitioners, the impugned provisions are beyond the legislative competence of the State and consequently, unconstitutional. They have also prayed for a declaration that exporters of seafood are not liable to pay the cess, interest, and penalty under the said Act. In the case, the Court heavily put its reliance on the decision in Koluthara Exporters v. the State of Kerala[194] In this case Kerala Fishermen's Welfare Fund Act was challenged as unconstitutional. The Act proposed to constitute a Welfare Fund for the fishermen with contributions from the persons engaged in the seafood trade. The definition of the dealer on whom the liability to pay contributions was cast, included an exporter also. The provisions of the said Act were challenged before this Court. Though the challenge was unsuccessful, in appeal the Apex Court held Section 4(2) of the Welfare Fund Act to be unconstitutional. The Apex Court found that though the State had the legislative competence under Entry 23, List III to cast the burden of an impost by way of contribution for giving effect to the provisions of welfare legislation, such burden could not be imposed on a person who was not a member of such section of the society or an employer of a person, who is a member of such section of society that is to benefit from the impost.[195] The burden of the impost could be cast only where

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[193] 2019 (1) KHC 102.
[194] AIR 2002 SC 973.
[195] *Id.* at para 23.

there exists the relationship of employer and employee between the contributor and the beneficiary of the provisions of the Act and the Scheme made thereunder.[196] Applying the above principle the Court in the case of Seafood Exporters Association of India v. The State of Kerala and Ors analyzed the Cess Act and found that it has been enacted in the exercise of the legislative power under Entry 23, List III, Schedule VII of the Constitution. The Court went on to a detailed comparison of the provisions of the Cess Act with the provisions of the Welfare Fund Act and the Ordinance of 2006. The Court reached its conclusion that though the levy in the present enactment is described as a 'Cess', the change in nomenclature does not make any difference. It is declared that Section 3(1), 3(2), and 3(3) of the Act are beyond the legislative competence of the State, and said provisions are set aside.

A study of the role of the Judiciary shows that the interferences of the Courts have only strengthened democracy. The Court follows set norms, standards, or guidelines so that it does not tend to become arbitrary. It had struck down provisions that violate fundamental rights guaranteed by the Constitution, especially where it deals with the violation of the right to profession,[197] lack of classification which created inequality,[198] double jeopardy,[199] Act enacted beyond the legislative competence of the State[200] etc.

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196 *Id.*
197 B. Sundaresan v. State of Kerala and Ors. AIR 1995 Ker 307.
198 Nelliyil Kunhali Haji v. State of Kerala and Anr. AIR 1966 Ker 14.
199 Paul Varghese v. Commissioner of Commercial Taxes and Others WP(C). No. 10534 of 2012. Sec.17(5A) of the Kerala General Sales Tax Act specifically provides for a penalty

Whereas the Court has followed the principle of judicial self-restraint and instead of making or evolving new law, the Court had itself made it clear that "the appropriate Government is very much at liberty to invoke its power to legislate on the subject, providing appropriate ceiling to the maximum wages under Section 2(k) of the Act by way of appropriate amendments to be brought out at the appropriate time, as the Government finds it fit and proper."[201] Similarly, in Manattillath Krishnan Thangal and Ors. v. The State of Kerala,[202] the Court directed the legislature to review provisions of the Act. The Court had given the space for the legislature to intervene and correct its error, wherever possible.

So far, the discussion was based on cases where the Judiciary had struck down either the impugned provisions or the whole of the Act when proved to violate the Constitution. Apart from these, around 75 cases were filed in the Court contending the validity of the Act. In these cases, the Court after analyzing had upheld the constitutional validity. Thus, in an analysis of the study of the challenges against legislative enactments of the Kerala Legislature, only a very few of the lot has been struck down as unconstitutional.

on failure to return the correct figures in a case covered by section 17(4) of the Act. Whether levy of penalty again under section 45A of the Act would amount to double jeopardy and hence unconstitutional.

[200] Seafood Exporters Association of India v. State of Kerala and Ors., Appeal (civil) 12788 of 1996.

[201] Kerala Plantation Workers Federation & Another v. Union of India 2009 (2) KLJ 724.

[202] 1970 KLJ 827.

7.4 DEMOCRATISING JUDICIAL REVIEW OF LEGISLATION

The principle of judicial review became an essential feature of written Constitutions of many countries, as already discussed above. Seervai in his book Constitutional Law of India noted that the principle of judicial review is a familiar feature of the Constitutions of Canada, Australia, and India. Though the doctrine of separation of powers has no place in a strict sense in Indian Constitution, the functions of different organs of the Government have been sufficiently differentiated, so that one organ of the Government could not usurp the functions of another.[203] Today, the doctrine of separation of powers has a strong footing in the constitutional jurisprudence in India. This is evident from the Supreme Court's observation in the State of West Bengal &Ors. v. Committee for Protection of Democratic Rights, West Bengal &Ors.[204] It is true that in the constitutional scheme adopted in India, besides supremacy of the constitution, the separation of powers between the legislature, the executive and the Judiciary constitute the basic features of the Constitution. As Edmund Burke said: all persons in positions of power ought to be strongly and awfully impressed with an idea that they act in trust, and must account for their conduct to one great master, to those in whom the political sovereignty rests, the people.[205] Separation of powers also means that the different branches have mutual respect for one another. Our Constitution

[203] H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA 237 (N.M. Tripathi Private Ltd 1983).
[204] AIR 2010 SC 1476.
[205] J. S. Verma, Ensuring Accountability and the Rule of Law: The Role of the Judiciary, A speech delivered by him at the Inaugural Conference of the Asian Centre for Democratic Governance titled 'Making Democracy Work: Accountability & Transparency' (Jan. 2001).

provides for coequal and coordinated organs of State with respective jurisdiction and powers distributed by each of them. It is apt to advert to what the Constitution Bench of our Supreme Court said in Sub Committee of Judicial Accountability v. Union of India[206] as regards this concept: "But whereas in this country and unlike in England, there is a written constitution which constitutes the fundamental and, in that sense, higher law and acts as a limitation upon the Legislature and other organs of the State as grantees under the Constitution, the usual incidents of parliamentary sovereignty do not obtain." The judicial review follows from this concept of the higher law being the touchstone of the limits of the powers of the various organs of the State under the Constitution. Naturally, as discussed in previous paragraphs, judicial review of legislative enactments is considered as antithesis to democracy because, ultimately, the decisions of the representative majoritarian institution are nullified. We have already discussed in detail different views of the scholars and placed arguments regarding this. Based on the empirical study and the theories I have discussed so far; I have framed two questions to conclude my arguments in this chapter. Firstly, whether judicial review amounts to usurpation of legislative power, and secondly, whether judicial review assumes an undemocratic dimension, or on the other hand, it strengthens democracy. In this part, I will be attempting to answer these questions.

[206] AIR 1992 SC 320 (345).

When we come to the specific history of judicial review there has been much debate as to whether the Courts have the power to declare acts unconstitutional. Whatever be the history, judicial review, everyone will agree, has become an integral part of American law. In America, unlike India, judicial review is a result of judicial intervention, the importance of judicial review in India is much more. Judicial review is enshrined in Art 13 of the Indian Constitution itself; the question of whether or not there is usurpation now seems to be immaterial. Although much recent scholarship has studied the causes of judicial independence in difficult environments, very little scholarship has considered the effect of judicial activism on democratic governance. Judges and constitutional drafters are notably unconcerned with the classic counter-majoritarian difficulty or the dilemma of Courts imposing on democratic space and taking on legislative roles. This is because they are focused on a different problem: how to make democratic institutions work better.[207]

The potential scope of judicial review has been immensely broadened in recent years and this has resulted in questioning the limits of judicial review. The real problem arises when the judicial attitude toward the judicial function and the Constitution has changed. Many Judges now consciously legislate. Indeed, they do so only intrinsically within the contours of the Constitution, but those contours are vague because the Constitution has its

[207] David Landau, *A Dynamic Theory of Judicial Role*, 55 B.C.L.Rev.1503 (2014) http://lawdigitalcommons.bc.edu/bclr/vol55/iss5/4 (last accessed Dec 18, 2020)

calculated generalities.[208] Thus, it is the Court itself that frames its principles and set norms to adjudicate on constitutionality. In most cases, this will be the guiding principle, as we have seen in the empirical study of Kerala, but there are cases where the verdicts in the exercise of judicial review intrude legislative power. As Justice Dwivedi observed:

> "Structural socio-political value choices involve a complex and complicated political process. This Court is hardly fitted for performing that function. In the absence of any explicit Constitutional norms and for want of complete evidence, the Court's structural value choices will be largely subjective. Our predilections will unavoidably enter into the scale and give color to our judgment. Subjectivism is calculated to undermine legal certainty, an essential element of rule of law."[209]

One may say that if there is any limitation on judicial review other than constitutional and procedural[210] that is a product of judicial self-restraint. In 1933 Mr. Justice Stone said: "While the unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our sense of judicial restraint."[211] Judicial self-restraint about legislative power manifests itself in the form of presumption of constitutionality when the validity of the

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[208] Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment* 16 INT'L J. CONST. L. 315 (2015).

[209] Keshavananda Bharati v. the State of Kerala, AIR 1973 SC 1461.

