

JUDICIAL REVIEW OF THE LEGISLATIVE PROCESS: A COMPARATIVE OVERVIEW

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ABSTRACT

Judicial review of the legislative process is a longstanding and often debated feature of constitutional democracies. Traditionally, courts have used judicial review to determine whether legislation complies with constitutional requirements. Over time, however, judicial review has come to involve closer scrutiny of how legislation is made, the purposes it seeks to achieve, and its practical effects. This paper examines the role of judicial review in the legislative process, focusing on how courts uphold constitutional principles, democratic accountability, and the protection of rights. It considers whether, in reviewing legislation, courts engage in post-legislative scrutiny by examining the implementation and impact of laws. The paper also explores how courts assess legislative outcomes while remaining mindful of the limits of their constitutional role. Further, the paper examines the circumstances under which judicial intervention to encourage legislative reconsideration, amendment, or repeal may be justified. It argues that judicial review of the legislative process serves as an essential constitutional safeguard, helping to maintain constitutional standards while respecting the institutional relationship between courts and legislatures. The paper concludes that although judicial review should be exercised with restraint, its involvement in legislative matters is both necessary and unavoidable to uphold constitutional supremacy and the rule of law.

KEYWORDS: Legislative Process, Judicial Review, Rule of Law, Accountability, Rights, etc.

"I cannot accept that in a nation founded on the Rule of law, a Legislature is free to ignore the law in its constituent instrument prescribing the manner and form in which legislation must be enacted." - Justice La Forest.¹

INTRODUCTION

The legal systems of most democracies worldwide are founded on the principle of the supremacy of the Constitution, with Judicial review as one of its essential features. The idea of Constitutional supremacy holds that every institution of governance is subject to the norms embodied in the Constitution. The Constitution does not allow absolute power within the institutions it creates. Judicial review, as part of the Constitution's basic features, is intended to ensure that every institution acts within its proper bounds.² Its primary purpose is to ensure that constitutional principles prevail both in interpretation and governance. In this regard, the Courts are expected to function as guardians of the Constitution and its values. In judicial review, they scrutinize the exercise of power by public officials under the Constitution. It is thus intended as a check against the arbitrary conduct of individuals holding constitutional posts, so that no such individual can act contrary to the Constitutional parameters.

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¹ R. v. Mercure, [1988] 1 S.C.R. 234 (Can.) at 279.

² Kalpana Mehta v Union of India, (2018) 7 SCC 1 at para 227.

In recent years, there has been much criticism of the Legislative process. General criticisms include frequent deviations from the procedural rules governing the legislative process, hasty, reckless lawmaking, a lack of deliberation, and the exclusion of opposition parties from the process. This widespread discontent has led to a new reform solution: Judicial Review, in which the Courts would play an essential role in improving the legislative process.

Judicial review of the legislative process (JRLP) is a form of judicial review in which Courts determine the validity of statutes by examining the procedures leading to their enactment. The basic idea is that a Bill must meet specific procedural requirements during its enactment to become law, and that the Courts should be given the power to determine whether these requirements have been met. In such a model of review, the Courts scrutinise the process of enactment rather than the statute's content. It focuses exclusively on the Statute's enactment process. Another feature of this model of judicial review is that it does not preclude legislative reenactment; it simply remands the invalidated statute to the legislature, which may reenact it, provided the proper legislative process is followed. The finest example of this model is Article 241 of the Colombian Constitution, which expressly grants the Constitutional Court the power to review legislation for errors of procedure and substance.

This model is somewhat different from 'Substantive judicial review', in which the Court examines whether the content of legislation is in accordance with the Constitution. In such a form, the Court is not interested in the way in which the Legislature enacted a law; it is interested merely in the result or outcome of the enactment process. A merger of these two models (substantive and procedural) has given rise to another model known as 'Semi-procedural Judicial Review'. Under this model, a Court reviews the legislative process as part of its substantive constitutional review of legislation. It begins by examining the content of the legislation; only if that content infringes on constitutional rights does the court examine the legislative record to ensure compliance with the procedural requirements of the legislative process.³ Under this model, defects in the legislative process, such as inadequate deliberation, may be a decisive factor in the judicial decision to strike down legislation.

³ The best example of a decision employing the semi-procedural approach is Justice Stevens's dissent in *Fullilove v. Klutznick*; 448 U.S. 448, (1980): "Although it is traditional for judges to accord [a] presumption of regularity to the legislative process . . . I see no reason why the character of their procedures may not be considered relevant to the decision whether the legislative product has caused a deprivation of liberty or property without due process of law. Whenever Congress creates a classification that would be subject to strict scrutiny under the Equal Protection Clause . . . it seems to me that judicial review should include a consideration of the procedural character of the decision making process." At 550-551.

However, it is also true that these procedural requirements and the judicial examination of the legislative process are triggered only when the bill's content is alleged to be unconstitutional.

IMPORTANCE OF JUDICIAL REVIEW OF THE LEGISLATIVE PROCESS:

Legislative procedures and rules have a crucial impact on policy outcomes. The rules that govern the legislative process are important because they promote and protect essential democratic values. These rules are designed to ensure that the laws produced by the Legislature reflect the will of the majority of its members and, by implication, of the voters they represent. The procedural requirements, such as committee discussion and three readings, are designed to enable and promote debate and deliberation during the legislative process. Apart from these, some rules are intended to encourage a more transparent and accountable legislative process and to allow citizens to observe and participate in it. Thus, it can be said that the rules that govern the legislative process are not mere technicalities but essential principles of procedural democracy, and any deviation from these procedural requirements would hamper the functioning of the law-making process. That said, it is clear that, to protect the integrity of the legislative process, courts can play a legitimate role.

