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Anmol Jain

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DEMOCRATIC DECAY IN INDIA: WEAPONISING THE CONSTITUTION TO CURB PARLIAMENTARY DELIBERATION

—Anmol Jain*

Abstract – The scholarship on the practice of abusive constitutionalism or autocratic legalism has shown how autocrats nowadays use tools of constitutional or legal changes to establish their authoritarian projects. This paper is an attempt to expand this idea. It studies the approach to law-making of the current NDA government in India and argues that autocrats need not even bringing any overt constitutional or legal change if they could manoeuver within the existing constitutional framework. It shows that since the Government was elected to power in 2014, it has employed several constitutionally permitted tools to curb parliamentary deliberation in the law-making process. These tools have enabled the Government to neutralise Parliament, overpower the balanced relationship between the legislature and the executive, and undermine the republican aspect of the Indian democracy, all the while remaining within the bounds of the Constitution. This paper documents three tools employed by the government– the ordinance-making power, the anti-defection law, and the powers of the chair – which have contributed significantly to the incremental establishment of authoritarian rule in India

* LL.M. Candidate, Yale Law School, 2023; B.A.LL.B. (Hons.), National Law University, Jodhpur, 2021. I am thankful to Mr. Aditya Pratap Singh Rathore for helping me in conceptualizing, developing, and refining many ideas discussed in this paper. I am grateful to Prof. Swati Jhaveri, Prof. Sandeep Suresh, Dr. Amal Sethi, and the independent reviewers for reading the earlier drafts of this paper and providing insightful suggestions. All errors remain mine.

I. INTRODUCTION

Academic scholarship on democratic decay in India abounds. Since the election of the Narendra Modi-led National Democratic Alliance ("**NDA**") in 2014, scholars have documented numerous instances of systemic deinstitutionalisation of the framework of democratic governance and constant threats to the core values of the Indian Constitution,[1] including secularism,[2] electoral accountability,[3] freedom,[4] federalism,[5] and independence of media and other constitutional institutions.[6] Such 'creeping authoritarianism', a phrase used by Tarunabh Khaitan,[7] has initiated the establishment of a hybrid regime in India,[8] as the elements of authoritarian governance have yet not thwarted the democratic legacy of India. Nevertheless, given the way in which the ruling party summons the state apparatus against opposition parties during elections,[9]subsidises selective speech and quells dissent to ensure majoritarian entrenchment,[10]

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[1] Christophe Jaffrelot, *Modi's India: Hindu Nationalism and the Rise of Ethnic Democracy* (Context 2021).

[2] Manoj Mate, 'Constitutional Erosion and Challenges to Secular Democracy in India', in Mark A Graber, Sanford Levinson and Mark Tushnet (eds), *Constitutional Democracy in Crisis* (Oxford University Press 2018).

[3] Tarunabh Khaitan, 'Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-state Fusion in India' (2020) 14(1) Law & Ethics of Human Rights 49, 58-68.

[4] Arvind Narrain, India's Undeclared Emergency: Constitutionalism and the Politics of Resistance (Context 2022).

[5] See Venkitesh Ramakrishnan, 'Federalism in Peril' (*Frontline*, 23 April 2021) <https://frontline.thehindu.com/cover-story/federalism-in-peril-as-gnctd-amendment-act-and-other- acts-adopted-by-narendra-modi-govt-and-other-bjp-state-govts-fit-into-sangh-parivar-long- term-project-of-dismantling-institutions-anathema-to-hindu-ethos/article34233209.ece#!> accessed 30 April 2021; TK Rajalakshmi, 'Sitaram Yechury: The BJP Should Understand that Without States, There is no India' (*Frontline*, 23 April 2021) <https://frontline.thehindu.com/ cover-story/sitaram-yechury-the-bjp-should-understand-that-without-states-there-is-no-india-in-terview/article34232516.ece> accessed 30 April 2021.

[6] Khaitan (n 3) 73-92; Seema Chishti, 'The Biased Referee: Why the Election Commission's Neutrality is in Doubt' (*The Caravan*, 31 March 2021) <https://caravanmagazine.in/politics/ why-election-commission-neutrality-doubt> accessed 13 April 2021; Hartosh Singh Bal, 'Executive (and) Editor' (*The Caravan*, 1 December 2020) <https://caravanmagazine.in/media/ media-becomes-government-modi-indian-express-republic> accessed 13 April 2021.

[7] Khaitan (n 3); Tarunabh Khaitan, 'A Sinking, Slow and Steady' (*The Indian Express*, 31 May 2018) <https://indianexpress.com/article/opinion/columns/indian-constitution-judicial-independence-narendra-modi-govt-indira-gandhi-5180820/> accessed 13 April 2021.

[8] Terry Lynn Karl, 'The Hybrid Regimes of Central America' (1995) 6(3) Journal of Democracy 72; Larry Diamond, Thinking About Hybrid Regimes' (2002) 13(2) Journal of Democracy 21; See also Kim Lane Scheppele, 'Not Your Father's Authoritarianism: The Creation of the "Frankenstate"' (2013) European Politics and Society Newsletter 5.

[9] Neeraj Chouhan, 'In Election Season, the Raids are Back – Against Opposition Leaders' (*Hindustan Times,*5 April 2021) <https://www.hindustantimes.com/india-news/in-election-season-the-raids-are-back-against-opposition-leaders-101617609673969.html> accessed 13 April 2021.

[10] See Adam Shinar, 'Democratic Backsliding, Subsidized Speech, and the New Majoritarian Entrenchment' (2021) The American Journal of Comparative Law, discussing how selective government funding of private speech could contribute to democratic backsliding; Shireen Azam, 'Revolution Muted' (*The Caravan*, 1 December 2020) <https://caravanmagazine.in/reportage/revolution-muted> accessed 13 April 2021; Adam Withnall, 'How Modi

arguably, India has come to represent what Steven Levitsky and Lucan Way term as 'competitive authoritarianism'.[11]

In documenting such trends, existing literature has focused extensively on the adoption of formal tools, such as enactment or amendment to the existing legal framework, as well as informal tools, which include appeals to the majoritarian mindset and radicalisation of the society, adopted by the ruling party in establishing its authoritarian project.[12] It has, however, missed capturing in detail how the NDA government has weaponised the Indian Constitution in this regard, perhaps because the Government has not specifically adopted any substantial constitutional amendment. I attempt to fill this gap in literature.

In this paper, I demonstrate that widely drafted constitutional provisions, with no attached mechanism for internal balancing and reinforcement of democratic principles, have enabled the NDA government to pursue its authoritarian project in India. I do this by studying how, by adopting several constitutionally permitted means, the Government has curbed parliamentary deliberation in the law-making process to neutralise the Parliament and undermine the republican aspect of the Indian democracy. This has transformed the institution of the Parliament, which has a constitutional obligation to maintain mechanisms of checks and balances,[13] into a mute, executive-controlled institution. By functioning in a formalistic manner, the Parliament's role is reduced to merely fulfilling the minimum constitutional requirements and providing legitimacy to the decisions adopted by the executive-controlled majority.[14]

In this study, I conceptualise democratic governance not as the mere adoption of certain minimum conditions, like the holding of independent electoral exercises at regular intervals, but in a wider sense that values the culture of deliberation within the institutionalised governance processes and considers it as one of the primary aspects of democratic governance.[15] Such a concep-

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Government Uses Ad Spending to 'Reward or Punish' Indian Media' (*The Independent*, 20 July 2019)<https://www.independent.co.uk/news/world/asia/india-modi-government-media-ad-spending-newspapers-press-freedom-a8990451.html> accessed 13 April 2021.

[11] Steven Levitsky and Lucan A Way, *Competitive Authoritarianism: Hybrid Regimes After Cold War* (Cambridge University Press 2010) 5 ('Competitive authoritarian regimes are civilian regimes in which formal democratic institutions exist and are widely viewed as the primary means of gaining power, but in which incumbents' abuse of the state places them at a significant advantage vis-à-vis their opponents.'); Steven Levitsky and Lucan A Way, 'The New Competitive Authoritarianism' (2020) 31(1) Journal of Democracy 51, 60.

[12] See footnotes 1-7 above.

[13] The Constitution of India, Article 75(3); On the importance of an Upper House independent of the executive to function as an effective check on the government, see Jeremy Waldron, 'Bicameralism and the Separation of Powers' (2012) 65 Current Legal Problems 31, 43-48.

[14] See *generally* Madhav Khosla and Milan Vaishnav, 'The Three Faces of the Indian State' (2021) 32(1) Journal of Democracy 111, 114-116.

[15] See Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press, Cambridge 1996); Joseph Bessette, *Deliberative Democracy: The*

tion of democratic governance is guided by the idea of constitutionalism and democratic legitimation. It ensures that governance is not reduced to a game of numbers based on party politics. It allows the community to constantly deliberate on matters of public importance and guide its collective development. It emphasises the idea that the community's fundamental notions are ever evolving, and they cannot be fixated as per the will of the few that happen to be in power at a given point in time. Parliament is a significant link in this respect, as it is one of the most powerful and effective mediums of public discourse. Moreover, a culture of deliberation puts in place a system of continued accountability of representatives who are chosen to govern and places the electorate in an environment where they can take better and informed decisions before the next election.