[210] The Supreme Court used the following procedural limitation to judicial review.
Doctrine of laches in order to quash the petitions at the threshold for the delay, See e.g. M.K. Krishnaswamy v. Union of India, AIR 1973 SC 1168, 2. Res Judicata, See also Gulab Chand v. State of Gujarat, AIR 1965 SC 1153.

[211] US v Butler, 297 U.S.1(1936).

statute is challenged. In the words of Fazl Ali, "…the presumption is always in favor of the constitutionality of an enactment, and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles."[212] If the Judiciary adheres to these principles strictly, it cannot be said that judicial review assumes an undemocratic dimension. Our national experience teaches that the Constitution is preserved best when each part of the Government respects both the Constitution and the proper actions and determinations of the other branches. Interpretation of the Constitution is a matter of great constitutional responsibility and requires foresight and judicial statesmanship on the part of the judges who must be inspired, while interpreting it, by a broad national perspective.[213] When the Court has interpreted the Constitution, it has acted within the province of the judicial branch, which embraces the duty to say what the law is.

Courts and other non-democratic institutions often see their role within such a regime as dynamic: they aim to improve the performance of political institutions over time.[214] A Court that is passive and sits back, waiting for the litigants has little force today. While dealing with petitions challenging the constitutional validity of section 377 of the Indian Penal Code, the Supreme Court observed that the Courts have no obligation to wait and would act if any violation of fundamental right was brought before the Bench.[215] The question

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[212] Charanjit Lal v. Union of India, AIR 1951 SC 41.
[213] UMSESHWAR PRASAD VARMA, LAW, LEGISLATURE AND JUDICIARY 25 (Mittal Publications 1996).
[214] *Id.* at 26.
[215] Navtej Singh Johar v. Union of India (2018) 10 SCC 1.

of whether the Court is either failing or not failing in its duty to protect constitutional rights is hard to determine. This depends upon the quality of its work and its efficiency or speed.[216] It is said that if the "Court decides as it thinks right, then it usually concludes that the Court rightly and constitutionally took jurisdiction."[217] "If it dislikes the result intellectually and emotionally the Court has usurped power."[218]

While labeling judicial review as undemocratic, we should know that there can be a vast discrepancy between the law in writing and the law applied. Unless the Judiciary steps in, our rights would also suffer at the hand of the majoritarian. This is because we have seen several examples in our day-to-day life and also the study in previous chapters that the work of the legislative department is generally carried on in the glare of publicity. They do have occasional private conferences and exclusive sessions, but they debate and confer mostly in public. In due course, elected representatives' propaganda may fail, but not so with the Judiciary. It is rightly said that review is the basis of all our liberties and constitutional rights and the question from year to year indeed from day to day is whether the Court is using that power when it should be used. We are deceiving ourselves if we are relying on unused power.[219] As said by the Chief Justice Marshal of the American

[216] Ben W Palmer, *Judicial Review: Usurpation or Abdication?* 46 AM. BAR ASS'N J.81–88(1960).
[217] *Id.* at 86.
[218] *Id.* at 87.
[219] *Id.* at 87.

Supreme Court, "we must never forget that it is a Constitution we are expounding". [220]

The judicial review comes in strong and weak forms, it is the former, not the latter that is the object of criticism. The difference between the two is that system of strong judicial review-such as the United States, - Courts have the authority "to establish as a matter of law, that a given statute or legislative provision will not be applied so that as a result of stare decisis a law that they have refused to apply becomes in effect a dead letter." [221]

Weak judicial review, by contrast, may involve ex-ante scrutiny of legislation by Courts, to determine whether or not it is unconstitutional or violates individual rights simply because rights would otherwise be violated. Britain, after the incorporation of the ECHR into British law by the Human Rights Act of 1998, is an example of weak judicial review. India follows a strong judicial review system wherein the Judiciary has itself acted as the lawmaker.

Now coming to the question in specific, whether democracy and judicial review are incompatible, the claim that they are, has been successfully defended by Waldron, a long-standing opponent of judicial review. His paper titled, "The Core of the Case against Judicial review" summarizes these arguments.[222] The first, the substantive thesis, maintains that "it is impossible

[220] McCulloch v. Maryland 17 U.S. 316(1819). (ADD TABC

[221] AJAY PRATAP, supra note 63 at 3.

[222] WALDRON JEREMY, RIGHTS AND MAJORITIES: ROUSSEAU REVISITED. IN LIBERAL RIGHTS: COLLECTED PAPERS Cambridge University Press 110(1991).

to decide whether or not judiciaries are better than legislators at protecting rights."[223] Based on the analysis in previous chapters, it is evident that no serious discussion takes place on the floor of the legislature. The second thesis, which is called the procedural thesis, holds that the legislatures are overwhelmingly superior to Courts from a procedural perspective.[224] This is because the legislature is more participative, transparent, and legitimate in the eyes of democracy. Being so Waldron maintains "that legislatures embody crucial democratic rights and values to an extent that is impossible for the latter to imitate."[225]

Waldron proposes that judges are better than legislatures at protecting rights. This theory strikes as correct, because the relative merit of the judiciary as compared to the legislature, in protecting the rights through interpretation of events and arguments, holds strong to the threshold of democracy. The argument that the Judges are not accountable seems baseless, this is because to be accountable, judges do not have to be elected, and they have their demands of accountability to meet. Accountability, in democracies, is necessarily constrained by the rights and institutions necessary to secure political choice and participation.[226] Accountability is therefore a less determinate and more complicated value than is implied by procedural objections to judicial review or the rhetorical constraint between elected

[223] *Id.* at 110.
[224] *Id.* at 112.
[225] AJAY PRATAP, supra note 63 at 4.
[226] Joshuam Cohen, *Pluralism and Proceduralism*, CHI.-KENT. L. REV 618 (1994).

legislators and unelected judges.[227] This argument strengthens the view that judicial review can be consistent with democratic accountability, as well as with democratic participation. As in the case of the example of the Kerala study, we have seen, the Court typically reviews a small fraction of all legislations and then upholds more than they invalidate. So, it would be surprising if judicial review discouraged electoral participation, and there is some evidence that it often provokes and promotes it.[228]

Thus, judicial review can have a democratic justification since it symbolizes and gives expression to the authority of citizens over their governors. Moreover, the absence or presence of judicial review does not hamper the belief about the vices of legislators. To conclude, judicial review can be justified on democratic grounds, even if its benefits are uncertain, it stands to strengthen democracy. Vernon Bogdanor's theory regards the connection between judicial review, constitutionalism, and democracy as pragmatic rather than conceptual. He contends that "judicial review and constitutionalism are useful institutions that secure impartiality or other goals that are essential to democracy." Further he argues "that judicial review and constitutionalism are not themselves essential to democracy nor are these institutions the only ones that can successfully implement democratic goals, or that they will do so infallibly, or that they will do so better than any

[227] Harelalon and Tsvi Aahan. *The Real Case for Judicial Review: A Plea for non-instrumentalist Justification in Constitutional Theory* 2, CAL. L. REV 81(2009).

[228] Samuel Freeman, *Constitutional Democracy and the Legitimacy of Judicial Review* 9 Law and Philosophy, 327–370(1990).

imaginable alternatives."[229] Instead, he suggests that different institutional arrangements might serve the goals of democracy.

The chapter shows that judicial review has a democratic justification, though the justification for judicial review does not depend on complex theories of democratic government. Against critics like Waldron and Bellamy, it shows that judges, no less than legislators, can embody democratic forms of representation, accountability, and participation.[230] Judicial review is not undemocratic simply because it enables unelected judges to overrule elected legislators when people disagree about rights.[231] Recent defenders of judicial reviews, such as Eisgruber and Brettschneider, show that democratic arguments for judicial review do not require judges to be better at protecting rights than legislators.[232] Thus the case of judicial review enables individuals to vindicate their rights, influence on the daily administration of justice and take an active role in ensuring that the other branches of the Government abide by the Constitution.

It has been pointed out that there is deterioration in the quality of deliberation both in Parliament and Kerala Legislature. On Independence Day, Chief Justice of India (CJI) N.V. Ramana highlighted this problem, noting that the ambiguities and gaps in laws passed without meaningful deliberation

[229] *Id*. at 329.
[230] JEREMY WALDRON, supra note 127, at 1348.
[231] Annabelle Lever, *Democracy and Judicial Review: Are They Really Incompatible*? *Perspectives on Politics*, 7 AMERICAN POL. SCI. ASS'C CAMBRIDGE UNIVERSITY PRESS 805–22 (2009).
[232] *Id. at* 815.

trigger avoidable litigation.[233] The CJI suggested that while lawyers and intellectuals enter public life to improve deliberation, the judiciary can also play a crucial role in improving the law-making process. [234]

Relying on the volume of Bills passed by the Legislature to measure its efficiency is flawed as it may not account for adequate notice and effective deliberations. Rushed law-making, rendering Parliament a rubber stamp, sacrifices two core ideals of democracy, namely, equal participation and respect for fundamental rights.[235] The Judiciary can play an active role in improving the law-making process and securing the ideals. Firstly, is by enforcing the text and spirit of the constitutional provisions governing legislative procedures. Though the Constitution contains detailed provisions laying out how laws are to be passed by the legislature, these are often undermined. For example, in Parliament recently, the controversial farm laws were rushed and passed by voice vote in the Rajya Sabha despite objections by Opposition Members. This is a negation of the rule that Bills may be passed, without securing the majority vote required under Article 100 of the Indian Constitution. Secondly, to stop the practice wherein the Bills are certified as Monet Bills to bypass the Rajya Sabha even where they do not

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[233] *Sorry State of Affairs': CJI Ramana Says Lack of Parliamentary Debates Causing Gaps in Laws*, THE WIRE, 15th Aug 2021. Available at https://thewire.in/law/cji-nv-ramana-lack-of-parliamentary-debates-gaps-laws-independence-day-speech.(last accessed on 21st Aug. 2021).