Secondly, the idea of Constitutional supremacy requires the courts to ensure that the Legislature exercises all its powers, including in the legislative process, in accordance with the Constitution. This concept was discussed in detail in the case of *Marbury v. Madison*⁴, in which Marshall J. had observed that, 'Constitution is supreme and binding on the Legislature because it represents the "original and supreme will" of the people, who as the real sovereign have "an original right" to organise their government and set the principles by which they will be governed⁵.' This idea is central to the development of JRLP because Judicial review of the legislative process protects the people's right not to be governed by the 'laws' that are not really enacted in accordance with the only procedure by which the people agreed to be bound.

Another argument in favour of judicial review of the legislative process is that a judicial decision invalidating a Statute is merely an invitation for reconsideration by the elected branches. This invitation for a second legislative look provides more room for a response that addresses both the policy and constitutional aspects of the legislation. By focusing on the legislative process and on enforcing rules that enable and encourage deliberation and participation, the court promotes dialogue within the political branches and the public. Hence,

⁴ 5 U.S. (1 Cranch) 137 (1803).

⁵ Id. at 176.

under JRLP, courts truly become facilitators of the conversation about the Constitution's meaning.⁶

However, the idea of judicial review of the legislative process has also been harshly criticised, with Justice Scalia as its staunchest opponent. The primary objection to JRLP is that such judicial review violates the separation of powers and evinces a lack of respect for a coequal branch. It is seen as an interference with the Legislature's internal workings and an intrusion into its prerogatives. This view was expressed by Justice Scalia of US Supreme Court in *United States v. Munoz-Flores*⁷, wherein he observed that “mutual regard between the coordinate branches prohibits the courts from inquiring into such matters of internal process, as Congress’s compliance with the constitutional requirements for lawmaking,”⁸ or when he objected in *Thompson v. Oklahoma*⁹, to “interference in the States’ legislative processes, the heart of their sovereignty.”¹⁰ It is therefore argued that any type of judicial inquiry into the enactment process is much more intrusive and disdainful than substantive judicial review.¹¹ It is also argued that the parliamentary process would be paralysed if Parliament were to spend its valuable time defending its processes in Court.

The idea of judicial review of the legislative process is also considered to be at odds with the traditional Common law Constitutional concept of Parliamentary Privileges¹². Parliamentary privilege as a concept has developed in scope and extent from the Blackstonian aphorism that ‘whatever matter arises concerning either House of Parliament ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere’.¹³ A similar view was observed by Lord Coleridge in *Bradlaugh v. Gossett* as: ‘What is said or done within the walls of Parliament cannot be inquired into a court of law.’¹⁴ As a result, the courts would avoid throwing a challenge to what is said or done within the walls of the Parliament in the performance of its legislative

⁶ Ittai Bar-Siman-Tov, ‘The Puzzling Resistance to Judicial Review of Legislative process’, *Boston University Law Review*, Vol. 91 (2011) at 1957.

⁷ 495 U.S. 385 (1990); (Scalia, J., concurring).

⁸ *Id.* at 410-11.

⁹ 487 U.S. 815 (1988); (Scalia, J., dissenting).

¹⁰ *Id.* at 877.

¹¹ *Supra* note 8 at 1927.

¹² Parliamentary privileges are the rights and immunities enjoyed by the Parliament as an institution and members of Parliament in their individual capacity, without which they cannot discharge their functions as entrusted upon them by the Constitution. Such privileges are conferred on each House so that it may vindicate its authority, prestige and power and protect its members from any obstruction in the performance of their parliamentary functions.

¹³ Blackstone’s *Commentary*, Vol. 1, 17th ed., 1830 at 163.

¹⁴ (1884) 12 QBD 271 at 275.

functions. It is also argued that judicial abstention from interfering in parliamentary proceedings would be the best guarantee of parliamentary abstention from interfering in the judicial process.

JUDICIAL REVIEW OF THE LEGISLATIVE PROCESS: COMPARATIVE FRAMEWORK

In light of the above discussion, it is necessary to examine and compare the extent and scope of Judicial Review of the legislative process across various democracies worldwide.

1. **South Africa-** The role of the South African Parliament as a deliberative law-making body came under scrutiny in the *Doctors for Life*¹⁵ case, due to the applicant's allegation of an omission in the legislative process. The applicant in this case, an advocacy organisation called Doctors for Life, complained that during the legislative process leading to the enactment of four statutes, the NCOP and some Provincial Legislatures failed to comply with their constitutional obligations to facilitate public involvement in their proceedings. They argued that there had been a failure to invite written submissions and conduct public hearings on these statutes. The Court concluded that both the Traditional Health Practitioners Act and the Choice on Termination of Pregnancy Amendment Act were adopted in a manner inconsistent with the Constitution and both were declared invalid.¹⁶ However, taking into account that the statutes had come into effect and recognising the adverse consequences of an immediate order of invalidity, the order of invalidity was suspended for 18 months to enable the Parliament to re-enact the statutes in a manner consistent with the Constitution.

¹⁵ *Doctors for Life International v. the Speaker of the National Assembly & Others*, 2006 (12) BCLR 1399 (CC) (S. Afr.). Chapter-IV: 'Public Participation in Legislative Process' also contains a brief discussion of this case.

¹⁶ However, the constitutional challenges relating to two other bills, the Dental Technicians Amendment Act and the Sterilisation Amendment Act, were dismissed. The challenge to the Dental Technicians Amendment Act was dismissed as, after having considered the nature of the Bill and the views of the provinces and the NCOP, the court concluded that it could not find that the respondents had acted unreasonably in not inviting written representations or holding public hearings on this Bill. Furthermore, the Bill had not elicited public interest, as evidenced by the fact that no submissions were received when the bill was first published for public comment. Hence, there was no breach of the duty to facilitate public involvement and the applicant's challenge to this Bill failed. So far as the Sterilisation Amendment Act was concerned, since the statute had not been passed by Parliament at the time of the application, and, although the statute was already passed at the time of writing of the judgment, the Court reached a decision that it did not have jurisdiction to hear this, as the legislative process was not complete at the time of application. *Supra* note 18 at 70-76, 174-75, and 177-78.