I chose parliamentary deliberation for this study because it is one of the most significant tools available with the legislature to oversee the executive and demand consistent accountability for its actions.[16] The essence of the Indian law-making process is based on values that revolve around debate and deliberation. After a bill is introduced in both Houses of Parliament, it goes through three readings, committee hearings, and several amendment suggestions before the final draft is debated and voted on.[17] This process requires the legislators to articulate their reasons for taking a particular stand. As Udit Bhatia notes, "it is only through such justification that power can be considered legitimate, based on collective authority rather than brute force".[18] Therefore, a procedural limitation on parliamentary deliberation effectively gives the executive a free pass to evade legislative scrutiny and to frame anti-democratic sub-constitutional laws without any effective legislative oversight.[19] This results in a virtual fading of the principle of separation of powers.

The arguments that I present in this paper bear importance for three reasons. *Firstly*, they expand the horizon to study democratic backsliding across the globe. Presently, there is a general assumption that a democratic mandate would by itself enable an autocrat to neutralise the Parliament and its oversight function. Existing literature has primarily been restricted to studying the manner in which autocrats in different jurisdictions have suppressed liberal values, such as freedom of speech and dissent, and how they have attempted to

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Majority Principle in Republican Government, in R. A. Goldwin and W. A. Schambra (eds.), *How Democratic Is the Constitution* (Washington, DC: American Enterprise Institute 1980), 102-16.

[16] See William Selinger, *Parliamentarism: From Burke to Weber* (CUP 2019) 3-4; John Stuart Mill, *Considerations on Representative Government* (1861), Ch 5.

[17] See 'Passage of Legislative Proposals in Parliament' (*The Lok Sabha*) <http://164.100.47.194/Loksabha/Legislation/Legislation.aspx> accessed 15 March 2021.

[18] Udit Bhatia, 'Cracking the Whip: The Deliberative Costs of Strict Party Discipline' (2020) 23(2) Critical Review of International Social and Political Philosophy 254, 262.

[19] See, for a similar study on the functioning of the UK Parliament, David Judge, 'Walking the Dark Side: Evading Parliamentary Scrutiny' (2021) 92(2) The Political Quarterly.

entrench the incumbent regime by denying fair political competition and making it difficult for the opposition parties to operate and win elections. While studying institutional capture, the focus remains on courts, media, NGOs, or academia.[20] This is also reflected in the kind of solutions that have been suggested to preserve the political processes and structures of representative democracy.[21] Scholars have generally sought solutions outside the Parliament, for instance, through judicial review.[22] A notable exception in this regard is Sujit Choudhry's recent work on how opposition rights could be institutionalised in the law-making process in parliamentary democracies to check the powers of the majority-holding party.[23] Therefore, by focusing on declining parliamentary deliberation in India, I attempt to explore how an overwhelming democratic mandate coupled with widely drafted provisions on executive power could affect the quality of parliamentary deliberation and help a would-be autocrat in neutralising the Parliament. This could enable scholars to devise possible solutions internal to the parliamentary design for checking the abuse of democratic mandate.

Secondly, I reflect upon the significance as well as the limitation of the central thesis of the idea of 'moderated parliamentarianism' as developed by Tarunabh Khaitan.[24] Khaitan argues that 'constitution makers must recognize that institutional arrangements, party systems, and electoral systems impact each other in complex ways, and no single one of them can be crafted in isolation'. The NDA government in India has easily overpowered the legislature and its traditional deliberative function by winning a majority of seats in parliament owing to the first-past-the-post electoral system, despite only winning a mere plurality of votes in the Indian General Elections of 2014 and 2019. This has been exacerbated by the top-down organisational structure adopted by political parties in India, which gives a few leaders at the top virtual control over the legislators (in both Houses of Parliament).

This analysis also highlights a limitation of Khaitan's thesis, which has also been identified by Swati Jhaveri.[25] In talking about institutional arrangements, Khaitan's central focus is on executive-legislative regime types. This

[20] See, Stephen Gardbaum, 'The Counter-Playbook: Resisting the Populist Assault on Separation of Powers' (2020) 59(1) Columbia Journal of Transnational Law 1; Aziz Huq and Tom Ginsburg, 'How to Lose a Constitutional Democracy' (2018) 65 UCLA Law Review 78.

[21] Stephen Gardbaum, 'Comparative Political Process Theory' (2020)18(4) Int. J. Const. Law 1429.

[22] *Ibid*.

[23] Sujit Choudhry, 'Opposition Rights in Parliamentary Democracies' (Unpublished manuscript) <https://www.law.nyu.edu/sites/default/files/Opposition%20Rights%20in%20Parliamentary%20Democracies%20Sept%202020%20draft_0.pdf.> accessed 18 October 2022.

[24] Tarunabh Khaitan, 'Balancing Accountability and Effectiveness: A Case for *Moderated Parliamentarianism*' (2021) 7 Canadian Journal of Comparative and Contemporary Law 81.

[25] Swati Jhaveri, 'Constitutional Desiderata for Idealised Models of Democratic Governance: Protecting Parliamentary Process and Administration' (*IACL-AIDC Blog*, 18 May 2021) <https://blog-iacl-aidc.org/workshop-my-paper/2021/05/16constitutional-desiderata-for-ideal-

typology ignores the fact that the manner of the internal functioning of the legislature in a parliamentary set-up could materially impact the resonance of constitutional democracy, since the entrenchment of the ruling party can disallow the opposition parties from checking the Government and presenting alternative policy models. As Jhaveri highlights, unless a democratic and truly representative system of parliamentary procedure is not entrenched by either big-C Constitution or small-c constitutions "to prevent it from being captured, instrumentalised and manipulated by the government in power", it would be extremely difficult for the legislature to keep a check on the executive. I present evidence in support of the idea of constitutionally entrenching parliamentary procedure and argue that such entrenchment must be done with precision; otherwise, the incumbent Government could still exploit the constitutional framework to defeat the principle of continued accountability.

Lastly, and most importantly, this paper contributes to the study of the use of constitutional and legal means for democratic decay. The existing literature focuses on the aspect of 'constitutional and legal change'. I demonstrate how 'existing' constitutional pro- visions could be employed to effectuate executive aggrandisement without any overt constitutional or legal change. A would-be autocrat could lay the ground- work for an authoritarian rule by manoeuvring within the existing constitutional framework.

One caveat before I proceed further: I restrict the scope of this paper to constitutional tools employed by the NDA government to curb parliamentary deliberation in India. There are also certain parliamentary tools that the Government has employed to fast-track the law-making process,[26] but I reserve that study for the future. The rest of the paper proceeds as follows. In part 2, I discuss the existing literature on the use of constitutional or legal means by autocrats to further their authoritarian projects and demonstrate how such literature fails to capture the peculiarity of the Indian situation. In part 3, I comprehensively document three tools of ordinance making power, the anti-defection law, and the powers of the chair that the NDA government has employed to attack or bypass parliamentary deliberation and legislative scrutiny in India. Though permissible under the Constitution, these tools have resulted in undemocratic parliamentary practice and secured executive control

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ised-models-of-democratic-governance-protecting-parliamentary-process-and-administration> accessed 20 May 2021.

[26] For instance, see Ajoy Ashirwad Mahaprashasta, 'RSTV Footage, MPs' Accounts for Farm Bills Debate Paint Picture of RS Rules Violation' (*The Wire*, 27 September 2020) <https://thewire.in/government/rajya-sabha-farm-bills-rules-violation-speaker> accessed 2 April 2021; 'Functioning of 16th Lok Sabha (2014-2019)' (*PRS Legislative Research*) <https://www.prsindia.org/parliamenttrack/vital-stats/functioning-16th-lok-sabha-2014-2019> accessed 2 April 2021 (about declining role of the parliamentary committees in the law-making process); See also Vikram Narayan and Jahnavi Sindhu, 'A Case for Judicial Review of Legislative Process in India?' (2020) 53(4) World Comparative Law 358, 363-376.

of the Parliament. I study how constitutional design failures and judicial decisions have enabled their abuse. Finally, in part 4, I conclude the paper.

II. THE USE OF CONSTITUTIONAL AND LEGAL MEANS FOR ESTABLISHING AN AUTHORITARIAN RULE

The scholarship on democratic backsliding[27] suggests that the current trend of the global rise in anti-democratic regimes is unique in the sense that would-be autocrats are generally found using and manipulating existing constitutional and legal frameworks to reach anti-democratic ends rather than totally thwarting the legal system through, for instance, coups d'état.[28] As Ozan O. Varol observes, "the new generation of authoritarians cloak repressive measures under the mask of law, imbue them with the veneer of legitimacy, and render authoritarian practices much more difficult to detect and eliminate."[29] The reason underlying this approach is simple: autocrats find it beneficial to maintain the façade that they are operating under a democratic constitution, rather than outrightly replacing the existing constitutional document with a new version so as to avoid any overwhelming domestic and international backlash.[30]

Many constitutional law scholars have attempted to theorise these trends, resulting in a vast collection of research on 'varieties of constitutionalism'.[31] One of the seminal works in this regard is David Landau's paper, written in 2013, on 'abusive constitutionalism'. Landau studied developments in Hungary, Colombia, and Venezuela and found that the governments in these countries have used the mechanism of constitutional amendment and constitutional replacement towards undemocratic ends. Landau termed this practice as abusive constitutionalism and defined it as "the use of the mechanism of constitutional change in order to make state significantly less democratic than it

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[27] Scholars have used different terms to describe this phenomenon – for instance, democratic erosion, democratic de-consolidation, constitutional retrogression etc. I am using democratic backsliding as defined by Nancy Bermeo – 'it denotes the state-led debilitation or elimination of any of the political institutions that sustain an existing democracy.' Nancy Bermeo, 'On Democratic Backsliding' (2016) 27(1) Journal of Democracy 5.