[234] *Id.*

[235] THE HINDU, *The Judicial Role in Improving Law-making,* Sep. 6, 2021, at 4.

meet the specific description of Money Bills provided under Article 110 of the Indian Constitution.[236]

Another important method suggested is for the judiciary to make deliberation a factor in evaluating the constitutional validity of laws. This is rooted in the rudimentary idea that legislature is a widely represented deliberative organ and a diverse interest group finds representation through this organ. In exercising judicial review, the Court's role is to call on the State to provide justifications explaining why it is reasonable and therefore, valid. While doing so, the Court can examine the extent of reasonable deliberations that took place. The legislative inquiry would usually include evaluating the factual basis justifying the law, the suitability of law to achieve its aim, and the necessity and proportionality of the law relative to its adverse impact on fundamental rights.[237] The judiciary can also make a deliberation in choosing whether to employ the doctrine of presumption of constitutionality. When laws are passed without deliberation and examination, the State usually finds it difficult to explain why such laws constitute a reasonable restriction on rights, heavily rely upon the doctrine of presumption of constitutionality. Following such a practice, the judiciary can encourage legislative bodies to ensure a deliberative law-making process.

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[236] *Id.* at 4.

[237] The Supreme Court adopted this approach in the Indian Hotel and Restaurants Association and Ors 2013 8 SCC 519.

CHAPTER - VIII
CONCLUSION AND SUGGESTIONS

The journey of exploring the contours of democratization of lawmaking in Kerala has not been smooth. The study shows that democratization is not a one-word solution in spheres of governance; rather it involves a plethora of measures intended to generate the seeds of democratization in various areas of governance, which constitute the foundations of a democratic state.

Though the idea of an institutionalized democracy came to us in the colonial era, democracy envisioned as a government by the people; a Government in which supreme power is vested in the people is yet to attain perfection. In our democracy which survives through a prescribed division of functions between the legislature, executive, and judiciary, the fact that the legislature is the most visible site of representative democracy is beyond debate. The inherent strategies in the law-making process of legislature play a decisive role in promoting democratization. The most defining and distinguishing feature of India's Parliamentary democracy by which the Parliament survives, i.e., collective responsibility shows remarkable consistency. The three major components of democratization of law-making viz., (i)Overview of lawmaking in the Kerala Legislative Assembly;(ii) Subject Committee and Select Committee; and(iii) Private Members' Bills

and other inputs in law-making formed the core of the study. Some major findings emerged from the study, that concentrated on the Legislative Assembly of Kerala during the period from 1957 to 2021, and spanned the period from the first Kerala Legislative Assembly (1957-59) to the Fourteenth Kerala Legislative Assembly (2016-21).

8.1 FINDINGS OF THE STUDY

8.1.1 Legislative Performance- Analysis of Democratization of Law Making

During the study, the bills enacted by the legislature were categorized as original bills, amendment bills, and financial bills. The analysis shows that amendments always outnumbered the number of original legislation and finance bills. It was also noticed that the number of original legislations began to decline as years passed by. When compared to the performance of the initial Kerala Legislative Assemblies which had only shortened tenures, the performance of the more recent Kerala Legislative Assemblies appears to be disappointing. The number of new original legislations has decreased especially in the 11th, 12th $13^{th,}$ and 14th Kerala Legislative Assemblies. Further, as the State progressed, the need for more and more financial outlays to manage development projects, more facilities, etc. is evident in the 11th, 12th, $13^{th,}$ and 14th Kerala Legislative Assemblies, from the increasing number of money-related enactments.

The study was then confined to the original legislation, which can be considered a better indicator of legislative performance. The subject-wise classification of bills, revealed the socio-political approaches of the legislative assemblies over the period. It is seen that during the period from 1957 to 1961 subjects like revenue, local self-Government, and law and order were given prominence to address the immediate needs of the new State. Slowly, the priorities spread out to subjects like labor and labor welfare, the establishment of universities, reforms in the educational system, decentralization, etc. As time progressed, legislations began to focus on subjects like traffic safety, corruption, agriculture and animal husbandry, water-related enactments, environment, etc. Of all the categories, the subject of labor and labor welfare was given importance in all the Kerala Legislative Assemblies.

The Kerala Legislative Assembly has passed 1702 bills from 1956 to 2021. i.e. during the tenure of the First Kerala Legislative Assembly to the Fourteenth Kerala Legislative Assembly. An exploration of the core question of the research i.e., whether law-making in the Kerala Legislative Assembly (KLA) is truly democratic or to what extent it is democratic is ascertained by the extent of democratization in different periods of Kerala Legislature. The following indcators were used to decide the democratic element in law-making: (i) time taken for the passage of a bill, (ii) the number of members who participated in the discussion on the bill, (iii) the number of amendments moved on the floor of the House, and (iv) the number of amendments accepted by the House. The analysis finds that some important bills witnessed

a meaningful discussion on the floor of the House, while others were hardly discussed.[1] An analysis of the data shows that there is no correlation between the time spent on each bill and the number of members participating in the discussion. This is because a single member may speak for a long time without any productive output, despite warnings from the Speaker. The dominating presence of several speakers while discussing a bill does not improve the quality of a bill. This is further proved in the qualitative analysis of some selected bills to portray the kind of discussion, the number of amendments moved, and the number of amendments accepted by the House. The question that arises is whether the time spent on each bill was fruitful and resulted in substantial positive contribution. An analysis of the content of the discussion shows that in between the debates many instances of unnecessary interventions hinder the speeches and the deliberations on the scope of the bill often get diverted at different stages. The analysis reveals that most of the bills failed to satisfy the relevancy test i.e., when the discussion is confined to the provisions, objects, and impact of the Bill, the so-called deliberations are termed relevant. Overall, a few bills were discussed with full focus and detailed proposals. Whether the discussion is productive or not, many bills show increased participation, which though democratizes representation, does not uphold qualitative democracy.

In addition to the time taken, factors such as the number of members who had participated in the debate, the number of amendments moved, and

[1] See Chapter III at 108-113.

the number of amendments accepted by the House, are also important indicators to ascertain the democratic nature of lawmaking by the legislature. It is found that the amendments that were introduced in the House by the opposition are not readily accepted by the Government. It is seen that the Minister, who is the Member-in-Charge moves the bill, plays the most decisive role and has the sole discretion in deciding whether to accept or reject the amendments. Usually, the ruling party does not accept amendments moved by the opposition parties. This results in increased placing of amendments and simultaneous rejection of the same. The members of the legislature, though not ministers or representatives of the Government, are also representatives of the people, and total rejection of the opinions and suggestions put forward by them hampers the true meaning of democratization. The idea of democracy is reduced to majoritarianism by ignoring non-official and opposition members by excluding them from the legislative process.

Further study of the legislative proceedings shows that many valuable amendments, propositions, and opinions are put forward by the members of the House. The practice of a proper introduction of amendments with an intended objective and its simultaneous rejection by the Minister for a specific reason, assures that the scope of the legislation is genuinely discussed on the floor. But the recent practice of the presentation of amendments monotonously, without stating its objectives, and the simultaneous rejection of the same by the Minister without any reasons had further deteriorated the concept of democratization. However, compared to earlier times, participation

is more. But the element of effective discussion and readiness for acceptance is lost.

The foregoing analysis shows that law-making in the Kerala Legislative Assembly suffers from a democratic deficit. Qualitative legislative business alone can produce democratic outputs. Rather than increasing quantitative outputs, focusing on the content to improve the quality of legislation must be the aim. A combined effort of both Ministers and all other members can bring forth more qualitative improvement of legislation. For this purpose, the attitude and mindset should change. Only then the House can positively contribute to the outcome of a Bill. Otherwise, it will continue to be the exclusive product of the executive.

8.1.2 Role of Legislative Committees in Democratizing Law Making

The contribution of legislative committees in democratizing the process of law-making was a key area of research. The study showed that only 27 bills were referred to the Select Committee from 1980 to 2021. This shows how sparingly a device that invites expert evidence from representatives of special interests is used. However, the number of sittings of each Select Committee shows a progressive trend. Since the Select Committee is designated to collect evidence and expert opinions from stakeholders, the duration of the Select Committee stretches to an average of 7 to 10 days. Each bill is discussed and studied in detail and placed before the House with proposed amendments.

In the analysis of the working of the Subject Committees, which Kerala had initiated in 1980 as an innovative measure for improvising legislative scrutiny, it is found that most of the bills are referred to the Subject Committee as a routine procedural requirement. Over the period from 1980 to 2021 (6th KLA to 14th KLA) a total of 687 bills were referred to different Subject Committees, of which, 532 bills were submitted back with modifications. Only 155 bills were reported without any modifications from the Subject Committee.

The study investigates the performance of Subject Committees and their contribution to the improvisation of the bills. The time taken by the Subject Committee for scrutiny of bills was also studied to evaluate the involvement of the Subject Committee in discussing the bills. Although the Committees were designed to make the report after a detailed discussion of the provisions of the bill and forward the report to the Assembly, it is seen that 130 original bills were discussed in one day span. After dissecting the bill containing a large number of sections, it is seen that from the 12th KLA, the number of bills that were scrutinized in a single day drastically increased, irrespective of the importance of the bill or its numerous provisions.