Moreover, the court in this case also analysed whether the Legislature had acted reasonably in discharging its duty to facilitate public participation in the law-making process. The court took certain factors into account and stated that, in evaluating the reasonableness of Parliament's conduct, it will: '[T]ake regard to what Parliament itself considered to be appropriate public involvement in the light of the legislation's content, importance, and urgency, and this means that the Court will pay particular attention to what Parliament considers to be appropriate public involvement.'¹⁷ The Court indicated that factors such as the nature and importance of legislation and the intensity of its impact on the public is relevant as these factors relate specifically to the efficiency of the law-making process.¹⁸

The judgment in *Doctors for Life* confirmed that South Africa's democracy was participatory, inclusive, and responsive. Both the imposition of a constitutional mandate to facilitate public participation and the striking down of laws for violating it send a strong message to the Legislature, leading to greater awareness and changes in how the Legislature facilitates public participation in the future.

A similar decision, involving a Provincial Legislature's approval of a Constitutional amendment, was reached in *Matatiele Municipality v. President of the Republic*.¹⁹ The applicants challenged the constitutional validity of the law passed by the Legislature, arguing that the Legislature had re-demarcated Matatiele municipality without consulting the affected people, thereby failing to discharge its constitutional duty to facilitate public participation. The Court again observed in this case that 'the system of government of South Africa requires that people elect the representatives who make laws on their behalf and contemplates that people will be allowed to participate in the law-making process in certain circumstances.'²⁰ The public involvement provisions in the Constitution lie at the heart of the legislative function... The Constitution contemplates that the people will have a voice in the state's legislative processes, not only through elected representatives but also through direct participation in lawmaking.²¹

¹⁷ Supra note 18 at para 1445B.

¹⁸ Ibid.

¹⁹ [2006] ZACC 12. In this case, the Parliament adopted the 2005 Twelfth Amendment of the Constitution and Cross-boundary Municipalities Laws Repealed and Related Matters Act to alter boundaries of KwaZulu-Natal and Eastern Cape. In terms of these amendments the local municipality of Matatiele would be transferred from the KZN Province into the Eastern Cape Province.

²⁰ Id. para 58, at 494.

²¹ Id. para 60 at 495.

The constitutional duty to facilitate public participation in the law-making process was also reinforced through judicial review in *Tongoane v. National Minister for Agriculture and Land Affairs*.²² The applicants in this matter had challenged the constitutionality of the Communal Land Rights Act 11 of 2004 (CLARA) because Parliament had failed to comply with its constitutional obligations to facilitate public involvement in the legislative process in terms of sections 59(1) (a) and 72(1) (a) of the Constitution before enacting CLARA. The Court then applied the principles used in the *Doctors for Life* case and declared CLARA invalid. It further indicated that Parliament was bound by the Constitution when enacting laws, because if the Constitution required public participation in enacting specific laws, Parliament should have followed that procedure.²³

The above judgments reveal that the Courts do intervene and conduct judicial review of the legislative process when the Legislature deviates from its law-making duties or proceeds in a manner or form not stipulated in the Constitution or any other law.

2. **United States:** In the United States, the concept of Judicial review of the Legislative process can be traced to the doctrine of the ‘due process of lawmaking’ introduced by an American scholar, Hans Linde.²⁴ The doctrine outlines a form of judicial review in which the courts examine the legislative process by which federal statutes are enacted to ensure that their provisions receive at least minimal Congressional deliberation. In his essay, he discussed judicial review of laws in light of violations of due process in law-making, both formal and substantive. His primary focus was on the rationality of legislation. According to his approach, laws are invalid unless they represent rational means towards permissible legislative ends. For Linde, ‘process’ means following the rules laid down for the composition of

²² 2010 (6) SA 214 (CC); 2010 (8) BCLR 741 (CC). In this case the applicants were a group of communities who occupied rural land. Their use and occupation of the land were regulated by the customary law. Parliament promulgated the Communal Land Rights Act 11 of 2004 (CLARA) in order to provide legally secure tenure to people or communities whose tenure of land was legally insecure because of apartheid laws. Parliament adopted CLARA following section 75 of the Constitution (i.e., Bills not affecting the provinces). The applicants challenged the procedure adopted on the grounds that CLARA in substantial measure deals with ‘indigenous and customary law’ and ‘traditional leadership’ which were functional areas listed in Schedule 4. As a result, CLARA was supposed to be enacted as a Bill affecting the provinces in terms of section 76 of the Constitution. The applicants’ concern was that CLARA would change their indigenous-law-based system of land administration and replace it by a new system that CLARA sought to introduce. The result was that CLARA would change the manner in which traditional leaders and tribal authorities administered their land and subjected it to the control of traditional councils.

²³ *Id.* at para 108.

²⁴ Hans A. Linde, ‘Due Process of Lawmaking’, 55 *Nebraska L. Rev.* 197 (1976).

the Legislature, the behaviour of legislators, and the enactment of legislation.²⁵ He also argued that the courts should hold Legislatures to the procedural rules governing their lawmaking. The best federal example of the procedural regularity model is probably *Powell v. McCormack*, in which the Supreme Court invalidated the expulsion of a member of Congress due to procedural defects. Other examples include *INS v. Chadha*²⁶, in which the Court invalidated the legislative veto as inconsistent with the constitutional procedural requirements of Congressional lawmaking, and *Clinton v. New York*²⁷, in which the Court struck down the line-item veto. However, the American model of judicial review has developed considerably since Linde wrote his essay, particularly under Chief Justice Rehnquist's tenure on the American Supreme Court, particularly in cases concerning federalism. It led to a new form of due process of law-making—the 'legislative deliberation' model, an approach which requires the courts to scrutinise the quality of the decision-making processes within the Legislature that led to the Statute under review. Courts, thus, invalidated many federal laws on the grounds of violation of legislative due process, and especially in all matters about a lack of an adequate factual infrastructure, lack of Congressional findings, and the absence of any rational connection between the legislation proposed and the legislative objectives. The three central judgments in this regard are *United States v. Lopez*²⁸, *Kimel v. Florida Board of Regents*²⁹, and *Board of Trustees of the University of Alabama v. Garrett*³⁰, in which the Court appeared to look for evidence in the legislative record that Congress based its decisions on sufficient legislative findings as part of the Court's substantive review of the legislation.