[28] Nancy Bermeo, 'On Democratic Backsliding' (2016) 27(1) Journal of Democracy 5; David Landau, 'Abusive Constitutionalism' (2013) 47(1) U.C. Davis Law Review 189 ('while traditional methods of democratic overthrow such as military coup have been on the decline for decline for decades, the use of constitutional tools to create authoritarian and semi-authoritarian regimes is increasingly prevalent.').

[29] Ozan O Varol, 'Stealth Authoritarianism' (2015) 100 Iowa Law Review 1673, 1677.

[30] Kim Lane Scheppele, 'Autocratic Legalism' (2018) 85 The University of Chicago Law Review 545, 561-571.

[31] Mark Tushnet, 'Editorial' (2016) 14(1) International Journal of Constitutional Law 1; See also Tom Gerald Daly, 'Democratic Decay: Conceptualizing and Emerging Research Field' (2019) 11 Hauge Journal on the Rule of Law 9.

was before".[32] This theorisation was then employed as a framework by David Landau and Rosalind Dixon to examine the possible ways through which constitutional replacements could be constrained[33] and how the unconstitutional constitutional amendment doctrine[34] and tiered constitutional design[35] could be adopted to check the abuse of constitutional amendment-making power.[36]

Parallelly, certain scholars developed the idea of 'autocratic legalism'. In 2018, Kim Lane Scheppele used this phrase to highlight how 'constitutional and legal changes' are used by the would-be autocrats in the service of an illiberal agenda,[37] which necessarily undermines liberal democratic constitutionalism to legalism, relegating the relevance of constitutionalism to a mere justifying factor for the legal changes pursued.[38] In this exercise, Scheppele's focus was on substantive legal changes, a formulation closer to the idea of abusive constitutionalism as developed by Landau. She emphasised how would-be autocrats begin with effectuating certain constitutional changes to remove checks on the law-making power to enable the passage of those laws which would have been considered unconstitutional hitherto.[39]

The significance of these works lies in the fact that they show how would-be autocrats exercise unfettered executive power while functioning within the confines of 'constitutionalism' without adopting any extra-constitutional mechanisms. This formulation might seem counter-intuitive at first glance. However, such mechanisms have long-term implications for constitutional democracies, as observed by Yaniv Roznai and Tamar Hostovsky Brandes. Not only is an autocrat allowed unfettered executive power, given the erosion of institutions extending vertical and horizontal accountability, but such constitutional and legal changes also 'positively entrench anti-democratic structures as constitutional norms.'[40]

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[32] David Landau, 'Abusive Constitutionalism' (2013) 47(1) UC Davis Law Review 189, at 195.

[33] David Landau and Rosalind Dixon, 'Constraining Constitutional Change' (2015) 50 Wake Forest Law Review 859.

[34] Rosalind Dixon and David Landau, 'Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment' (2015) 13(3) International Journal of Constitutional Law 606; David Landau, 'Abusive Constitutionalism' (2013) 47(1) UC Davis Law Review 189.

[35] Rosalind Dixon and David Landau, 'Tiered Constitutional Design' (2018) 86(2) The George Washington Law Review 438.

[36] See also, Yaniv Roznai and Tamar Hostovsky Brandes, 'Democratic Erosion, Populist Constitutionalism and the Unconstitutional Constitutional Amendments Doctrine' (2010) 14(1) Law and Ethics of Human Rights 19.

[37] Kim Lane Scheppele, 'Autocratic Legalism' (2018) 85 The University of Chicago Law Review 545, 548.

[38] *Ibid* 563.

[39] *Ibid* 581.

[40] Yaniv Roznai and Tamar Hostovsky Brandes, 'Democratic Erosion, Populist Constitutionalism and the Unconstitutional Constitutional Amendments Doctrine' (2010) 14(1) Law and Ethics of Human Rights 19, 23.

However, one of the limitations of understanding democratic backsliding through this approach, as highlighted by Sujit Choudhry, is the sole focus on constitutional or legal 'changes' in understanding the authoritarian project. In response to one of the papers written by David Landau and Rosalind Dixon, Choudhry noted that the study of democratic backsliding must be premised on "a broader inventory of various legal tools used by autocrats that enable democratic backsliding, which encompasses the abuse of the power of constitutional amendments but extends well beyond it".[41] There are at least two important works that have theorised democratic backsliding using this expanded approach.

Writing in 2015, Javier Corrales noted that for a competitive authoritarian regime like Venezuela to turn more authoritarian, autocratic legalism could be a primary tool.[42] "Autocratic legalism has three key elements: the *use, abuse,* and *non-use* (in Spanish, *desuso*) of the law in service of the executive branch", wrote Corrales.[43] The difference in Corrales' approach is the focus on sub-constitutional means adopted by Hugo Chávez, for instance, the enactment and inconsistent and biased implementation of laws towards executive aggrandisement and illiberalism, rather than constitutional change. This corresponds much closer to the existing scholarship on democratic decay in India.

Ozan O. Varol theorised the idea of 'stealth authoritarianism' in a similar manner. "Stealth authoritarianism refers to the use of a legal mechanism that exists in regimes with favourable democratic credentials for anti-democratic ends", noted Varol.[44] The focus here is again on sub-constitutional mechanisms such as surveillance laws, libel lawsuits against dissidents, skewed structuring of electoral laws, etc., that could contribute to the weakening of 'horizontal and vertical checks and balances' and entrenchment of the incumbents government, enabling 'the creation of a political monopoly'.[45]

While these two works expanded the idea of abusive constitutionalism or autocratic legalism, their focus was limited to sub-constitutional means. With an aim to contribute to this literature, the present work, in the next part, shows that would-be autocrats can even weaponise widely drafted constitutional provisions to establish their authoritarian rule. It is important to document this approach because the actions of autocrats in such an approach are subtler and harder to identify, as compared to those adopting the approach of abusive constitutionalism. At first blush, the constitutional framework would seem to be

[41] Sujit Choudhry, 'Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment: A Reply to Rosalind Dixon and David Landau' (2017) 15(2) International Journal of Constitutional Law 826.

[42] Javier Corrales, 'Autocratic Legalism in Venezuela' (2015) 26(2) Autocratic Legalism in Venezuela 37.

[43] *Ibid* 38.

[44] Ozan O. Varol, 'Stealth Authoritarianism' (2015) 100 Iowa Law Review 1673, 1684.

[45] *Ibid* 1684, 1686-1718.

intact (as there is no overt constitutional change), and the concerns regarding constitutionalism and parliamentary oversight might be considered a failure of politics. However, when the actions of an autocrat adopting this approach are studied over a period, a pattern emerges revealing the actual *modus operandi*.

In this background, the next part comprehensively studies three tools from the existing Indian constitutional framework, which the NDA government has manipulated to fast pace the law-making process and crush parliamentary deliberation in its last eight years of rule in India.

III. DECLINING PARLIAMENTARY DELIBERATION IN INDIA

A. (Ab)use of the Power to Promulgate Ordinances

Article 123 of the Indian Constitution empowers the President to exercise original legislative powers by way of promulgation of ordinances upon satisfaction of two conditions: (1) when the existing circumstances make it necessary to take immediate legislative action; and (2) when both Houses of Parliament are not in session.[46] The ordinances must, therefore, be predicated upon some form of legislative urgency and not 'perverted to serve political ends'.[47] As the President exercises her functions only with the aid and advice of the Union Council of Ministers,[48] Article 123 effectively allows the Council of Minister, headed by the Prime Minister, to initiate legislative enactments through executive decrees. The only limitations on this power are: (1) it is co-extensiveto the powers of Parliament;[49] and (2) every ordinance must be laid before both Houses of Parliament, and they "cease to operate at the expiration of six weeks from the reassembly of Parliament".[50] Therefore, they must be replaced with parliamentary enactments within this timeline.

The actual practice of the ordinance-making power is quite far from the ideals envisaged in the Constitution. Shubhankar Dam, one of the foremost academicians studying ordinances in India, has documented the use of ordinances from 1952 to 2009.[51] He found that in this period, Presidents "have promulgated 615 ordinances", at "an average of 10.6 ordinances *every* legislative

[46] Constitution of India, art 123(1); Shubhankar Dam, 'Executive', in Sujit Choudhry et. al. (Eds), *The Oxford Handbook of the Indian Constitution* (Oxford University Press 2016) 324-325.

[47] *Dr DC Wadhwa v. State of Bihar* (1987) 1 SCC 378, [6].

[48] Constitution of India, art 74; Shubhankar Dam, 'Executive', in Sujit Choudhry et. al. (Eds), *The Oxford Handbook of the Indian Constitution* (Oxford University Press 2016) 316-320.

[49] Constitution of India, art 123(3).

[50] Constitution of India, art 123(2)(a).

[51] Shubhankar Dam, *Presidential Legislation in India – The Law and Practice of Ordinances* (Cambridge University Press 2014).

year".[52] He found that ordinances have become a parallel, and at times, 'the preferred legislative arrangement'[53] because they are an easy tool to bypass Parliament, short-circuit deliberation on the proposed legislative framework and avoid any form of legislative scrutiny. In his words, "[t]hey authorize a non-deliberative, non-majoritarian and 'private' legislative method – one that reduces legislation to fiats".[54] He further writes that they "make legislative intransigence *more* likely. Conversely, they render parliamentary opposition to legislation ineffective: No matter the situation, cabinets always have a way out, at least temporarily."[55] This not only impacts the quality and significance of pre-legislative discussions but also creates a possibility of sub-optimal laws being enacted.