A qualitative analysis of the reports of the Subject Committees showed that lots of amendments were suggested by the Committee including major and minor changes. Those suggested by the majority are usually accepted. Most of the minor amendments such as spelling errors, grammatical mistakes, the substitution of words, etc. are also accepted by the House without much

hesitation. But any change in the core principle of the proposed Bill depends solely on the Chairman of the Committee, very often the respective Minister in charge.

The Committee is intended to serve as a platform for an elaborate discussion of the bills. However, the study reveals that even in the case of bills that were thoroughly discussed in the Subject Committee, the proposed amendments rarely receive support on the floor of the House. Although the Subject Committee reports are placed before the House, the discussion revolves around a few provisions, and the discussion is mostly a political discussion. This reduces the importance of the amendments suggested. However, the above practice is only with the proposed amendments which propose any substantial improvement in the content of the bill. Concerning minor suggestions, most of the recommendations are accepted by the House.

Apart from the usual practice, the 14th KLA shows a major change and sets an example. The discussion in the legislative assembly and its recommendations were taken on a serious note. Kerala Clinical Establishments (Regulation and Registration) Bill, 2017, Kerala Madrasa Teachers' Welfare Fund Bill, 2019, Malayalam Language (Compulsory Language Bill)2017, and Sree Narayana Guru Open University Bill, 2021 had a good discussion in the respective subject committees and unlike previous practices, most of the major amendments were accepted. Numerous minor amendments were proposed by the Subject Committee to Kerala Micro Small and Medium Enterprises Facilitation Bill, 2019, Kerala Christian Cemeteries

(Right to Burial of Corpse) Bill, 2020, etc, which were also accepted by the Assembly. However, about the dissent expressed by members in a subject committee, like other KLAs, 14th KLA also gave the least importance to the opinions.

A notable feature of the reports of the Committee is the dissent expressed by its members. The dissent so expressed, when it comes to the floor of the House, is hardly given any importance. Since the dissent is often expressed by the members of the opposition party, whether the dissenting opinion gives a positive impact on the bill or not, it fails on the floor. Dissent has become mechanical and routine. The tool of dissent, which is the embodiment of a fruitful democracy, has become a mockery with the least importance.

Comparison of the pre-and post Subject Committees-era shows that the mandatory procedure of sending all bills to respective Subject Committees sets the stage for discussing the bill in detail and formulating views on the bills. The forwarding of certain bills to the Select Committee paved the way for collecting evidence and consultation with stakeholders. The only drawback is that most of the substantial qualitative improvements suggested by the Subject Committee are not accepted by the House easily, except in a few cases. The study on the Subject Committee and Select Committee reveals that to get the desired output of vibrant and relevant parliamentary practices, a more systematic approach to the committee system is necessary.

Despite the specific rule stated in R.237(2) of the Rules of Procedure that there shall be at least one clear day between the day of reference of a Bill to the Subject Committee and the date of the meeting of the Subject Committee for the purpose, Subject Committee sittings take place on the same day the bill is referred to the Committee. To uphold democratic principles and people's aspirations, the Committees must strive to perform the role assigned to them in a meaningful manner.

8.1.3 Private Members Bill- An Excersice in Futility

The introduction of the Private Members' Bill is a strategy to promote participation of all members, including those belonging to the opposition, in the democratic process. Rule 70 of the Rules of Procedure and Conduct of Business in the Kerala Legislative Assembly states that any Member other than a Minister desiring to move for leave to introduce a Bill, shall give notice of his intention and shall, together with the notice, submit a copy of the Bill and an Explanatory Statement of Objects and Reasons. While Government Bills can be introduced and discussed on any day, Private Member's Bills (PMB) can be introduced and discussed only on Fridays. Analysis of the Private Members' Bills reveals that numerous PMB were introduced during the period from the 1st Kerala Legislative Assembly to the 14th Kerala Legislative Assembly. A total number of 724 PMB were moved till May 2021. During the initial period, the motion for which private bills were moved was fewer. In the 1st, 2nd, and 3rd KLA, only 12 PMB motions were moved. Further, the PMBs introduced were much lesser. Only 9,10 and 8 bills

respectively were introduced on the floor. From the 10th KLA, the motion on PMBs began to rise drastically. From 39 private members' bills in the 9th KLA, the number rose to 98 in the 10th KLA, 112 in the 11th KLA, 144 in the 12th KLA, and 151 in the 13th KLA. The data shows a positive approach of the members of the legislature in contributing toward better governance of the State. In the 14th KLA, the number of PMBs which were submitted for motion is reduced to 63. The reduction may be also because of the covid pandemic, but one cannot wholly shift the poor performance, since only two years of the entire tenure of the Assembly were affected due to Covid 19.

Further scrutinizing of the data shows a dismal state of affairs. Of the 724 motions, only 449 PMBs were introduced. Some were never introduced due to lack of time and few were dropped because of the lack of initiative from the members themselves. Of the 449 bills introduced, only 45 were discussed on the floor during the period from 1950 to 2021. Many bills were withdrawn and others were opposed by the Minister. Around 8 bills got assurance from the Minister that they will be enacted and thus the members withdrew them. Of the assurance given, 3 bills were enacted on the same lines as proposed in the PMB. Based on the gist of two PMBs, in one case the Government implemented a Agriculturists' Welfare Fund Pension Scheme and in 2018 the Government proposed to consider the Minimum Wage For Private School Teachers in Kerala, which was a recommendation of a Private Members' Bill.

PMBs serve as an important yardstick to measure democratization since MLAs are close to their respective constituencies and connected with the people in real-time. But the truth is that the Government often fails to recognize the proposals of non-official and opposition members in the PMBs. Moreover, PMBs were designed to empower MLAs to draw the attention of the House to issues that were willingly or unwillingly ignored by the party at the helm. It helps to draw the government's attention to what individual MLAs see as issues and gaps in the existing legal framework, which require legislative intervention. However, the study shows that PMBs are accorded the lowest priority, scheduling the day for discussion of PMBs to just one day once in two weeks.

8.1.4 Role of Law Reform Commission in Democratising Law Making Process

Law Reform Commissions were constituted by the Government from time to time and were empowered to recommend legislative reforms to clarify, consolidate and codify particular branches of law where the Government felt the necessity for it. Kerala Government, in a sublime response to its constitutional responsibility, established two Law Reform Commissions. The first Law Reform Commission recommended 65 new bills, along with various amendments to the existing legislation. Of the 65 new bills, only two were considered by the Government and only one was enacted successfully. Similarly, the Second Law Reform Commission recommended 13 draft bills

along with the reports. The report is pending before the Government taking action.

The plight of reports of Law Reform Commissions is rather disheartening. The pace of the legal reform depends on the studies conducted by the Law Reform Commissions. The recommendations in the form of draft bills and amendments constitute a great input to the entire legislative exercise undertaken by the government. The process of the Commission in evolving a bill, or any other task, involves huge research backing when compared to the process adopted by the legislative department and its subsequent scrutiny by the Legislature. The lack of definite composition or fixed functions dilute the importance of the Law Reform Commissions. The Government needs to reconstitute the Law Reform Commission and provide it with statutory status. The recommendations of the Commission, which had been effectively working for reforming legal provisions and new legislations, need to be mandatorily considered by the Government.

8.1.5 Manifestos- Withered Promises in a Democracy

Another important area that needs attention is the promulgation of manifestoes by the political parties during the election campaign. Manifestoes serve a very important function because they are the main source of communicating with voters what they intend to do when they are elected to power and why voters should give their vote to a particular political party. This means that they are usually written in a persuasive style that attempts to make readers believe that the policies they contain will be in their best

interests.[2] The manifesto is a promise given to the voters that when they come to power, they will fulfill these policies in their best interests. This is a practice that adds to the democratization of lawmaking by the elected representatives.

Two manifestoes of different political parties were taken for study to see how the parties when elected democratically fulfill these promises. The UDF Government of 2011-16 had only very few provisions in the manifesto that related to the enactment of laws, of which fewer were considered during its tenure. Whereas the LDF Government of 2016-21, though had many promises relating to the enactment of various laws, no solid legislations were made out of the proposed manifesto.

The study of manifestoes shows that election is a season of making broken electoral promises. Manifesto has become a tool in the hands of political parties as a device to prove themselves more trustworthy and credible than the others. While the loss of trust can lead to anti-incumbency, it also creates intangible cleavages in the institution of democracy. There are two ways in which unchecked political promises undermine public trust and weaken democracy. Firstly, the political promises proposed in the manifesto often fail to weigh the realities of implementation. Secondly, promises often fail to take into account the broader historical/institutional backdrops in which legislations were established. In the present situation, the political parties must be made answerable for their promises by ensuring a legal responsibility for

[2] Chapter V, supra note 28.

their fulfillment. As the erstwhile Chief Justice of India has noted, manifestoes have become a mere piece of paper and political parties need to be held accountable for them.[3]

For an electorate to vote for a certain party objectively in a democracy, then manifesto promises are required to be fair and practicable as far as possible.