In *United States v. Lopez*, the Court faced a Federal statute that prohibited possession of a gun within 1,000 feet of a school. For the first time, it concluded that Congress had reached beyond its enumerated Article I law-making authority and found insufficient linkage between gun possession near schools and interstate commerce. It relied on the fact that the activity Congress had regulated under the Commerce Clause was not 'economic' in nature. It also observed that neither the Statute nor its legislative history contains express Congressional findings regarding the

²⁵ Id. at 243. See also the analysis of Linde's article by authors Philip P. Frickey & Steven S. Smith, 'Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique', 111 YALE L.J. 1707 (2002) at 1711-1712.

²⁶ 462 U.S. 919 (1983).

²⁷ 524 U.S. 417 (1998).

²⁸ 514 U.S. 549 (1995).

²⁹ 528 U.S. 62 (2000).

³⁰ 531 U.S. 356 (2001).

effects upon the interstate commerce of gun possession in a school zone.³¹ This aspect of the Court's reasoning, for the first time, raised questions about the relevance of Congressional findings in the making of a Statute. Thereafter, in *Kimel v. Florida Board of Regents*³², the Court held that Congress had exceeded its Section 5 power by subjecting states to damages suits by their employees under the Age Discrimination in Employment Act. For this purpose, the Court undertook a searching review of the legislative history. It held that the legislative record failed to establish a basis under the Equal Protection Clause for abrogating the States' Eleventh Amendment immunity from suit under the ADEA. It then laid down certain fact-gathering obligations upon the Congress, which have been summarised as³³:

1. Congress must establish in the formal record of its proceedings or in the statute a clear goal for the statute.
2. Congress must demonstrate in the formal record of its proceedings or in the statute that it recognises the constitutional considerations that might be raised by the courts about a statute.
3. Congress must establish in the formal record of its proceedings or in the statute persuasive findings of fact that are the result of a systematic investigation of the relevant issues.
4. Congress must establish in the formal record of its proceedings or in the statute that there is a strong causal relationship between the goal and the statutory means for achieving the goal.
5. Congress must demonstrate in the formal record of its proceedings or in the statute that it recognised and properly balanced constitutional and policy considerations.

³¹ Court suggested that formal findings would be helpful when the basis for legislative power was not 'visible to the naked eye.' at 562-563.

³² In this case, the Court struck down by 5-4, a 1974 amendment to the Age Discrimination in Employment Act (ADEA) of 1967 that abrogated the general immunity of states under the Eleventh Amendment to lawsuits by individuals to permit such actions against states and state agencies that violated the statute. The original ADEA was a federal law that protected workers over the age of 40 from age discrimination by private employers, and the 1974 amendment extended the same protections to workers employed by the states. Although the Eleventh Amendment gives states sovereign immunity from lawsuits, this immunity is not absolute. For instance, when exercising its power to enforce the Fourteenth Amendment, Congress may abrogate the states' immunity. In *Kimel*, the court held that Congress did not have the power to abolish state immunity to ADEA claims and thereby to enable individuals to sue states and state agencies in federal court for age discrimination.

³³ See Philip P. Frickey and Steven S. Smith, 'Judicial Review and the Legislative Process: Some Empirical and Normative Aspects of Due Process of Lawmaking', Paper presented at 2001 Annual Meeting of the American Political Science Association, San Francisco, August 30-September 2, 2001. Available at <https://>

6. Congress must establish in the formal record of its proceedings or in the statute that the A statute is a means of minimising constitutional violations.
7. Congress must demonstrate in the formal record of its proceedings that a significant number of legislators shared the goal and, through debate and deliberation, recognised and balanced the relevant constitutional and policy considerations.
8. Congress must follow procedures that guarantee deliberation that provides for proper balancing constitutional and policy considerations.

In *Garrett*, the Court struck down the provisions of the Americans with Disabilities Act that subjected states to damages suits by their employees claiming disability discrimination. The Court held that Congress did not properly exercise its power under Section 5 of the Fourteenth Amendment to pass legislation holding states accountable for damages if they discriminated in employment against people with disabilities. This decision was necessary since the Court's reasoning called into question the factual underpinnings of the Americans with Disabilities Act (ADA) and the history of discrimination against individuals with disabilities, recounting instances of such discrimination.

A brief discussion of the above cited case-laws shows that the search for evidence of a clear goal, a documented need for governmental action, and a careful consideration of alternative policies has led US Courts far beyond the text of the Statutes into an excruciatingly fine-tuned examination of the record of Congressional action on the legislation, thereby, extending Judicial review to an evaluation of the quality of the legislative process. However, the doctrine has generated extensive disagreement among legal scholars about its application by the Supreme Court, and numerous articles have also criticised its underlying conception.

3. **Israel:** In Israel, Judicial Review of the legislative process was endorsed by the Supreme Court judgments in the 1980s when the Court recognised new grounds for invalidation of a law tainted by a procedural defect.³⁴ The most significant development in this matter occurred in the *Poultry Growers' case*,³⁵ in which it was established that judicial intervention in the legislative

³⁴ See Justice Barak ruling in H CJ 761/86 *Miari v. The Knesset Speaker* [1989] IsrSC 42 (4) PD. 868, at 873: "because legislative process are carried out in accordance with the law, and the organs of the Knesset that deal with legislation carry out a public function under law. From this it flows that legislative activities too are subject to the HCJ power of judicial review."