It is important to study this data by classifying the frequency with which different regimes promulgated ordinances. It is astonishing to note that if we remove the number of ordinances promulgated by Indira Gandhi, the former Indian Prime Minister who had imposed a national emergency during 1975-76, and by several Prime Ministers during the dramatic decade of the 1990s, the average number of ordinances promulgated per year comes down to 6.8.[56] The 1990s was the most turbulent decade as far as Indian politics is concerned. In a span of just ten years, six Prime Ministers[57] held the helm of Indian affairs as none of the governments was able to muster a clear parliamentary majority. The country even witnessed a union government lasting as short as 16 days. Even the Narasimha Rao government, which ruled for five out of these ten years, was a minority government and thus unstable. This instability also resulted in the 1990s being marked as the worst decade for ordinances in India. In such a short period, the Union government was issuing ordinances at the rate of around 20 per year, with the years 1993, 1996, and 1997 topping the league with 34, 32, and 31 ordinances, respectively.[58]

In sharp contra-distinction to this instability, Indira Gandhi enjoyed a parliamentary majority during most of her long tenure of 16 years. Despite that, Gandhi promulgated 208 ordinances–the maximum by any Prime Minister

[52] *Ibid,* 66 (Emphasis in original).

[53] *Ibid,* 117.

[54] *Ibid,* 4-5.

[55] *Ibid*, 221-222.

[56] This calculation is based on the data collated by Shubhankar Dam. *See* Shubhankar Dam, *Presidential Legislation in India – The Law and Practice of Ordinances* (Cambridge University Press 2014) 109.

[57] Vishwanath Pratap Singh (1989-1990); Chandra Shekhar (1990-1991); PV Narasimha Rao (1991-1996); Atal Bihari Vajpayee (1996); HD Deve Gowda (1996-1997); Inder Kumar Gujral (1997-1998); Atal Bihar Vajpayee (1998-1999).

[58] For a detailed study of these ordinances and how they have unfolded in India since 1950, see-Shubhankar Dam, *Presidential Legislation in India – The Law and Practice of Ordinances* (Cambridge University Press 2014) 66-118.

yet.[59] The high number of ordinances during Gandhi's rule could be attributed to her disregard for parliamentary procedure. In an interview with Ved Mehta, she once remarked, "sometimes I feel that even our parliamentary system is moribund. Everything is debated, and nothing gets done".[60] Such personality traits have regained primacy in the Indian political sphere with the ascendency of Narendra Modi.

The tendency of the current NDA government to push through its ideological reforms via the ordinance route, perhaps because it lacked the majority in Rajya Sabha (Upper House of the Indian Parliament),[61] was evident right from its first year of governance. In fact, the Government had recommended the President to promulgate two ordinances – the Telecom Regulatory Authority of India (Amendment) Ordinance, 2014,[62] and the Andhra Pradesh Reorganization (Amendment) Ordinance, 2014[63] – in its very first cabinet meeting.[64] By the end of 2014, the Government was passing ordinances immediately before summoning and after proroguing the Parliament.

On October 21, 2014, while Cabinet Committee on Parliamentary Affairs had already decided to summon the Parliament two days ago,[65] the Government promulgated its third ordinance – the Coal Mines (Special Provisions) Ordinance, 2014.[66] It dealt with a significant issue concerning the process of re-allocation of coal mines, mine leases, and allied rights in response to a Supreme Court judgment delivered two months earlier in August 2014[67] and a subsequent order delivered in September 2014.[68] Through these

[59] See Shubhankar Dam, *Presidential Legislation in India – The Law and Practice of Ordinances* (Cambridge University Press 2014) 109.

[60] Ved Mehta, *Portrait of India* (Farrar, Straus and Giroux 1970) 501; Christophe Jaffrelot and Pratinav Anil, *India's First Dictatorship: The Emergency, 1975-1977* (OUP 2020) 282.

[61] See Special Correspondent, 'BJP Reaches 92 Mark in Rajya Sabha' (*The Hindu*, 3 November 2020) <https://www.thehindu.com/news/national/bjp-reaches-92-mark-in-rajya-sabha/article33009834.ece> accessed 17 April 2021; Prabhash K Dutta, 'NDA Closer to Majority in Rajya Sabha as BJP Gets Stronger, Congress at its Weakest' *India Today*(3 November 2020) <https://www.indiatoday.in/news-analysis/story/nda-closer-to-majority-in-rajya-sabha-as-bjp-gets-stronger-congress-at-its-weakest-1737588-2020-11-03> accessed 17 April 2020.

[62] The Telecom Regulatory Authority of India (Amendment) Ordinance 2014, No 3 of 2014. It was promulgated effectively to facilitate the appointment of Nripendra Mishra as the Principal Secretary to Prime Minister Modi.

[63] The Andhra Pradesh Reorganisation (Amendment) Ordinance 2014, No 4 of 2014. It was promulgated for transferring a cluster of villages for the Polavaram multi-purpose irrigation project.

[64] 'Modi Govt. Passes 22nd Ordinance, Still Short of UPA Number' (*The Hindu,* 29 August 2016) <https://www.thehindu.com/news/national/Modi-govt.-passes-22nd-Ordinance-still-short-of-UPA-number/article14596574.ece> accessed 17 April 2021.

[65] 'PTI News Delhi, Winter Session of Parliament Likely from Nov 24' (*Hindustan Times*, 19 October 2014) <https://www.hindustantimes.com/india/winter-session-of-parliament-likely- from-nov-24/story-yMNJgypi7SQistzdkRDWxI.html> accessed 17 April 2021.

[66] The Coal Mines (Special Provisions) Ordinance 2014, No 5 of 2014.

[67] *Manohar Lal Sharma v Principal Secretary* (2014) 9 SCC 516.

[68] *Manohar Lal Sharma v Principal Secretary* (2014) 9 SCC 614.

pronouncements, the Court cancelled the allocation of coal blocks undertaken by the previous Government after holding them arbitrary. Given the importance of the matter, it was expected of the Government to summon the Parliament for a special session and deliberate upon the possible legal framework keeping in view the directions issued by the Supreme Court. However, it opted for legislating through an ordinance, short-circuiting the entire legislation-making process.

When the two Houses met during November-December 2014 for the scheduled winter session, the Government was unable to pass all the bills listed on its agenda, including the Coal Mines Bill[69] and the Insurance Bill,[70] due to protests from the opposition parties over an alleged campaign by the BJP to convert Muslims and Christians to Hindus.[71] Both Houses were thereby prorogued by the President on December 23.[72] However, failure to achieve its legislative agenda through the Parliament did not deter the Government. On the very next day, the Union Cabinet approved two ordinances for reforms in the coal and insurance sector,[73] even though the opposition had demanded the Coal Mines Bill be sent to a Parliamentary Standing Committee for deliberation and scrutiny.[74] They were formally promulgated by the President two days later.[75] Eminent jurist and constitutional law scholar Rajeev Dhavan remarked on this action of the Government that "[i]t [was] nothing but an act of constitutional terrorism that subvert[ed] both the constitution and its purposes and grossly violate[d] democratic principles. Legislation by executive is to be decried in any democracy".[76]

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[69] The Coal Mines (Special Provisions) Bill 2014, No 183 of 2014.

[70] Due to protests, the government could not introduce the insurance bill. Therefore, there is no official copy of the bill that the government intended to introduce in December 2014. However, an ordinance was promulgated immediately after the prorogation of the House, which was then replaced by the Insurance Laws (Amendment) Bill 2015, No 31 of 2015, in March 2015.

[71] Sunil Prabhu and Akhilesh Sharma, 'Why Government will have to Use Ordinance for Key Reforms' (*NDTV,* 22 December 2014) <https://www.ndtv.com/india-news/why-government- will-have-to-use-ordinances-for-key-reforms-716598> accessed 19 April 2021.

[72] New Delhi Bureau, 'President Prorogues Both House' (*Business Line,* 23 December 2014) <https://www.thehindubusinessline.com/news/national/President-prorogues-both-Houses/article20936877.ece#> accessed 19 April 2021.

[73] 'Cabinet Approves Ordinance on Coal and Insurance' (*The Economic Times,* 24 December 2014) <https://economictimes.indiatimes.com/news/economy/policy/cabinet-approves-ordi- nance-on-coal-and-insurance/articleshow/45626710.cms> accessed 19 April 2021.

[74] PTI, 'Opposition Attacks Government on Coal Mines Bill' (*The Economic Times,* 12 December 2014) <https://economictimes.indiatimes.com/news/politics-and-nation/opposition-attacks-government-on-coal-mines-bill/articleshow/45492754.cms> accessed 19 April 2021.

[75] The Coal Mines (Special Provisions) Second Ordinance 2014, No 7 of 2014; The Insurance Laws (Amendment) Ordinance 2014, No 8 of 2014.

[76] Betwa Sharma, 'Government's Ordinance Push is 'Constitutional Terrorism': Rajeev Dhavan' (*Huffington Post*, 31 December 2014) <https://www.huffpost.com/archive/in/entry/2014/12/31/land-acquisition-_n_6395224.html> accessed 19 April 2021.