8.1.6 Abuse of Promulagation and Re-promulgation of Ordinances

The practice of abuse of promulgating ordinances that significantly dilutes the democratic element in law-making, and may be termed as undemocratic or anti-democratic. The so-called compromise of the legislative process through the Ordinance making power of the President and the Governor is dealt with in Art. 123 and Art. 213 of the Indian Constitution respectively.

An analysis of the provisions makes it clear that the ordinance and legislative law are structurally different, though the Constitution confers that ordinance, like parliamentary legislation, has the same force and effect as law of the land. They do not have public requirements similar to Acts.[4] An ordinance issued by the President partakes fully of the legislative character and is made in the exercise of legislative power.[5] The controls differ from the checks that we apply to parliamentary legislation, which is purely tested on violation of constitutional provisions. More importantly, the control exercised

3 Chapter V, supra note 35.
4 Chapter VI at 32.
5 *Id*.

by the parliament implies that parliamentary pre-eminence is still part of India's legislative design.[6]

The present position is exemplified by citing various examples of outreach of ordinance making power in India. The position before the coming into force of the Constitution clearly shows that the Governor-General had exclusive rights to determine the need of an ordinance, and the matter was unquestionable in a court of law. Even after the Constitution came into being, the matter repeatedly came into question before the Courts, but the Courts never undermined the power of ordinance conferred on the President (or Governor) but it only made a word of caution in using their powers. In S.K.G. Sugar Ltd. v. the State of Bihar,[7] the Supreme Court stated as regards President's satisfaction to make an ordinance under Art 213(which is similar to Art 123) that the necessity of immediate action and of promulgating an ordinance is a matter purely for the subjective satisfaction of the Governor. The strict interpretation of Art 213 gave rise to unencumbered powers to the Governor in deciding the state of immediate circumstances that led to the promulgation of ordinances. However, in a later decision, the court has relaxed the strict view and held that the Court can interfere only if the exercise of the power is *mala fide* or with bad motive.[8] This argument is further strengthened after the Supreme Court ruled in Bommai[9] that a proclamation by the President under Art 356 can be challenged on the ground of mala fides,

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6 *Id.*
7 Chapter VI, supra note 39.
8 *Id* at 45.
9 *Id.* at supra note 113.

or that it is based on wholly extraneous and irrelevant grounds. An analysis of cases such as T. Venkata Reddy v. State of Andhra Pradesh[10] and K. Nagaraj v. State of Andhra Pradesh,[11] reveals that the Supreme Court in its decisions has gone too far in immunizing an ordinance from judicial review. An examination of the power of ordinance sums up that the power of ordinance making act as legislative surrogates; they are to ordinances what both houses of Parliament or State Assemblies are to legislation.[12] They authorize a non-deliberative, non-majoritarian, and private legislative method –one that reduces legislation to fiats.[13]

The effect of an ordinance making power was also analyzed briefly. The effect of the promulgation is similar to that of legislation enacted by the Legislature. The concern here is that an ordinance has only limited life. If later the ordinance comes to an end for any reason, the status of the ordinance does not become void ab initio. Whatever valid transactions have been completed cannot be reopened once the ordinance ceases. Such a change of law temporarily may or may not result in injustice depending on the circumstances.

One of the important aspects of an abuse of ordinance-making power is the re-promulgation of ordinances. Re-promulgation of ordinances had been resorted to, as a matter of routine, to such an extent and on such a vast scale

10 *Id.,* supra note 54.
11 *Id.*, supra note 55.
12 *Id.*, at 234.
13 *Id.*

and covering such a variety of subjects in this State that it has become an inveterate habit, resulting in the supplanting of commentaries of the ordinary legislative process.[14] The Wadhwa decision of 1986 was analyzed in detail to make the position clear.

Ordinances, in practice, have an extensive presence in India's parliamentary annals.[15] The power of ordinance was considered exceptional and limited but relevant literature reveals that it is not. Rather, they are a convenient and –distressingly at times-the preferred legislative method.[16]

There was no clear systematic account of ordinances in Kerala. The statistical study on ordinances of Kerala is intended to fill that void. The data on the promulgation of ordinances over the period from 1957 to 2021 were surveyed. Of the 60 years, 1965 is the only year without an ordinance. 1959, 1960, 1964, 1966, 1966, and 2004 have the second-best records: all these years saw not more than five ordinances each. Conversely, 1984 has the worst record (as many as 103 ordinances were promulgated that year) and 1985 was close behind with 100 ordinances. Measured in absolute numbers, the 1980s and 2010s are the worst affected decades. The 1980s account for substantially more ordinances, i.e., 382, than any other decade.

The study clearly shows that in the initial years, that is in the 1960s, the ordinances never outnumbered Acts enacted by the legislature. The number of ordinances passed each year was minimal. By the end of 2021, the number of

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14 *Id.* at 236.
15 *Id.* at supra note 90.
16 *Id.* at supra note 91.

ordinances had drastically increased when compared to legislation enacted by the legislature. The marginal difference between the number of ordinances and Acts has slowly turned to a sufficient number that governance by ordinance is evident.

A study of the subject-wise category of ordinances reveal that the greatest number of ordinances were passed in the subject of education. Though health is an important matter, only few ordinances have been enacted on the particular subject. Thus, it is concluded that the ordinances are not promulgated to meet or overcome any urgent situation. Legislations are initially enacted as ordinances, before being introduced in the Assembly as bills.[17]

The top ten years with the largest number of Acts and corresponding ordinances along with the top ten years with the smallest number of Acts and corresponding ordinances were examined to find the statistical correlation between the Legislature's legislative performance and the promulgation of ordinances.[18] Throughout the 60 years, there is no statistical correlation between legislative performance and the likelihood of ordinances. Contrary to our perspectives, ordinances in any given year do not necessarily rise with a fall in the number of Acts enacted that year.

The Table on promulgation of ordinances in proximity to legislative sessions depicted that ordinance is taken as a convenient means of enacting a

[17] Refer Figure 6.4, Chapter VI.
[18] Chapter VI, at 252.

law deviating from the democratic means of enacting legislation, rather than a tool to be used in extraordinary circumstances when both houses of Legislature are not in session.[19] 27 ordinances had been promulgated just 5 days before the legislative session during the period from 1950 to 2021. Similarly, 165 ordinances had been promulgated in five days after the session of the Assembly is prorogued. This practice shows that for whatever reason, including lack of time, those bills which were listed to be introduced in the Assembly were enacted as ordinances, whether urgent or not. On the same lines, 79 ordinances were promulgated after 10 days of Assembly. The number of ordinances enacted in the proximity of legislative sessions reveals that the practice of ordinance is resorted often than necessary.

The startling record of re-promulgation in Kerala shows that re-promulgation is the most convenient method adopted by the Government, discarding the cardinal principle of democracy and salutary provisions of the Constitution. The data presented shows that the ordinances have been re-promulgated numerous times before becoming an Act. 355 ordinances were re-promulgated from 1950 to 2021.[20] The data includes ordinances that are re-promulgated every year repeatedly. The Kerala Private Forests (Vesting and Assignment) Ordinance 1967 is one such example, where the ordinances were re-promulgated till 1999 till it became an Act of Legislature. Similarly, there are several other ordinances, to name a few, The Kerala Stay of Eviction Proceedings Ordinance 1958, Kerala Weights and Measures (Enforcement)

[19] Chapter VI at 222.
[20] Chapter VI, see Figure 6.6.

Ordinance 1958, Kerala Municipalities Ordinance and Kerala Municipalities (Amendment)Ordinance, Kerala Panchayats Ordinances, The Abkari (Amendment)Ordinances, etc were re-promulgated more than 5 times before they became legislation. For avoiding the tag of re-promulgation, in some cases, the ordinances are re-promulgated as the first amendment, second amendment, and the third amendment without much changes. The Kerala Fishermen Welfare Societies (Second Amendment) is a classic example of such a practice.

For the establishment of universities, ordinances such as Gandhiji University, Calicut University, Cochin University, University Laws (Amendment) Ordinance, Kerala University, etc were re-promulgated more than 4 times before they became Acts of Legislature. Considering recent data, in the 14th KLA, The Kerala University (Alternate Arrangement Temporarily of the Senate and Syndicate) Ordinance, 2018 was re-promulgated 6 times. More specific examples are cited in the chapter to depict the actual picture of re-promulgation. Depending on the convenience of the executive ordinances are re-promulgated, discarding the cardinal principle of democracy and salutary provisions of the Constitution. In D.C. Wadhwa Case, the Court ruled that the mechanical re-promulgation of the ordinances without going to the legislature was a colorable exercise of power by the executive and ruled that re-promulgation of ordinances was unconstitutional.[21] The executive

[21] D.C. Wadha, supra note 14.

assuming the role of the legislature, except in an emergency, disregards the constitutional limitations and undermines the basis of democracy.

8.1.7 Analysis of Democratic Content of Judicial Review

An overemphasis on the democratic content of legislature raises concerns about the vital aspects of the judicial power of the State and needs to be discussed separately. Judicial review in its most widely accepted meaning is the power of the courts to consider the constitutionality of acts of organs of Government (the executive and legislature) and declare it unconstitutional if it violates or is inconsistent with the basic principles of the Constitution.

Judiciary, by Art 13(2), checks the constitutional validity of the impugned Act and declares it void if it contravenes any of the fundamental rights granted under Part III of the Constitution. This constitutional invalidity covers both substantive and procedural checks. If the Constitution violates certain substantive norms such as reasonable classification in Art.14, it is struck down or invalidated by the Court. The question of legislative competence is another fertile ground facilitating judicial intervention. Similarly, any procedural impropriety also leads to the constitutional invalidity of the legislation. However, these two kinds of constitutional invalidity are not watertight compartments - there can, arguably, be overlaps.