³⁵ H CJ 4885/03 *The Poultry Growers' Organization v. The Government of Israel* [2004] IsrSC 59 (2) 14. The petition in the *Poultry Growers' case* challenged the legislative process of the chapter on agriculture in the Program for Israel's Economic Recovery

process is justified only in the presence of a defect that involves a severe and substantial violation of the basic principles of Israel's parliamentary and constitutional regime. In this case, the Knesset adopted the Economic Program Law, which included extensive reforms to the agricultural sector and a transfer of powers from the agricultural councils to the Minister of Agriculture, in an accelerated proceeding. The petitioners claimed that the legislative process for the Economic Program Law was strikingly reminiscent of the procedures that typically accompany the Arrangements Laws, as the law was adopted in an improper, expedited manner. The Finance Committee devoted less than one meeting to the debate on the agricultural section. The second reading of the law was held almost immediately thereafter, and voting on each section lasted from the afternoon of that day until the wee hours of the next morning.

But the Court rejected the petition. The main decision was written by Justice Beinisch, who then observed:

"To bring about judicial intervention in the legislation procedure it is not sufficient to prove a violation of a fundamental principle of the legislative process... rather it must be shown that the damage to the principle was considerable and severe... only in extreme and rare cases... is the court likely to declare that a law is void due to flaws in the legislative process."³⁶ Although the petition was rejected, this judgment made several incisive observations on the legislative process for the Arrangements Law. According to Justice Beinisch, resort to the mechanism of the Arrangements Law raised a slew of problems regarding appropriate democratic procedure, because the legislation was characterized by a perfunctory legislative process that thwarted deep and profound discussion and inhibited the lawmakers' ability to formulate a position on the bill's contents. Such a procedure precluded a serious and proper discussion of the bill and prevented the Knesset from objectively examining the legislative process.³⁷ The primary innovation found in Justice Beinisch's ruling was the four fundamental principles of the legislative process, which, if infringed upon,

(Legislative Amendments for Attainment of Budgetary Objectives and Economic Policy for Fiscal years 2003 and 2004) (also known as the Economic Program Law). The legislation preceding the enactment of the agricultural section in the Economic Program Law granted the poultry growers and their organizations a dominant position in the activity of the agricultural councils, and wide autonomy in the management and regulation of the agricultural branches.

³⁶ Id. at 50-51.

³⁷ See the translated copy of the opinion give by Justice Beinisch at <https://versa.cardozo.yu.edu/opinions/israel-poultry-farmers-association-v-government-israel>. Original judgment is in Hebrew.

may constitute ‘a flaw in the very root of the process,’³⁸ and lead to judicial review of the law. These four fundamental principles³⁹ of the legislative process are the principle of majority rule, the principle of formal equality (one person, one vote for all Knesset members), the principle of publicity, and the principle of participation (each Knesset member is entitled to participate in the legislative process).

In late 2017, the High Court of Justice of Israel, in *Quantinsky v. The Israeli Knesset*, invalidated a new law for the first time in Israel’s history due to flaws in the legislative process. The petitions challenged the Multiple Apartments Tax Arrangement in Chapter XII of the Economic Efficiency (Legislative Amendments for the Implementation of the Economic Policy for Budget Years 2017 and 2018) Law, (also known as the Economic Efficiency Law), which imposed a designated tax upon owners of multiple apartments whose aggregate rights in the flats was 249% or more.⁴⁰ The Petitioners argued that there was a substantive defect in its legislative proceedings that went ‘to the heart of the proceedings’ – a violation of the principle of the participation of Knesset members in the legislative process, which justified its annulment.

In this case, the High Court of Justice addressed its authority to review the Knesset’s legislative proceedings. It focused mainly upon the principle of participation, which establishes the right of Knesset members not merely to be physically present in plenum and committee debates, but instead requires granting a real, serious, and fair possibility to examine, debate, comment and enlighten, question, and consider, so that they can form an informed position on the matter concerned. Only when such an opportunity

³⁸ It was held by the Court that: ‘The definition of such a flaw does not depend on its classification as *ultra vires*, or as a formal breach of a specific rule of the Knesset regulations. Rather, it is a question of the intensity of the damage caused by the violation to ‘the substantive values of our constitutional regime,’ or to the basic values of our constitutional regime as expressed in the legislative process. Only a flaw involving a grave and significant violation of the fundamental principles of the legislative process in our parliamentary and constitutional regime will justify judicial intervention.’ *Supra* note 42 at 40.

³⁹ These fundamental principles are derived from the principles of formal democracy and from the very existence of a democratic parliamentary regime; these are those fundamental principles without which (and without the principles of substantive democracy), democracy in Israel could not survive. Para 18 of judgment delivered by Justice Beinisch.