More than the urgency of the reforms, it seems that attitudinal reasons[77] were at play in the promulgation of these ordinances. When asked about their requirement, government officials openly highlighted that the purpose of the ordinances was to 'send out a strong signal regarding its intent to carry out policy changes by issuing the ordinance'.[78] Legislative immediacy was nowhere on their list of purposes, a fact which remains true for other ordinances as well.[79]

The Government did not stop at promulgating ordinances. On its failure to win legislative approval of its ordinances, it mechanically re-promulgated the same ordinances multiple times in an act of blatant abuse of the process. Though this practice remains legal, the Supreme Court has termed it a fraud on the Constitution.[80] For instance, consider the case of the 2014 land acquisition ordinance, which was promulgated with the intent to ease the process to acquire land for business purposes by removing certain safeguard mechanisms like social impact assessments and mandatory consent of landowners.[81] However, owing to mass opposition to this ordinance,[82] the Government was unable to replace the ordinance with a parliamentary legislation. It was re-promulgated twice[83] before it ultimately lapsed.[84] Similar was the story of the law criminalising the act of *triple talaq*. In 2017, the Government introduced a bill in this regard.[85] The Lok Sabha passed the bill but, it remained pending in the Rajya Sabha. Not willing to initiate deliberations on the matter

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[77] For an extensive discussion on what possible attitudinal reasons could be, see Shubhankar Dam, *Presidential Legislation in India – The Law and Practice of Ordinances* (CUP 2014) 114-117.

[78] 'Cabinet Approves Ordinance on Coal and Insurance' (*The Economic Times,* 24 December 2014) <https://economictimes.indiatimes.com/news/economy/policy/cabinet-approves-ordi- nance-on-coal-and-insurance/articleshow/45626710.cms> accessed 19 April 2021.

[79] See, for instance, Citizenship (Amendment) Ordinance 2015, No 1 of 2015, which was promulgated to ease the visa and citizenship norms for the overseas Indian community on the eve of the 'Pravasi Bharatiya Summit'. Bureau, 'President Promulgates Citizenship Ordinance, Paves Way for Life-long Visas for PIOs' (*Business Line,* 7 January 2015) <https://www.thehindubusinessline.com/economy/president-promulgates-citizenship-ordinance-paves-way-for-lifelong-visas-for-pios/article6763896.ece> accessed 19 April 2021.

[80] *DC Wadhwa v State of Bihar* (1987) 1 SCC 378; *Krishan Kumar Singh v State of Bihar* (1998) 5 SCC 643; *Krishna Kumar Singh v State of Bihar* (2017) 3 SCC 1.

[81] The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Amendment) Ordinance 2014, No 9 of 2014.

[82] See Anumeha Yadav, 'Ordinance on Land Act brings Opposition Together' (*The Hindu,* 30 December 2014) <https://www.thehindu.com/news/national/opposition-slams-ordinance-to-amend-land-act/article6738765.ece> accessed 19 April 2021.

[83] Mandira Kala and Prachee Mishra, 'While in Session: Does the Executive Really Need the Power to Pass Ordinances?' (*The Wire*, 6 August 2018) <https://thewire.in/government/while- in-session-does-the-executive-really-need-the-power-to-pass-ordinances> accessed 19 April 2021.

[84] Namita Wahi, 'How Central and State Governments have Diluted the Historic Land Legislation of 2013' (*The Economic Times*, 14 April 2018) <https://m.economictimes.com/news/politics-and-nation/how-central-and-state-governments-have-diluted-the-histor- ic-land-legislation-of-2013/articleshow/63764378.cms> accessed 21 April 2021.

[85] The Muslim Women (Protection of Rights on Marriage) Bill 2017, No 247-C of 2017.

and reach a consensus, the Government first promulgated[86] and then re-promulgated twice[87] the same ordinance over the course of two years because it was unable to secure parliamentary approval for its bills, and the ordinances kept on lapsing every time the Parliament re-assembled over a new session. Eventually, the Government was able to muster majority support in the Rajya Sabha, and the law was passed in July 2019.[88]

Such thrust of the NDA Government to legislate through executive fiats, even for regular matters which had no urgency attached, has continued. To quote a few examples, the Government promulgated the Motor Vehicles (Amendment) Ordinance, 2015, to include e-cart and e-rickshaw within in ambit of the Motor Vehicles Act, 1988;[89] the National Sports University Ordinance, 2018, to establish a National Sports University in the north-eastern state of Manipur;[90] and the New Delhi International Arbitration Centre Ordinance, 2019, to establish the New Delhi International Arbitration Centre.[91] Moreover, in at least one instance, the Government prorogued an ongoing budget session of the Parliament, which was originally supposed to end two months later,[92] only to allow the Government to promulgate the Uttarakhand Appropriation (Vote on Account) Ordinance, 2016.[93]

Even certain consequential matters which are too significant to be subjected to non-deliberative executive action have been introduced through ordinances. For instance, the three farm bills, that have the potential to overhaul the way agricultural activities take place in India, and against which the Government continues to face a nation-wide protest[94] were initiated as ordinances in the cover of the COVID-19 pandemic in 2020.[95] They were three of the eleven ordinances that the Government promulgated during the pandemic induced

[86] The Muslim Women (Protection of Rights on Marriage) Ordinance 2018, No 7 of 2018.

[87] The Muslim Women (Protection of Rights on Marriage) Ordinance 2019, No 1 of 2019; The Muslim Women (Protection of Rights on Marriage) Second Ordinance 2019, No 4 of 2019.

[88] The Muslim Women (Protection of Rights on Marriage) Act 2019, No 20 of 2019.

[89] The Motor Vehicles (Amendment) Ordinance 2015, No 2 of 2015.

[90] The National Sports University Ordinance 2018, No 5 of 2018.

[91] The New Delhi International Arbitration Centre Ordinance 2019, No 10 of 2019.

[92] The budget session for the year 2016 was scheduled to take place from February 23 to May 13, 2016. However, Parliament was prorogued on March 29. See 'Budget Session of Parliament from February 23 till May 13, 2016' (*Press Information Bureau*, 4 February 2016) <https://pib.gov.in/newsite/PrintRelease.aspx?relid=136079> accessed 22 April 2021.

[93] The Uttarakhand Appropriation (Vote on Account) Ordinance 2016, No 2 of 2016; 'Modi Govt. Passes 22nd Ordinance, Still Short of UPA Number' (*The Hindu*, 29 August 2016) <https://www.thehindu.com/news/national/Modi-govt.-passes-22nd-Ordinance-still-short-of-UPA-number/article14596574.ece> accessed 22 April 2021.

[94] *See* Hartosh Singh Bal, 'Why Are India's Farmers Angry?' (*The New York Times*, 14 January 2021) <https://www.nytimes.com/2021/01/14/opinion/india-farmers-protest.html> accessed 21 April 2021; Simran Jeet Singh, 'The Farmers' Protests Are a Turning Point for India's Democracy – and the World Can No Longer Ignore That', (*Time*, 11 February 2021) <https://time.com/5938041/india-farmer-protests-democracy/> accessed 21 April 2021.

[95] The Essential Commodities (Amendment) Ordinance 2020, No 8 of 2020; The Farmers' Produce Trade and Commerce (Promotion and Facilitation) Ordinance 2020, No 10 of 2020;

lockdown,[96] and many of them were unrelated to the pandemic and were not on urgent matters.[97] As Yogendra Yadav, an activist and political scientist has observed,

> [their] inclusion in the Covid 'relief package' was purely a distraction. There is nothing so urgent in any of these three laws that call for bypassing Parliament through an ordinance. These measures have been debated for decades and the Government could have waited a few months for Parliament to reconvene.[98]

Ironically, the Prime Minister also used the same argument to highlight how the three farm ordinances were a culmination of widespread discussions that took place over the past 20-30 years.[99] This was in total disregard of the fact that ordinances are constitutionally required to be predicated upon legislative urgency.

The table below offers a comparative overview of the *modus operandi* of the Narendra Modi-led government vis-à-vis the number of ordinances promulgated by different governments in the last three decades:

Time Frame	*Union Government*	*Prime Ministership*	*No. of Ordinances Promulgated*
1990-1999	Multiple	Multiple	196
1999-2004	NDA	Atal Bihari Vajpayee	33
2004-2009	UPA-I	Dr Manmohan Singh	36
2009-2014	UPA-II	Dr Manmohan Singh	25
2014-2019	NDA-I	**Narendra Modi**	**55**
2019-present[100]	NDA-II	**Narendra Modi**	**28**

The Farmers (Empowerment and Protection) Agreement on Price Assurances and Farm Services Ordinance 2020, No 11 of 2020.

[96] For a list of these 11 ordinances, please *see* 'Text of Central Ordinances – 2020' (*Legislative Department, Ministry of Law and Justice*): <https://legislative.gov.in/sites/default/files/legislative_references/ORDINANCES%202020%20%2820.11.2020%29.pdf> accessed 10 March 2021.

[97] Derek O'Brien, 'The Ordinance Raj of the Bharatiya Janata Party' (*Hindustan Times,* 11 September 2020) <https://www.hindustantimes.com/analysis/the-ordinance-raj-of-the-bharati- ya-janata-party/story-NlVvn0pm6updxwYlj0gSvJ.html> accessed 18 April 2021.

[98] Yogendra Yadav, 'Modi Govt's Three Rushed Ordinances Can help Agriculture, But Not Farmers' (*The Print,* 10 June 2020) <https://theprint.in/opinion/modi-govt-three-rushed-ordinances-can-help-agriculture-not-farmers/439148/> accessed 18 April 2021.

[99] ' Farm Laws Not Introduced Overnight; Were Discussed Extensively For 20-30 Years, says PM Modi' (*Business Today*, 18 December 2020) <https://www.businesstoday.in/current/economy-politics/farm-laws-not-introduced-overnight-was-discussed-extensively-for-20-30-years-says-pm-modi/story/425340.html> accessed 18 April 2021.