In determining the constitutional validity of a statute, Indian courts have been guided by two main principles of interpretation, which are presumptive. The first is the presumption of constitutionality of a statute and

doctrine of severability, the second is the presumption of the so-called legislative wisdom. Principles governing severability formulated three principles in the case of R.M.D. Chamarbaugwalla v. Union of India.[22]

The supporters of wider judicial review often consider it as strengthening of rule of law. They do not see it as being anti-democratic by emphasizing that it rises from the Constitution itself—the social contract that reflects the will of the people.[23] Those who favor judicial restraint, argue that in a democracy, people exercise their sovereignty through elected representatives and not through the unelected judges who must defer to the wisdom of parliamentary majorities.[24] They argue that Legislators represent the will of the people and this must not be allowed to be frustrated by the judiciary. But on the contrary, the Constitution had embodied the Judiciary as the watchdog of the fundamental rights of the people, and thus conflicting propositions had raised several conflict stories.

To draw a line between legislative power and judicial authority is a difficult one in any system of government where the judiciary is the final arbiter of legislative action. There are dangers and apprehensions on one hand, of the judiciary overstepping its bounds and nullifying important social and economic measures initiated based on majority decisions of the representative bodies. On the other hand, there is the possibility of the legislature surpassing and undermining the basic tenets of democracy and implementing decisions

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22 Chapter VII, supra note 69.
23 Chapter VII at 16.
24 *Id.* at supra note 77.

against public interests. Even after 70 years, a happy compromise between these two extremes is still at its embryonic stage. The key question that arises during the journey is whether the courts of law through judicial review have legitimacy in nullifying the decision of the majority? The problem of so-called counter-majoritarianism is analyzed through the arguments placed by jurists including James Bradley Thayer and John Hart Ely. Chief Justice K.G. Balakrishnan stated that arguments in favor of judicial restraint fail to recognize the constant failures of governance taking place at the hands of the other organs of State and that it is the function of the Court to check, balance, and correct any failure arising out of any other State organ.[25] In both of these systems, the justices are giving voice to broadly-felt perceptions about the low quality of democratic institutions.

There are three possible claims justifying the practices of the judiciary.[26] Firstly, judicial action would be permissible when the court steps in and carries out an activity that the political branches themselves either cannot do or cannot do well wherein the democratic institutions fail to do their tasks. A second possible focus for a theory of judicial role would be the process of constitutional transformation itself. But a constitutional transformation theory is problematic because it again eludes institutional considerations: it ignores the question of which institution is tasked with Constitutional mandates and are open to interpretation. Thus, a dynamic theory makes much more sense.

[25] Chapter VII at 19.
[26] *Id.* at 304.

In an attempt to study the extent of judicial review of legislative action, three questions become relevant: (i) whether the action of the judiciary amounts to usurpation of legislative power? (ii) whether judicial review assumes an undemocratic dimension? and (iii) whether it strengthens democracy? The empirical study attempts to find out the reach of judicial review on legislative acts during the period from the 1st KLA to the 14th KLA.

A study of the role of the judiciary shows that judicious interference by the courts have strengthened democracy. The Court follows set norms, standards, or guidelines so that it does not become arbitrary. It had struck down provisions that violated fundamental rights in the Constitution especially the right to practice profession,[27] lack of classification being violative of the right of equality,[28] double jeopardy,[29] and Acts beyond the legislative competence of the State.[30] An analysis of the data about the Kerala legislature reveals that though scrutiny of legislative enactments via judicial review exists, only very few legislations are nullified. Lawmaking is still in the exclusive domain of the legislature and the interference of the judiciary is significantly limited.

While labeling judicial review as undemocratic, one should keep in mind that there can be a vast discrepancy between law in writing and the

[27] *Id.* at 334.
[28] *Id.* at 334.
[29] *Id.* at 335.
[30] *Id.* at 335.

applied law. Unless the judiciary steps in, our rights would also suffer at the hands of majoritarian encroachments. Members of the legislature generally remain in the light of publicity. While occasional private conferences and executive sessions occur, they mostly debate and confer in public. In due course, elected representatives' propaganda may fail, but not so with the judiciary.

8.2. EXTENT OF DEMOCRATIZATION OF LAW MAKING

After attempting an analysis of the various dimensions of democratization of lawmaking in India, the question to be addressed is this: what is the extent of democratization of lawmaking in India? The answer regrettably is not very heartening. A report published in the Hindu newspaper dated 11th December 2017 points out that there has been a steady reduction in parliamentary hours compared with records of the first 20 years since 1952 show.[31] Between 1952 and 1972, the House sessioned for between 128 and 132 days a year, according to parliamentary sources. In the last 10 years, it ran for 64 to 67 days a year on average.[32]

The report also shows that 31% of legislations were passed in parliament with no scrutiny or vetting by any parliamentary standing or consultative committee.[33] Further, 47% of bills in the last 10 years were

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[31] The Hindu, https://edurev.in/studytube/English-11-December-2017-The-Hindu-Editorial-News-/c8b7d546-380c-4b8f-a301-8ecce068d14d_v (Last assessed on 15th December 2017).

[32] *Id.*

[33] *Id.*

passed with no discussion at all.[34] 61% of these (24% in all) were passed in the last three hours of a session. Even if one leaves a margin for the distortions and errors in the survey process it must serve as an eye-opener. A recent report published in The Hindu newspaper, in the year 2022 points out that the number of assembly sittings went down gradually over the past few years in most of the State Assemblies. The States with the highest average of assembly sittings in a year over the last decade are Odisha (46) and Kerala (43), but even these are much lower than the average of 63 for the Lok Sabha.[35] Even Lok Sabha's attendance pales in comparison to national legislatures elsewhere. The US House of Representatives, for instance, was in session for 163 days in 2020 and 166 days in 2021 and the Senate for 192 days both years, The UK House of Commons had 147 sittings in 2020, in line with its yearly average of about 155 over the previous decade. Japan's Diet, or House of Representatives, meets 150 days a year apart from any extraordinary special sessions.[36] In Canada, the House of Commons is to sit on 127 days in 2022 and Germany's Bundestag, where members must attend on sitting days, is to meet on 104 days.[37]

The performance of the Kerala Legislature with respect to law-making has been elaborately discussed in the research.[38] The study shows that though

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34 *Id.*

35 In almost all states analysed, the lowest number of sittings was in 2020 or 2021, the two Covid years. Except in Haryana, where the lowest, 11sittings, was in 2020, 2011, 2012 and 2014.

36 Most State Assemblies sit for less than 30days a year, TIMES OF INDIA, February 17th, 2022 at 1 & 6.

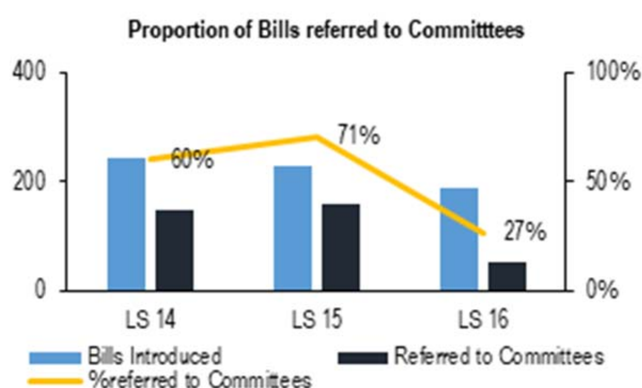
37 *Id.*

38 See Chapter III at 85-95.

there were discussions, they were generally not fruitful and only occasionally added to the qualitative output of the bills. [39]

Recently, there has been a declining trend in the percentage of Bills being referred to a committee. In the 15th LS, 71% of the Bills introduced were referred to Committees for examination, as compared to 27% in the 16th Lok Sabha. [See Table 8.01][40]

TABLE 8.01



Source: PRS Legislative

Though it is a well-accepted proposition in a parliamentary democracy that lawmaking is a deliberative and consultative process, important bills such as The Farmers' Produce Trade and Commerce (Promotion and Facilitation) Bill, 2020 and the Farmers' (Empowerment and Protection) Agreement of Price Assurance and Farm Services Bill, 2020, the Constitution Amendment Bill abrogating Jammu and Kashmir's special status and Bills concerning Citizenship Amendment, and Triple Talaq and Unlawful Activities

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[39] *Id.* at 110.

[40] PRS Legislature, https://prsindia.org/theprsblog/importance-parliamentary-committees(last accessed on Dec. 28th, 2021).

(Prevention) Bill were not referred to any of the committees[41] of Parliament for in-depth deliberation for inviting inputs from stakeholders. Despite constant demands from the opposition sides, the farm laws were neither referred to the concerned department-related parliamentary standing committees nor were they referred to the select committee of the Rajya Sabha. In the absence of in-depth deliberation, the Bills or legislative proposals suffer from a serious deficiency of legislative scrutiny. N.K. Premachandran (MP), in an article published in Mathrubhumi,[42] discussed in detail how Indian democracy works. He pointed out that in the Indian Parliament in a span of 20 days, 20 bills were passed without any discussion. He stated that during his tenure, the performance of Parliament deteriorated, especially in the 16th and 17th Loksabha.