⁴⁰ Under the Tax Arrangement, a holder of apartments to the said extent would be subject to a tax of 1% of ‘the determining amount’ for each apartment held, exclusive of two apartments as he may choose.

is provided can it be said that the Knesset members were granted a chance to participate in the legislative process in a real, active sense.⁴¹

The Court also laid down the parameters that would serve in assessing whether the Knesset members were afforded the opportunity for a proper debate: the length of the discussion, and whether it was proportionate to the length of the bill, its complexity and the scope of its consequences; a unique, complex bill should be debated independently of other matters, sometimes in the relevant Knesset committee, in a manner that would allow appropriately serious consideration; the effect of the committee or plenum debate upon the wording and content of the bill; the factual foundations provided with the bill; the period of time that elapsed from the time the bill – or at least the essential or significant part of its arrangements – was presented for examination by the Knesset members and the date of the debate etc.⁴²

So far as the question of whether the members of Knesset were allowed to formulate an informed position about the Bill in the present case was concerned. The Court found that the haste that characterized the enactment of the Arrangement Law was inconsistent with the manner in which a parliamentary debate should be held. No honest discussion could be conducted when consideration was given to the hurried schedule under which the Knesset members were required to hear the bill read. Therefore, the Court ordered the annulment of Chapter XII of the Economic Efficiency Law and asked the Legislature to return to the legislative process from the stage of deliberation in the Finance Committee – the stage at which the defect occurred – and continue as required. Thus, in this case, the participation principle established in the Poultry Growers' case was restated in a new and more detailed manner. This decision also widened the scope of judicial review of an infringement of the right to substantive participation.

From the above case, it is reiterated that when a violation of the fundamental principles of the parliamentary regime is substantial, judicial intervention may be justified. Any defect in the legislative process may significantly impair the fundamental legislative principles, even if the defect consists of a failure to conduct minimal deliberation over the draft bill, or where such deliberations were conducted without any factual infrastructure

⁴¹ Translated copy of the summary of the opinion given in *Quantinsky v. Knesset* (2017) available at <https://versa.cardozo.yu.edu/opinions/quintinsky-v-knesset-summary>. Original judgment is in Hebrew.

⁴² *Ibid.*

having been laid despite the obligation to do so, or in the conduct of a procedure that was substantively inappropriate.⁴³

4. **India-** India has a troubled history when it comes to Parliament complying with the legislative procedure. For example, one of the first Acts passed by the Indian Parliament- the First Amendment Act of 1951,⁴⁴ was marred by the questions of procedural impropriety. The Act sought to overrule rulings by the High Courts and the Supreme Court, holding that the laws governing press censorship, zamindari abolition, and land reforms were unconstitutional because they were inconsistent with the Fundamental Rights enumerated in Part III of the Constitution.

This Act was passed by the Provisional Parliament⁴⁵ (which consisted of members of the former Constituent Assembly). A limited franchise elected it, i.e., members were elected indirectly by the members of the provincial assemblies. The critics, therefore, pointed out that a Provisional Parliament, which was indirectly elected by the people, could not have the authority to amend the Constitution, especially when it concerns the Fundamental Rights.⁴⁶ Secondly, this provisional Parliament consisted of only one House instead of two, and Article 368, which gave the Parliament the power to amend the Constitution, required a two-thirds majority in both Houses. Therefore, the provisional Parliament, consisting of only a single chamber, was incompetent to amend the Constitution.⁴⁷ However, despite massive criticism and opposition, the Act was passed by the Parliament.

More contemporary examples of procedural infirmities plaguing the passage of legislation include the effective abrogation of Article 370 and the Farm Bills, which were passed in blatant violation of procedural rules.

⁴³ Suzie Navot, 'Judicial Review of the Legislative Process', *Isr. L. Rev.* Vol. 39 No. 2, 2006 at 234.

⁴⁴ This amendment established a precedent for rewriting the Constitution to override judicial decisions that prevented the government from carrying out its alleged obligations to specific policies and programmes.

⁴⁵ This state of affairs continued till 1952, when the country's first general elections were held and a Parliament was elected directly by the people of India.

⁴⁶ Tripurdaman Singh, 'Sixteen Stormy Days: The story of the First amendment to the Constitution of India', Penguin Random House India, 2020.

⁴⁷ The Government got around this difficulty by adapting Article 368 to temporarily refer to Parliament rather than two separate Houses by using the Constitution (Removal of Difficulties) Order No. 2-issued by President on 26 January 1950 (under powers granted to him by Article 392) to make minor adaptations to the Constitution in order to remove any procedural difficulties that arose before a full Parliament was elected. This adaptation itself was ultra vires, because under the guise of removing difficulties, it effectively (albeit temporarily) amended Article 368 without adhering to the amending procedure as the Article itself required.

In such a scenario, robust use of Judicial Review can be an effective strategy to keep Parliament in check, because when Parliament violates the procedure, it strikes at the very root of a country's democratic setup.

Article 122(1)⁴⁸ of the Indian Constitution lays down that: 'The validity of any proceedings in Parliament shall not be called in question on the ground of any alleged irregularity of procedure.' A bare reading of this Article shows that there is no scope for judicial review of the Parliament's legislative process. However, the Supreme Court, by its various judgments, has shown a propensity to intervene in legislative actions whenever actions or irregularities of the Parliament have impugned the Constitutional requirements. To cite an example, in the *Puttaswamy-II* case, the Supreme Court was faced with the question of whether the Speaker's designation of a particular Bill as a Money Bill is open to judicial review.⁴⁹ Although the Court, with a majority of 4:1, favoured the Speaker's certification of the Aadhaar Bill of 2016 as a Money Bill as constitutional, it was agreed by all the judges of the Bench that this power of the Speaker would not be immune from judicial review. Justice D.Y. Chandrachud's dissent clearly examines and explains the importance and need for judicial review of Parliament's proceedings in cases of procedural illegality. In his dissent, he observed that Article 122 does not envisage an exemption from judicial review in the event of a constitutional infirmity. It was observed that where the entrustment of the power is subject to the due fulfilment of constitutional norms, the exercise of jurisdiction is amenable to judicial review, to the extent necessary to determine whether there has been a violation of a constitutional mandate. He further held that the entrustment of a constitutional function to the Speaker under Article 110(3)⁵⁰ to certify a Bill as a Money Bill is premised on the fulfilment of the norms stipulated in Article 110(1)⁵¹. A certification can be questioned because the Bill did not

⁴⁸ The marginal note to Article 122 is: "Courts not to inquire into proceedings of Parliament".