[100] Data updated upto November 15, 2021, when the government promulgated the Delhi Special Police Establishment (Amendment) Ordinance, 2021, No. 10 of 2021.

Table 1: Data on the number of ordinances passed by the union governments in India since 1990[101]

The data is instructive. Once the union government in Delhi stabilised after a series of minority coalition governments during the 1990s, the average number of ordinances promulgated in a year dwindled significantly. The NDA government, under the leadership of Atal Bihari Vajpayee, issued ordinances at an average of 6.5 per year. The number further reduced during the UPA regime, when the union government passed ordinances at an average of 6 per year. However, this number has nearly doubled since the NDA government under Narendra Modi assumed power. The Government promulgated an average of 11 ordinances since 2014. The years 2019 and 2020 fared worst, with the Government promulgating 16 and 15 ordinances, respectively.

What is more revealing is that this increase in the number of ordinances under the NDA government has been despite it winning a clear majority of seats in Parliament.

Time Frame	*Union Government*	*Type of Win by the Winning Coalition*	*No. of seats won by the Winning Coalition (272 for Majority)*	*No. of seats won by the leading political party*
1999-2004	NDA	Majority	299	182 (BJP)
2004-2009	UPA-I	Plurality	221	145 (INC)
2009-2014	UPA-II	Plurality	262	206 (INC)
2014-2019	NDA-I	Majority	**336**	**282 (BJP)**
2019-2024	NDA-II	Majority	**353**	**303 (BJP)**

Table 2: Data on the number of seats won by the winning coalition and its leading political party in the Indian general elections since 1999.

This data indicates that the reason for such a high number of ordinances is not the instability of the Government or its failure to muster majority support for its legislative agenda; rather, its contemptuous attitude towards the due process of law-making is to blame. It brings to light the prophetic apprehension of G.V. Mavalankar, the first Speaker of the Lok Sabha, about the use of ordinances for purposes other than those which require extreme urgency or emergency. Mavalankar wrote to the then Prime Minister of India Jawahar Lal Nehru in 1954:

[101] *Statistical Handbook 2019* (Ministry of Parliamentary Affairs 2019); 'Legislative References' (Legislative Department, Ministry of Law and Justice) <https://legislative.gov.in/documents/legislative-references; The Gazette of India: http://www.egazette.nic.in/(S(mrrqjpe1koi2r45xcxf3iktq))/RecentUploads.aspx> accessed 18 April 2021.

> … we, as first Lok Sabha, carry a responsibility of laying down traditions. It is not a question of present personnel in the Government but a question of precedents; and if this Ordinance issuing is not limited by convention, only to extreme and very urgent cases, the result may be that, in future, the Government may go on issuing Ordinances giving the Lok Sabha no option, but to rubber-stamp the Ordinances.[102]

This trend of the NDA government of frequently resorting to ordinances for enforcing its legislative agenda is disturbing. This practice not only hinders any parliamentary discussion on pertinent issues, but also wipes off any possibility for pre-legislative deliberation at other forums and with the stakeholders.[103] This has also resulted in the promulgation of certain debatable ordinances, the provisions of which are contrary to the recommendations of expert committees and for which no explanation has been given by the Government. For instance, the recent Tribunals Reforms (Rationalisation and Conditions of Service) Ordinance, 2021,[104] took experts by surprise, as it abolished the Film Certification Appellate Tribunal without any justification, in contradiction to two expert committees that had instead recommended expanding the tribunal's jurisdiction.[105] These episodes highlight the brazen political persistence of the NDA government and its attitude to enforce its political ideas through executive fiats, despite a conscious realisation of the fact that its actions directly vio-late the constitutional ethos and the essence of ordinance-making power.[106]

The ordinance route is typically adopted to neutralise the parliamentary opposition in the law-making process. The next section analyses the Indian anti-defection law, which performs the same role, but vis-à-vis the Government's own party members in the Parliament. It reveals the irony underlying the undemocratic structure of political parties that aim to run a polity that is democratic in nature.

B. Wide Amplitude of the Anti-Defection Law

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[102] *Presidential Ordinances 1950 – 2014* ii (5th Revised Ed, Lok Sabha Secretariat 2015).

[103] Apart from the ordinance route, the government has also misused its rule-making power by wrongly interpreting the parent act and issuing rules with any public discussion. SeealsoRaman Jit Singh Chima, 'More About Big Government than Big Tech' (*The Hindu,* 1 March 2021) <https://www.thehindu.com/opinion/lead/more-about-big-government-than-big-tech/article33956682.ece> accessed 22 April 2021.

[104] Tribunals Reforms (Rationalization and Conditions of Service) Ordinance 2021, No 2 of 2021.

[105] Anuradha Raman, 'The Abolition of FCAT' (*The Hindu,* 11 April 2021) <https://www.thehindu.com/todays-paper/tp-miscellaneous/tp-others/the-abolition-of-fcat/article34293006.ece> accessed 13 April 2021.

[106] For other such instances, see M.R. Madhavan, 'The Ordinance Route is Bad, Repromulgation Worst' *The Hindu*(20 April 2021) <https://www.thehindu.com/todays-paper/tp-opinion/the-ordinance-route-is-bad-repromulgation-worse/article34362855.ece> accessed 21 April 2021.

The anti-defection law was enacted to check the rising menace of floor-crossing among legislators.[107] The tragedy of the anti-defection law is that while it has failed to cure the original sin of floor-crossing,[108] it has counter- productively quelled deliberation and intra-party dissent in Parliament and state legislatures. This is because it has vested political parties with wide powers to virtually dictate the behaviour of their legislators.

The anti-defection law not only proscribes floor-crossing or change in party allegiance, but it also disqualifies a legislator from the membership of the House "if he votes or abstains from voting in such House contrary to any direction issued by the political party to which he belongs or by any person or authority authorised in this behalf…".[109] Such a broadly drafted anti-defection law allows political parties to control a legislator's voting pat-terns through the issuance of party whips, which consequently, in the words of Khosla and Vaishnav, compromise the principle of legislative oversight of the executive by turning the relationship between the two organs 'on its head'.[110] This is also perhaps the reason behind the limited purchase of this kind of provision in other democracies across the world. Out of the forty-one countries having legally binding anti-defection laws,[111] merely five of them – Pakistan,[112] Bangladesh,[113] Sierra Leone,[114] Papua New Guinea,[115] and India

[107] Constitution of India, Tenth Schedule. For a general overview of the law and its history, *see* Paras Diwan, 'Aya Ram Gaya Ram: The Politics of Defection' (1979) 21(3) Journal of the Indian Law Institute 291; P.M. Kamath, 'Politics of Defections in India in the 1980s' (1985) 25(10) Asian Survey 1039; Subhash C Kashyap, 'The Anti-Defection Law – Premises, Provisions and Problems' (1989) 35(1) The Journal of Parliamentary Information 9; Aradhya Sethia, 'Where's the Party?: Towards a Constitutional Biography of Political Parties' (2019) 3(1) Indian L Rev, 23-31.

[108] See Chakshu Roy, 'The Anti-Defection law Continues to Damage Indian Democracy' (*Hindustan Times,* 22 February 2021) <https://www.hindustantimes.com/opinion/the-anti-defection-law-continues-to-damage-indian-democracy-101613914337557-amp.html> accessed 28 April 2021; Gautam Bhatia, 'Why the Anti-Defection Law Has Failed to Deliver' (*Hindustan Times*, 30 July 2020) <https://www.hindustantimes.com/analysis/why-the-anti-defection-law- has-failed-to-deliver/story-JtDhlEFHZ8VPpnNBD7Fv9J.html> 28 April 2021.

[109] Constitution of India, Tenth Schedule, Paragraph 2(b).

[110] Madhav Khosla and Milan Vaishnav, 'The Three Faces of the Indian State' (2021) 32(1) Journal of Democracy 111; see also Subhash C. Kashyap, 'Committees in the Indian Lok Sabha', in John D. Lees and Malcolm Shaw (eds.), *Committees in Legislatures* (Durham, NC: Duke University Press, 1979) 291.

[111] Kenneth Janda, 'Laws Against Party Switching, Defecting, or Floor Crossing in National Parliaments' (2009) Paper delivered at the 2009 World Congress of the International Political Science Association in Santiago, Chile; Csaba Nikolenyi, 'The Adoption of Anti-Defection Laws in Parliamentary Democracies' (2016) 15(1) Election Law Journal 96. These two works include a list of forty countries that have enacted anti-defection laws. The forty-first country is New Zealand, which enacted the anti-defection law in 2018 through the Electoral Integrity (Amendment) Act 2018, No 39 of 2018.

[112] The Constitution of Islamic Republic of Pakistan 1973, art 63A.

[113] The Constitution of the People's Republic of Bangladesh 1972, art 70.

[114] The Constitution of Sierra Leone 1991, art 77.

[115] Organic Law on the Integrity of Political Parties and Candidates 2003, No 0 of 2003, s 70, 72-73.

– have such provisions. More peculiarly, only India, Bangladesh, and Sierra Leone have generic provisions disqualifying a legislator for voting against *any* party direction.