The lack of sanity which is reflected in pushing numerous legislations in the Parliament from 2014 onwards by avoiding scrutiny on a bipartisan basis in parliamentary committees has become a new normal, negating the very basis of parliamentary democracy.[43] Compared with Parliament, the Kerala Legislature stands in a better position since all of the bills are mandatorily referred to subject committees for in-depth discussion, though the qualitative output and its acceptance may vary.

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[41] To ensure that a Bill is scrutinized properly before it is passed, our law-making procedure has a provision for Bills to be referred to a Departmentally Related Standing Committees (DRSC) for detailed examination. Any Bill introduced in Lok Sabha or Rajya Sabha can be referred to a DRSC by either the Speaker of the Lok Sabha or Chairman of the Rajya Sabha.

[42] MATHRUBHUMI (Malayalam Daily), *Death Bell of Democracy*, 1st Sep. 2021 at 6.

[43] See Chapter IV at 137.

The need of the hour is to restore the culture of deliberative and consultative process of lawmaking and salvage the democratic process in parliament – the apex representative body in the constitutional scheme of governance. It seems that the outweighing factor is the government's urgency in enacting particular legislation. Proper scrutiny of bills can take from a week to a month. To meet deadlines, the Lok Sabha avoids the scrutiny by Departmentally Related Standing Committees altogether, whereas in Kerala the discussions, even though held on a serious note, fail to get proper acceptance in the final stages of the bill. Indeed, all laws do not receive the same amount of parliamentary attention. A few undergo rigorous scrutiny by Parliamentary/ Legislative Committees. Others are passed with just a simple debate on the floor of the House. However, it must be remembered that the bills that become law have far-reaching consequences and impact every aspect of people's lives. When the Committees do not scrutinize Bills, it increases the chances of the country being saddled with half-baked laws and it leads to numerous amendments and may fail judicial scrutiny. At last, the cost to the nation is not only the time and resources of Parliament/Legislature in changing the law., but a hurriedly made law is a financial cost to the entire nation.

Another area that shows serious democratic deficiencies is the making of ordinances. With the Assembly sessions being impacted by the COVID-19 pandemic, States used the Ordinance route more for making laws in 2020. And most of the laws that were enacted were without any scrutiny. And the

most shocking revelation is that the report published by PRS Legislative, a nonprofit organization, reveals that the Kerala Assembly promulgated the highest number of ordinances in the COVID-hit 2020.[44] According to the report, Kerala tops the list by promulgating 81 ordinances.[45] It is followed by Karnataka (24), Uttar Pradesh (23), Maharashtra (21), and Andhra Pradesh (16).[46]

When a bill is in the draft stage, it may be placed in the public domain for inviting public responses or for consulting with stakeholders. Over the years, a few bills have been published for eliciting public opinion, though the process had not been consolidated.

In 2014, the Central Government introduced a policy on pre-legislative consultation to be followed by every Ministry before submitting a legislative proposal to the Cabinet.[47] The policy mandates that a draft bill be placed in the public domain for 30 days. It is to include a justification for its introduction, financial implications, estimated impact assessment, and an explanatory note for key legal provisions. A summary of the comments received is to be made available on the relevant Ministry's website. The draft bill is then sent for Cabinet's approval.

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[44] Covid-19 forced ordinances, Kerala topped with 81: Study, THE TIMES OF INDIA, https://timesofindia.indiatimes.com/india/covid-19-forced-ordinances-kerala-topped-with-81-study/articleshow/83221712.cms

[45] *Id.*

[46] *Id.*

[47] Committee of Secretaries, Law Department, Ministry of Law and Justice.

Though the policy shows a well-outlined process, the government's pre-legislative consultation policy has not been implemented uniformly. Many bills are not placed in the public domain. The 30-day window is not strictly followed.

In Kerala, only one bill[48] has completed the circulation of the public opinion process, which is indeed a shame to democracy. The Kerala Hindu Religious and Charitable Institutions and Endowments Bill, 1997, The Kerala Dowry Prohibition Bill, and The Christian Succession Act (Repeal) Bill, were sent for public opinion but never became Acts. The provisions encapsulating reference to public opinion remain almost a dead letter. However, in the 14th Kerala Legislative Assembly, in the Kerala Legislature Website, a provision is added for the pre-consultation of legislative bills. But it invites pre-consultative opinions *via* email option, along with the draft bill.

The overall conclusion states some apparent reasons for the inadequate democratization of lawmaking. The obvious reasons are: (i) India's political system gives an upper hand to the ruling party, substantially and procedurally(ii) Poor educational qualification of MPs and MLAs and lack of expertise in their field (iii) Lack of power of the Speaker to control the members and enforce the same (iv)Lack of accountability of elected members (v)Lack of guidelines for public participation in law-making (vi) No post-legislative scrutiny.

[48] Kerala Agrarian Relation Bill, 1957 (Act 4 of 1961)

The solution to this problem is not within easy reach; however, it is never too late to make a new beginning.

8.3 SUGGESTIONS AND RECOMMENDATIONS

1. Robust Law-Making Process

The Legislature has an important role to play in strengthening the law-making process and thereby upholding democratic values. The first step in democratizing the law-making process starts with the government. The Government machinery has to be proactive and not just reactive while making a law.

Every member of the Legislature must proactively contribute to improving the quality of the legislation. The Rules of Procedure of the Legislature must undergo appropriate changes so as to ensure that all Bills that are introduced by the government go through timely scrutiny by respective Committees in a proper time frame. To do this effectively, the legislature needs a strong law-making process without loopholes or deviations. A systematic time frame by which adequate time should be allotted for forwarding the bills to respective committees, followed by deliberations on the floor of the House to shape the government's proposal into a law. The suggestions put forward by the committees must be properly scrutinized on the floor.

Though Speaker has adequate powers in controlling the House, it is seen that on many occasions, the members indulge in pure political speeches

and often deviate from the scope and object of the bill under discussion. There are times when the House is disrupted and Bills passed in a hurry. In order to effect any improvement in this regard, a radical change in the attitude of the Members to the process of law making is necessary. For this purpose, senior members and leaders of political parties under the leadership of the Speaker must create awareness among the Members so that they realize the seriousness of their law-making role and act accordingly.

It would also be desirable to introduce a new rule in the Rules of Procedure stipulating that the minimum number of sittings in a year shall not be less than 100. This will ensure that sufficient time will be allotted to law making and the number of ordinances could also be brought down to the minimum.

2. Streamline the Functioning of Subject Committee and Select Committee

In the Subject Committee, Minister shall be the ex officio member of every Committee in respect of which the subject/subjects allocated to such committee may fall within his responsibility. The Minister as a Chairman of the Committee helps to present the Government perspective in the right sense. And also, the Minister is the Chairman, which improves the importance of the Committee. But once again, the Subject Committee is a small group consisting of conflicting interests reflecting their political views. The Minister has a dominating role in the Committee and his influence affects the

deliberations of the Committee. Hence it is suggested that Chairman may be any other Member, who is not the Minister.

It is recommended that two members must be added as invitees at the time of referring a Bill to the Subject Committee. A social worker, working in the relevant field connected to the area of proposed legislation and a legal expert, who has at least 10 years of experience is proposed to help the Committee in analyzing the scope and impact of the provisions of the bill.

Despite the express rule stated in R.237(2) of the Rules of Procedure that there shall be at least one clear day in between the day of reference of a Bill to the Subject Committee and the date of the meeting of the Subject Committee for the purpose, unless the Speaker, in his discretion, allows the meeting to be convened, many Subject Committee sittings are done on the same day the bill is referred to the subject committee. The exception is often practised as a rule. Strict adherence to this rule must be insisted on.

Further, a provision to incorporate qualitative amendments in the final output of the bill is necessary. With an exception in the case of 14th KLA, the effort of the Subject Committee often fails to get accepted in the Assembly. With the advent of the subject committee, the reference of bills to Select Committees had become practically non-existent. All the important bills must be referred to a Select Committee so as obtain expert evidence from representatives of special interests. A guideline must be formed to determine

what kind of bills must be forwarded to the Select Committee. All such important bills must invariably be deliberated in the Select Committee.

The Subject Committee and Select Committee reports must be published to ensure more transparency and accountability. A guideline must be formulated to select the important bills that need to be referred to Select Committees, which is necessary since it serves as a tool to obtain expert evidence from representatives of special interests. To uphold democratic principles and people's aspirations, the Committees must strive to march to excellence in parliamentary democracy.

3. Pre-legislative scrutiny: How can citizens be more actively involved?

The pre-engagement of bills for public participation is still at a budding stage in India. In recent public discourse over lobbying, two issues that have underscored the debate[49] are greater transparency in the policymaking process, and equality of access for all stakeholders in engaging with the process.

There is a need to build linkages between citizens and the policymaking process, especially by strengthening scrutiny before a Bill is introduced in Parliament. Currently, few bills are circulated for citizens' opinions, but the process is not mandatory. Countries such as South Africa, the United Kingdom, the United States, Canada, and Austria provide for strong public consultation in the legislative process.[50] A Committee must be

[49] Chapter V at 204.
[50] For details, refer Chapter V at 208-209.

formed to analyze the views and inputs thus collected from the citizens and must duly be addressed and incorporated in the final bill.