⁴⁹ The petitioners had challenged the constitutionality of the Aadhaar Act, contending that it could not have been passed as a Money Bill as it did not qualify as a Money Bill under Article 110 of the Constitution. The Attorney General for India submitted that the Constitution accords finality to the decision of the Speaker as to whether a Bill is a Money Bill and hence the question whether the Aadhaar Act fulfils the requirements of being categorized as Money Bill is not open to judicial review.

⁵⁰ It reads as: 'If any question arises whether a Bill is a Money Bill or not, the decision of the Speaker of the House of the People thereon shall be final.'

⁵¹ Article 110 (1) reads as: 'For the purposes of this Chapter, a Bill shall be deemed to be a Money Bill if it contains only provisions dealing with all or any of the following matters, namely:

- (a) the imposition, abolition, remission, alteration or regulation of any tax;
- (b) the regulation of the borrowing of money or the giving of any guarantee by the Government of India, or the amendment of the law with respect to any financial obligations undertaken or to be undertaken by the Government of India;
- (c) the custody of the Consolidated Fund or the Contingency Fund of India, the payment of moneys into or the withdrawal of moneys from any such Fund;

fulfil the conditions specified in Article 110(1) for designation as a Money Bill. If that is established, the certification would be contrary to the constitutional mandate and therefore subject to judicial scrutiny.

In his dissent, he further observed that any exclusion of judicial review must be tested on the anvil of its functionality. A specific exclusion of judicial review must, to be valid, serve a constitutional function. The test of functionality must relate to whether an exclusion of review is necessary to fulfil the overarching need for the proper discharge of a constitutional role. Exclusion of review, to be valid, must satisfy the requirement of a constitutional necessity. Its purpose cannot be to shield an excess of power from being questioned before the Court. Nor is the fact that a power is vested in a high-ranking official a ground for protecting it from scrutiny. The ultimate test is whether the exclusion of judicial review is express and specific, and whether such an exclusion is designed to achieve a constitutional purpose that meets the test of functionality, assessed in terms of a constitutional necessity.⁵²

Thus, paving the way for judicial review of the decision of the Speaker, it was observed that a mere ‘irregularity of procedure’ is different from a ‘substantive illegality’ which occurs when there is a violation of an ‘essential Constitutional condition’⁵³. In support of this assertion, he cited the judgment in *Ramdas Athawale v Union of India*,⁵⁴ wherein a The Constitution Bench of the Court had extended the above formulation to Article 122 of the Constitution. It had observed thus:

“...it may be possible for a citizen to call in question in the appropriate Court of law, the validity of any proceedings inside the Legislature if his case is that the said proceedings suffer not from mere irregularity of procedure, but from an illegality. If the impugned procedure is illegal and unconstitutional, it would be open to scrutiny in a Court.

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- (d) the appropriation of moneys out of the Consolidated Fund of India;
 - (e) the declaring of any expenditure to be expenditure charged on the Consolidated Fund of India or the increasing of the amount of any such expenditure;
 - (f) the receipt of money on account of the Consolidated Fund of India or the public account of India or the custody or issue of such money or the audit of the accounts of the Union or of a State; or
 - (g) any matter incidental to any of the matters specified in sub-clauses (a) to (f).

⁵² Para 75 of the Dissent given by Justice Chandrachud.

⁵³ According to the Court an ‘essential constitutional condition’ was one which was expressed in a provision of the Constitution, in the present case being Article 110(1), which lists out what constitutes a Money Bill. It also held that there may be certain features of the Constitution which do not find a place in any express provision and yet their violation is seen as a violation of the Constitution. And therefore, these basic features are understood as ‘essential Constitutional conditions’.

⁵⁴ (2010) 4 SCC 1.

of law, though such scrutiny is prohibited if the complaint against the procedure is no more than this, that the procedure was irregular.”⁵⁵

He also observed that the said distinction between a ‘procedural irregularity’ and an ‘illegality’ was reaffirmed by the Court in *Raja Ram Pal v Hon'ble Speaker, Lok Sabha*,⁵⁶ wherein the Bench had held that courts are not prohibited from exercising their power of judicial review to examine any illegality or unconstitutionality in the procedure of Parliament. It had observed:

“Any attempt to read a limitation into Article 122 to restrict the court's jurisdiction to examination of the Parliament's procedure in case of unconstitutionality, as opposed to illegality, would amount to doing violence to the constitutional text. Applying the principle of “*expressio unius est exclusio alterius*” (whatever has not been included has by implication been excluded), it is plain and clear that the prohibition against examination on the touchstone of ‘irregularity of procedure’ does not make taboo judicial review on findings of illegality or unconstitutionality...”⁵⁷

Thus, the consistent thread that emerges from the judgments in *Ramdas Athawale* and *Raja Ram Pal* is that the validity of proceedings in Parliament or a State Legislature can be subject to judicial review on the ground that there is an illegality or a constitutional violation.

Apart from the above-discussed issues, another point of adjudication before the Court was whether the introduction of the Aadhaar Act as a Money Bill, thereby bypassing the Rajya Sabha's constitutional authority, constituted an illegality. Regarding this, it was observed by Justice Chandrachud that: “The passage of the Aadhaar Act as a Money Bill amounts to an abuse of the constitutional process, as it deprived the Rajya Sabha of altering the provisions of the Bill by carrying out amendments. It held that the Rajya Sabha has an important role in the making of laws, and that superseding its authority is in conflict with the Constitutional scheme and the legitimacy of the democratic institution. It also constitutes a fraud on the Constitution. Passing a Bill as a Money Bill when it does not qualify for it damages the delicate balance of bicameralism, which is part of the basic structure of the Constitution. The legislative role of a legislative body cannot be obviated by legislating a Bill which is not a Money Bill as a

⁵⁵ Ibid. at 13-14.

⁵⁶ (2007) 3 SCC 184.