There is no denial of the fact that some form of party cohesion is necessary for the proper functioning of a representative model of democracy that is dominated by political parties.[116] In the absence of such cohesion, electors would be unable to make an informed choice during elections, as defections after elections would amount to a contempt of the electorate, and legislatures would function under uncertainty. However, the absurdly wide reach of the Indian anti-defection law, and its imposition of immediate disqualification on cross-voting, has reduced incentives for an independent debate on legislative matters. It has imposed self-defeating costs on speech, in particular dissent, and has proved to be one of the foremost reasons for declining legislative deliberations in India.[117] Parliament, which was envisioned as a forum for debate, discussion, and deliberation, has been turned into a place where strict party discipline roars louder than the values of free speech.[118] As Madhavan notes, "[t]his law has fundamentally changed the way of functioning of our parliamentary democracy by shifting power away from individual legislators to the leadership of political parties",[119] and thus, in the words of Udit Bhatia, violating the 'many-minds principle'.[120] In a similar vein, Nani Palkhivala wrote scathingly,

> No greater insult can be imagined to the members of Parliament and the State legislatures than to tell them that once they became members of a political party, apart from any question of the party constitution and any disciplinary action that party may choose to take, the Constitution of India itself expects them to have no right to form a judgment and no liberty to think for themselves, but they must become soulless and conscienceless entities who would be driven by

[116] Giovanni Sartori, *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes* (Macmillan 1994) 94; Shaun Bowler, David M. Farrell, and Richard S. Katz (eds), *Party Discipline and Parliamentary Government* (Ohio State University Press 1999).

[117] *See* Ruchika Singh, 'Intra-Party Democracy and Indian Political Parties' (2015) The Hindu Centre for Politics and Public Policy 27.

[118] Kartiak Khanna and Dhvani Shah, 'Anti-Defection Law: A Death Knell for Parliamentary Dissent?' (2012) 5(1) NUJS Law Review 103.

[119] MR Madhavan, 'Legislature: Composition, Qualification, And Disqualification', in Sujit Choudhry et. al. (Eds), *The Oxford Handbook of the Indian Constitution* (Oxford University Press 2016) 281.

[120] Udit Bhatia 'What's the Party Like? The Status of the Political Party in Anti-Defection Jurisdictions' (2021) 40 Law and Philosophy 305; See also Nani Palkhivala, *Our Constitution – Defaced and Defiled* (MacMillan 1974) 67.

their political party in whichever direction the party chooses to push them.[121]

Bhatia has identified three negative implications of strict party discipline for intra-party dissent, which consequently dampen the quality of legislative deliberation: it hinders the formation of dissent; it stifles the expression of dissent; and lastly, it reduces the uptake of dissent.[122] The Indian anti-defection law has led to all these implications. Shivanand Tiwary, a former member of the Rajya Sabha, has termed this phenomenon as 'party dictatorship over legislators', and he notes that "[t]here is no doubt that individual freedom has been compromised by the law. Even genuine voices of dissent and difference have been gagged".[123] In a recent interview, a member of the Haryana state legislature who was standing against his party's official directions, in support of the farmers' protest against the three farm laws, showed his helplessness because of the anti-defection law. "The anti-defection law has made MLAs bonded labourers. We are handicapped", said the MLA.[124] The anti-defection law, thus, not only suppresses free debate in the legislature, but it also subordinates the duties of a parliamentarian towards her constituency to the party dictum. It prioritises party discipline over the values of the democratic form of decision-making. As Khanna and Shah have observed, the anti-defection law has "[confused] dissent for defection".[125] Further, as the anti-defection law applies to members of both the Houses of Parliament, the ruling executive could, if it is able to attain a majority even in the Rajya Sabha, convert the entire law-making process into a rubber-stamp and deprive the country of the advantages of bicameralism.[126] As Madhavan puts it, the anti-defection law has made legislators into mere 'agent[s] of the party'.[127]

[121] Nani Palkhivala, *Our Constitution – Defaced and Defiled* (MacMillan 1974) 67.

[122] Udit Bhatia, 'Cracking the Whip: The Deliberative Costs of Strict Party Discipline' (2020) 23(2) Critical Review of International Social and Political Philosophy 254.

[123] V Kumara Swamy, 'Agree to Disagree' (*The Telegraph,* 21 April 2010) <https://www.telegraphindia.com/opinion/agree-to-disagree/cid/533026> accessed 29 April 2021.

[124] Vikas Vasudeva, 'In Haryana, JJP Under Strain from Protesting Farmers' (*The Hindu,* 12 January 2021) <https://www.thehindu.com/news/national/other-states/in-haryana-jjp-under-strain-from-protesting-farmers/article33568604.ece> accessed 29 April 2021.

[125] Kartiak Khanna and Dhvani Shah, 'Anti-Defection Law: A Death Knell for Parliamentary Dissent?' (2012) 5(1) NUJS Law Review 103, 113.

[126] See Udit Bhatia, 'Cracking the Whip: The Deliberative Costs of Strict Party Discipline' (2020) 23(2) Critical Review of International Social and Political Philosophy 254. The author notes that the second chamber could help in 'multiplying opportunities for rectifying possible errors' only if it is 'constituted of a distinctive set of persons.' The author uses the phrase 'distinctive set of persons' to imply the presence of independent opinions and deliberative autonomy. However, if the political party controls the manner of deliberation in the second chamber as well, the Parliament loses the advantage of bicameralism. The author notes, 'If the only permissible view they can voice is the one sanctioned by the party's leadership, and if they lack the capacity to form opinions that differ from that view, then distinctiveness no longer obtains. We, then, lose, what the epistemic case for bicameralism suggests, is the value of having two chambers of parliament.'

[127] See MR Madhavan, 'The Absurdity of the Anti-Defection Law' (*The Hindu,* 26 February 2021) <https://www.thehindu.com/todays-paper/tp-opinion/the-absurdity-of-the-anti-defection-law/

Moreover, as there is a general absence of intra-party democracy and a tradition of deliberation in almost all the prominent political parties in India,[128] the anti-defection law has transferred the control of the legislative business into the hands of a few leaders at the top.[129] These leaders enjoy vast powers andare unencumbered by any form of regulation on the issuance of whips or mandatory directions.[130] With legislators of their own parties under control, party leaders now concentrate more on convincing their legislators from other political parties than legislators in general to muster the majority over a matter.[131]

The constitutionality of the anti-defection law was challenged before the Indian Supreme Court in *Kihoto Hollohan v Zachillu*.[132] One of the arguments before the court was that the law infringes upon the freedom of speech of legislators and impedes deliberation in the legislature. The court resorted to a balancing approach in responding to this argument. On the one hand, it recognised that '[d]ebate, discussion and persuasion are the means and essence of the democratic process', and on the other, it recorded the presence of a 'real and imminent threat' that defection posed to 'the very fabric of Indian democracy' and noted that's hared beliefs' among legislators of a particular party helps in stabilising the Government.[133] I argue that this is a flawed approach to adopt, as it clubs the arguments concerning free deliberation in the legislature with those pertaining to floor-crossing. It creates a false assumption that any vote against one's own political party is equivalent to floor-crossing, without realising that a cross-vote, in most instances, is merely an expression of a different point of view by a legislator and has no impact on the stability of a government.

article33936936.ece> accessed 30 April 2021.

[128] See Pratap Bhanu Mehta, 'Reform Political Parties First' (2001) 497 Seminar; Pratap Bhanu Mehta, 'State and Democracy in India' (2012) 178 Polish Sociological Review 203, at 217-218; Zoya Hasan, 'The Question of Intraparty Democracy' (*The Hindu,* 17 December 2017) <https://www.thehindu.com/opinion/op-ed/the-question-of-intraparty-democracy/article21827524.ece> accessed 30 April 2021.

[129] See Aradhya Sethia, 'Where's the Party?: Towards a Constitutional Biography of Political Parties' (2019) 3(1) Indian Law Review 1, 28-31; Udit Bhatia 'What's the Party Like? The Status of the Political Party in Anti-Defection Jurisdictions' (2021) 40 Law and Philosophy 305.

[130] Law Commission of India, *One Hundred Seventieth Report on Reforms of the Electoral Law* (1999), Part III, Chapter IV, [3.4.6].

[131] See M.R. Madhavan, 'Legislature: Composition, Qualification, And Disqualification', in Sujit Choudhry et al (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2016) 282; *See* PTI, 'Mayawati Asks BSP MPs Not to Join Opposition Protest in FDI In Retail' *The Economic Times*(21 November 2012) <https://economictimes.indiatimes.com/news/pol- itics-and-nation/mayawati-asks-bsp-mps-not-to-join-opposition-protest-on-fdi-in-retail/articleshow/17311831.cms?from=mdr> accessed 30 April 2021; Purnima S. Tripathi, 'Friends In Need' (*Frontline*, 28 December 2012) <https://frontline.thehindu.com/cover-story/article30162265.ece#!> accessed 30 April 2021.

[132] *Kihoto Hollohan v Zachillu* 1992 Supp (2) SCC 651.

[133] *Ibid*, [33]-[44].