The following guidelines are suggested for providing a platform for public participation:

- These Bills must be published in simple language and they should be published where it is easily accessible to the general public.
- A summary of the objects must be published along with the bill
- Report on the legislative priorities addressed by the Bill to be made available for citizens.
- Form *ad-hoc* committees or standing committees to scrutinize the Bill before it is piloted in the House.

Eliciting public opinion must be made more meaningful and effective. When publishing such bills, steps must be taken to ensure that institutions of legal education, Bar associations, Advocates' organizations, stakeholders, etc must respond. The media must act as a channel of communication between the legislature and the general public. Social media can also play a significant role in creating awareness in this regard.

4. Private Member's Bill

An important method that promotes democratization is the recognition of PMBs.This is considered valuable because MLAs are close to their respective constituencies and connected with the people in real-time. Moreover, PMBs were designed to empower MLAs to draw attention to issues

that were willingly or unwillingly ignored by the party at the helm. It helps to draw the government's attention to what individual MLAs see as issues and gaps in the existing legal framework, which require legislative intervention. However, the study shows that PMBs are considered the least important legislative business. Ministers consider legislative business as their domain and they are not willing to accept the proposals made by MLAs. This adds to the tragic fate of the Private Member's Bill.

A systematic guideline must be framed for the discussion of the Private Membe'rs Bills in the Assembly. This includes an increase of days fixed for discussion of the Private Member's Bill, systematic allocation of private member's bills, in case of assurance given by the Minister, a follow-up method to see its implementation. Usually, the lack of intent is evidenced by low attendance on Fridays. Hence, a day other than Friday may be allotted for discussion of Private Members' Bills.

5. Regulation of Ordinances

A Standing Committee must be formed by the Government to analyze and scrutinize the need for ordinances. In the case of non-urgent matters, the introduction must be postponed to the upcoming legislative session. Further, the Committee must also keep a close watch of the re-promulgation and must set reminders to the legislative wing in case law needs to be enacted.

6. Law Reform Commission Recommendations to be Given More Serious Attention

The Law Reform Commissions often work sincerely for legal development. But lack of definite composition and fixed functions dilute the importance of the law commissions. The Government under its discretion constitutes it as an *ad-hoc* body. All these factors are impediments to implement the recommendations provided by the Law Reform Commission. The Government needs to reconstitute the Law Reform Commission and provide it with statutory status. The Commissions had been effectively working for reforming legal provisions and new legislations need to be mandatorily considered by the Government. The Kerala Government had placed the Church Bill prepared by the Kerala Law Reforms Commission within the public domain for eliciting public views. This is an unprecedented step since it is the first time a bill recommended by the Kerala Law Reform Commission is placed for eliciting public opinion by the Government even prior to legislative scrutiny.

7. Overhaul Manifesto

Manifesto has become a tool in the hands of political parties as a device to prove themselves more trustworthy and credible than the others. There are two ways in which unchecked political promises undermine public trust and weaken democracy. Firstly, the political promises proposed in the manifesto often fail to weigh the realities of implementation. Secondly,

promises often fail to take into account the broader historical/institutional backdrops in which legislations were established.

The very fact that the code of conduct by itself is non-enforceable by law had led to such guidelines being followed more in the breach than in the observance. There is also another reason why political parties make big promises in the manifestoes and ignore them at will. A large number of voters neither read the manifestos in detail nor attach any significance to them. It is equally true that one voter may be influenced by one promise while another by others in a manifesto, and also some others never know what a manifesto contains while casting their vote. But if democracy is a social contract between those elected and ordinary citizens, then manifestoes should be considered as a legal contract enshrining a country's purported development agenda. For an electorate to vote for a certain party objectively in a democracy, manifesto promises are required to be fair and practicable as far as possible.

8. Incorporate Dissent

The right to dissent is an important hallmark of democracy. Like the right of dissent is recognized for ordinary citizens against the government, the right of dissent of opposition must also be duly considered by the Government. There are several instances where the dissent is often ignored by the ruling government. For instance, when dissent is expressed in the reports of the subject committee, it is given the least weightage. Similarly, dissent expressed by a member of the Legislature in the discussion of bills

must also be taken into account. Many of them may be open criticism, but objectively scrutinizing the same is necessary.

Similar to the way the Government looks forward to the consent of opposition in certain matters, the dissent must also be taken on a positive note. It improves the efficiency and accountability of the Government.

9. Judicial Role in Improving Law Making

It is felt that there is deterioration in the quality of deliberation both in Parliament and Kerala Legislature. On Independence Day, Chief Justice of India (CJI) N.V. Ramana highlighted this problem, noting that the ambiguities and gaps in laws passed without meaningful deliberation trigger avoidable litigation. [51] The CJI suggested that while lawyers and intellectuals enter public life to improve deliberation, the judiciary can also play a crucial role in improving the law-making process. [52]

Relying on the volume of Bills passed by the Legislature to measure its efficiency is flawed as it may not account for adequate notice and effective deliberations. Rushed law-making, rendering Parliament a rubber stamp, sacrifices two core ideals of democracy, namely, equal participation and respect for fundamental rights.[53] The Judiciary can play an active role in improving the law-making process and securing the ideals. Firstly, by

[51] Sorry State of Affairs': CJI Ramana Says Lack of Parliamentary Debates Causing Gaps in Laws, The Wire, 15th Aug, 2021 https://thewire.in/law/cji-nv-ramana-lack-of-parliamentary-debates-gaps-laws-independence-day-speech (last assessed on Jan 12th,2022).

[52] *Id.*

[53] THE HINDU, The Judicial Role in Improving Law making, Sep. 6th, 2021 at 4.

enforcing the text and spirit of the constitutional provisions governing legislative procedures. Though the Constitution contains detailed provisions laying down how laws are to be passed by the legislature, these are often undermined. For example, recently, the controversial farm laws were rushed and passed by voice vote in the Rajya Sabha despite objections by Opposition Members. Secondly, to stop the practice wherein the Bills are certified as Money Bills to bypass the Rajya Sabha even where they do not meet the specific description of Money Bills provided under Article 110 of the Indian Constitution. [54]

Another important method suggested is for the judiciary to make deliberation a factor in evaluating the constitutional validity of laws. This is rooted in the principle that legislature is a widely represented deliberative organ and a diverse interest group finds representation through this organ. In exercising judicial review, the Court's role is to call on the State to provide justifications explaining why it is reasonable and therefore, valid. While doing so, the Court can examine the extent of reasonable deliberations that took place. The legislative inquiry would usually include evaluating the factual basis justifying the law, the suitability of law to achieve its aim, and the necessity and proportionality of the law relative to its adverse impact on fundamental rights.[55] The judiciary can also make deliberation a factor in choosing whether to employ the doctrine of presumption of constitutionality.

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[54] *Id.*

[55] The Supreme Court adopted this approach in State of Maharashtra v. Indian Hotel & Restaurants Association Writ Petition (CIVIL) NO. 576 OF 2016.

When laws are passed without deliberation and examination, the State usually finds it difficult to explain why such laws constitute a reasonable restriction on rights, heavily rely on the doctrine of presumption of constitutionality. Following such a practice, the judiciary can encourage legislative bodies to ensure a deliberative law-making process.

10. Conduct Meetings

The study revealed a democratic deficit in the law-making process. As a remedial measure, it is suggested that at least in the case of important bills which may have far-reaching consequences for society, debates in the Assembly alone are not sufficient. The legislative proposal must be discussed widely on the initiative of members of the legislature in meetings organized in various parts of the State. Elected representatives of Panchayat Raj institutions, experts, NGOs, and current stakeholders must get involved in this process.

11. Hold Special Sessions

As a remedial measure for reducing the democratic deficit in law-making, it is suggested that special sessions of the legislature exclusively devoted to law-making be summoned every year. In such special sessions, normal business including questionnaires, adjournment motions, submissions, calling attention motions, etc. must be suspended, so that discussion on bills will get the total attention of members. It is necessary to build up a political consensus to implement this proposal.

12. Post-Legislative Scrutiny

The post-legislative scrutiny of a law passed by the Legislature needs to be introduced. Though India has numerous laws on its statute book, its implementation record is saddening.

The ultimate object of strengthening the democratization of law-making is the democratization of law, not just the process of making it. So, what happens after a law is made must also be one of our concerns, though this aspect has not been discussed in the present study, it is considered relevant to advance a suggestion in this regard.

Very often a law enacted by the legislature is not brought into force by a notification by the Government as required by law. This results in law remaining dormant thereby nullifying the role of legislature as a lawmaker. In some other cases even though the law is brought into force by a notification, rules are not made and the administrative machinery required for implementing the provision is not set up. In such cases also the law enacted by the legislature is not implemented in practice thereby weakening the role of the legislature as a lawmaker. This practice amounts to a negation of democracy.

It is suggested that a committee be constituted by the legislature to monitor the implementation of laws enacted by it. The Government must be made accountable to this committee for failure to notify an Act, delay in making rules, or setting up administrative machinery necessary for the

implementation of an Act. Thus, a periodic assessment of the functioning of post-implementation of law helps to gain valuable feedback and insights, which can help in plugging gaps and taking corrective measures for better implementation of the law.

The importance of democratizing the process of legislation for the survival of democracy finds unchallenged acceptance. But the question is how that could be achieved in practice. The present research is an earnest and humble attempt to evaluate the existing strategies used for democratization of law making and to suggest some measures for improving them. The search for better strategies has to go on, as our quest for deepening democracy never ends.

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