⁵⁷ Ibid. at 359.

Money Bill. That would constitute a subterfuge, something which a constitutional court cannot countenance.”⁵⁸

Finally, he concluded that the Aadhaar Act failed to qualify as a Money Bill under Article 110 of the Constitution, for it was passed as a Money Bill even though it never qualified to be so, thereby rendering the whole passage of the Act illegal. On these grounds, he declared the Aadhaar Act to be unconstitutional.

From a perusal of Justice Chandrachud's dissent, it becomes clear how necessary it is for the Courts to review the infirmities in the legislative process. However, this does not mean that judicial review is the only solution to problems in the legislative process. But it would surely supplement other reform efforts. A combination of the legislative and judicial processes can create an overall proper balance between procedural values and norms and competing considerations in the lawmaking process, as it can incentivize legislators to give greater weight to procedural considerations. Thus, Judicial review of the legislative process may eventually serve as a trigger for Parliament to engage in responsible law-making, for democracy to survive, only when the Constitutional institutions are vibrant.

After an in-depth analysis of the importance of judicial review of the legislative process and the role of the Courts in improving it, a question arises: do the Courts, under their power of judicial review, also conduct post-legislative scrutiny of laws enacted by the Legislature? Should a Court conduct an impact assessment of the laws made by the Legislature? What if the Legislature fails to do a proper post-legislative scrutiny of the laws made by it? Would it then be justified for the Courts to intervene, scrutinize those laws, and direct the Legislature to amend, repeal, or make necessary reforms in that legislation? Although a backlash would undoubtedly come from the Legislature for interference in its sphere, and from the Judiciary, which is already overburdened, it would be given yet another task: scrutinizing laws for their impact on society. However, the truth is that this has been done by the Judiciary for a long time whenever the constitutionality of the Statute passed by the Legislature is questioned before it. While doing so, it has not only measured a Statute on the scales of constitutionality or illegality, but also reviewed it to assess its potential effects and whether the intended objectives of the laws have been achieved. Many times, such situations have arisen before the Courts, where the Courts have flagged specific laws as needing reform and directed the Legislature to work on them. The truth is that whenever any reform is made in a Statute, the initiative has been taken by the Courts through their judgments, asking the Legislature to take a relook at the laws.

⁵⁸ Supra note 65. Para 117 of Justice D.Y.Chandrachud's Dissent.

A recent instance of this issue is *S.G. Vombatkere v. Union of India*, in which the Court directed the Parliament to revisit Section 124-A of the Indian Penal Code, which pertains to the offence of Sedition. In response, the Union of India agreed with the *prima facie* opinion expressed by the Court that ‘the rigors of Section 124-A of IPC is not in tune with the current social milieu, and was intended for a time when this country was under the colonial regime’⁵⁹, decided to reconsider and re-examine the aforesaid provision of law but urged the Court to pause the ongoing judicial scrutiny of the penal provision. After this historic order of the Court, a Committee has been set up to review Section 124-A of the Indian Penal Code, and the process of re-examination been set in motion.

In yet another case, *Satender Kumar Antil v. CBI*⁶⁰, the Supreme Court acknowledged the ineffectiveness of India’s Bail system and its contribution to the crisis of undertrial prisoners languishing in jails. The Court provided comprehensive guidelines on bail laws. It urged the Union Government to consider enacting a separate Statute, such as a Bail Act, as is done in various other countries, including the United Kingdom, to streamline the grant of bail. While observing that there is a pressing need for a similar enactment in our country, as the provisions regarding it in the Code of Criminal Procedure are a continuation of the pre-independence era with modifications, the Court asked the Union of India to look into the suggestion made in right earnest. This is how the Supreme Court called for a reform in the bail jurisprudence.

CONCLUSION

The above notable judgments demonstrate how judicial involvement can induce legislative actors to improve the quality of legislation. The problem is that some laws are passed not because a majority of members of Parliament thought them worthy of passage, but because a small group of representatives was able to game the lawmaking process to get them passed. Here, the judiciary can play a part. Courts can help to ensure minimal deliberation by Parliament by reviewing the legislative process that led to the enactment of a law. Therefore, if a particular law did not receive a minimal deliberation, the court can provisionally invalidate that law and ask the Parliament to reenact that law. The result would be an increase in the proportion of legislation enacted because the majority of representatives considered it to be in the public interest, and a corresponding decrease in legislation resulting from a non-deliberative legislative process.⁶¹ Of course, this second-guessing would raise significant separation-of-powers concerns, as well as worries that subjecting the legislative

⁵⁹ Para 5 of order dated 11.05.2022 passed in WP(C) 682 of 2021.

⁶⁰ (2022) 10 SCC 51

⁶¹ See Victor Goldfeld, ‘Legislative Due Process and Simple Interest Group Politics: Ensuring Minimal Deliberation through Judicial Review of Congressional Processes’, 79 New York Univ. Law Review 367, April 2004.

process to a rigid judicial process would violate legislative supremacy by disrespecting the Legislature. But there is nothing wrong with it if it does more good than harm. If the Courts proceed with caution, judicial review of the legislative process can give beneficial outcomes. It would provide an incentive for the Legislature to discuss and debate the provisions, and, in turn, make the law-making process more transparent. When the Courts would deal with questions like was there sufficient time for the legislators to take notice of the provisions of the Bill and debate its consequences?, were hearings held or studies commissioned?, were alternate means of achieving policy goals considered?, what was the nature of action taken by the Committees that took up the Bill?, it would make Legislature more cognizant in enacting laws, knowing that the Courts would highlight such shortcomings in the legislative process. However, it is also asserted that there should not be excessive judicial interference in the legislative process of the Parliament. The court should intervene only to examine the substance of the process, to question whether the law expresses the will of the nation, and whether it is commensurate with democratic principles.