The Court gave its judgment in the backdrop of a high number of floor-crossings, and therefore, it failed to independently appreciate the values of deliberation in the law-making process and the negative impact of the anti-defection law on the same. It was satisfied merely by the fact that the Tenth Schedule envisages certain exceptions under which a legislator can be exonerated from disqualification on cross-voting or abstinence from voting.[134] Further, in interpreting the clause 'any direction issued by the political party', whose violation could invite disqualification from the House under Paragraph 2(b) of the Tenth Schedule, the Court laid down a very wide interpretation, giving political parties immense lee way to issue binding whips. It noted:

> the direction … would have to be limited to a vote on motion of confidence or no-confidence in the Government or where the motion under consideration relates to a matter which was an integral policy and programme of the political party on the basis of which it approached the electorate.[135]

Any vote against party directions on a motion of confidence or no-confidence would undoubtedly affect the stability of the Government and, therefore, must be covered under the anti-defection law. However, the second part of the aforementioned ruling lays down a very vague rule for testing the validity of a party whip or direction. Every political party makes numerous promises during its election campaign. Every effort is made to ensure that the party manifesto reflects the concerns of every section of society on all possible issues. Therefore, linking the legality of a direction issued under the Tenth Schedule with the party's 'integral policy and programme' gives parties huge flexibility to issue binding directions on almost all legislative matters. As Khanna and Shah observed, "[t]he Court … has unwittingly given too expansive a ground for when dissent is prohibited".[136]

Not surprisingly, political parties have conveniently employed this ruling in their favour. For instance, the BJP has issued whips to its members in nearly all parliamentary sessions by merely asking the party legislators to be present in Parliament and 'support the Government's stand', without mentioning any specific legislation in relation to which such whips are issued.[137] Similar to the

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[134] *Ibid*.

[135] *Ibid*, [122].

[136] Kartiak Khanna and Dhvani Shah, 'Anti-Defection Law: A Death Knell for Parliamentary Dissent?' (2012) 5(1) NUJS Law Review 103, 124.

[137] See, for instance, KC Srivatsan, ''Very Important Business': BJP Issues 3-line Whip to Lok Sabha Members' *Hindustan Times* (12 February 2021) <https://www.hindustantimes.com/india-news/very-important-business-bjp-issues-3-line-whip-to-lok-sabha-members-101613138826772.html> accessed 2 May 2021; ANI 'BJP Issues Whip to Lok Sabha MPs Asking Them to be Present on March 16' (*The New Indian Express,* 13 March 2020) <https://www.newindianexpress.com/nation/2020/mar/13/bjp-issues-whip-to-lok-sabha-mps-asking-them-to-be-present-on-march-16-2116277.html> accessed 2 May 2021; IANS, 'BJP Issues Whip to Its MPsto be Present in Parliament Till December 11' (*India Today,* 8 December 2019) <https://

requirement of legislative immediacy in the case of ordinances, the requirement of the particular legislation's connection, in relation to which a whip is issued, with the 'integral policy and programme of the basis of which the party approach the electorate' has been, for all intents and purposes, written off. The only causality here is parliamentary deliberation.

A multi-party Parliament has three primary pillars: the ruling party, the opposition parties, and the Chair. With inter-party and intra-party dissent under control, the third tool that the NDA government has adopted to curb parliamentary deliberation is aimed towards controlling the last pillar – the Chair of the two Houses of Parliament. The next section elaborates on how the Chair has been working in a politicised manner to favour the ruling party while denying legislative due process to the opposition.

C. Abuse of Power by the Chair

The Chairs of the two Houses of Parliament are supposed to function independently and impartially to guarantee legislative due process.[138] However, the nature of the Offices of the Speaker and Deputy Speaker of the Lok Sabha and the Deputy Chairman of the Rajya Sabha[139] remains partisan.[140] The Constitution[141] and corresponding Parliamentary Rules[142] provide that the members of the Parliament shall elect the chairpersons of their respective Houses, and unlike the British parliamentary tradition,[143] there is no obligation on the chosen chairpersons to resign from their political parties, so as to portray

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www.indiatoday.in/india/story/bjp-issues-whip-to-its-mps-to-be-present-in-parliament-till-december-11-1626473-2019-12-08> accessed 2 May 2021; ANI, 'BJP Issues Whips to Lok Sabha MPs' (*India Today*, 25 July 2019) <https://www.indiatoday.in/india/story/bjp-whip- lok-sabha-1573263-2019-07-25> accessed 2 May 2021; HT Correspondent, 'Triple Talaq Bill to Face Lok Sabha Test on December 27, BJP Issues Whip to MPs' (*Hindustan Times,*26 December 2018) <https://www.hindustantimes.com/india-news/triple-talaq-bill-to-face-lok- sabha-test-on-december-27-bjp-issues-whip-to-mps/story-qBPmLZUQ1PGQzWsTwGKHXK. html> accessed 2 May 2021; Special Correspondent, 'BJP Issues Whip to MPs' (*The Hindu,* 12 March 2018) <https://www.thehindu.com/news/national/bjp-issues-whip-to-mps/article23164249.ece> accessed 2 May 2021.

[138] See G.V. Mavalankar, 'On the Position of Speaker, No-Confidence Motions and Parliamentary Committees', in Subhash C. Kashyap (ed.), *Dada Saheb Mavalankar: Father of Lok Sabha* (The Lok Sabha Secretariat 1989) 147; Philip Laundy, *The Office of Speaker* (Cassell 1964) 7; Philip Laundy, 'The Speaker of the House of Commons' (1960) 14 Parliamentary Affairs 72; *See* D.R. Elder (Ed.), *House of Representatives Practice* (7th Ed, Department of the House of Representatives, Canberra 2018) 167-169.

[139] The Constitution confers *ex-officio* chairpersonship of the Council of States upon the Vice-President of India. See Constitution of India, art 89.

[140] See M.N. Kaul and S.L. Shakdher (Anoop Mishra ed.), *Practice and Procedure of Parliament* (7th ed, Lok Sabha Secretariat 2016) 102-108.

[141] Constitution of India, art 89 and 93.

[142] Rules of Procedure and Conduct of Business in Lok Sabha, Rules 7 and 8; Rules of Procedure and Conduct of Business in the Council of States, Rule 7.

[143] 'The Speaker of the House of Commons' (*House of Commons, UK Parliament*) <https://www.parliament.uk/globalassets/documents/commons-information-office/Speaker.pdf> accessed 5

political impartiality.[144] Since these functionaries are chosen through elections, more often than not, they belong to the ruling party,[145] making their Offices' susceptible to partisan decision-making. This is because the Constitution and the Parliamentary Rules vest the officers of these functionaries with them certain decisive powers[146] with no internal checks;[147] rendering them open to abuse in favour of the ruling party and subversion of the political opposition.[148] One such power relevant to present study for its impact on parliamentary deliberation is the Speaker's power to certify legislative bills as Money Bills.

The Indian Constitution envisages a restricted role for the Rajya Sabha insofar as Money Bills are concerned. Money Bills can only be introduced in the Lok Sabha and the Rajya Sabha is obligated to mandatorily return the Money Bill to the Lok Sabha with its non-binding recommendation(s) 'within a period of fourteen days from the date of its receipt'.[149] Therefore, the Lok Sabha Speaker's certification of a bill as a Money Bill curtails the Rajya Sabha's powers, and has an obstructive impact on the principle of bicameralism, as it nullifies any check that may be posed by the Rajya Sabha. The exer-cise of such powers allows the ruling executive to bypass the requirement of seeking majority support for its legislative agenda in the Rajya Sabha and saves it from deliberating, defending, and convincing the parliamentarians in Rajya Sabha about the merits of its proposed legislation.[150]

May 2021; See Philip Laundy, *Parliaments in the Modern World* 49-50 (Dartmouth Publishing Company, Hampshire 1989).

[144] See Hari Chand, 'Powers of the Speaker' (1974) 16(1) Journal of the Indian Law Institute 128, at 132; Deepak Raju and Karthy Nair, ''Quit or Be Disqualified': Does Continuing as Speaker Inviting Expulsion from One's Party Warrant Disqualification Under the Tenth Schedule?' (2009) 2 NUJS Law Review 127.

[145] M.R. Madhavan, 'Parliament', in Devesh Kapur, Pratap Bhanu Mehta, and Milan Vaishnav (eds), *Rethinking Public Institutions in India* (Oxford University Press 2017) 79.

[146] For instance, see Constitution of India, Tenth Schedule, paragraph 6; for a general overview of the Speaker's powers, see M.N. Kaul and S.L. Shakdher (Anoop Mishra ed.), *Practice and Procedure of Parliament* (7th ed, Lok Sabha Secretariat 2016) 125-136; Vikram Narayan and Jahnavi Sindhu, 'A Case for Judicial Review of Legislative Process in India?' (2020) 53(4) World Comparative Law 358, at 366-367.

[147] See Hari Chand, 'Powers of the Speaker' (1974) 16(1) Journal of the Indian Law Institute 128.

[148] For a detailed account of how the politicized nature of the Speaker of the House of People subverted the parliamentary process and abused its powers, particularly to undermine the opposition, See Sujit Choudhry, 'Opposition Rights in Parliamentary Democracies' (Unpublished manuscript) https://www.law.nyu.edu/sites/default/files/Opposition%20 Rights%20in%20Parliamentary%20Democracies%20Sept%202020%20draft_0.pdf; Khaitan (n 1) 63-68; *See* Chakshu Roy, 'The Anti-Defection Law Has Failed. It Is Time to Scrap It' (*Hindustan Times,* 26 July 2020) <https://www.hindustantimes.com/analysis/the-anti-defection-law-has-failed-it-is-time-to-scrap-it/story-BCTMzgsgLiqHzrOxqSucCM.html> accessed 4 May 2021.

[149] Constitution of India, art 109.

[150] *Justice KS Puttaswamy (Retd) v Union of India* (2019) 1 SCC 1, [1094]-[1111] (per Chandrachud, J).

The ruling political party typically uses such tactics when it lacks a majority in the Rajya Sabha – a situation that the present NDA government has recurrently exploited. This endeavour is most commonly furthered by clubbing unrelated matters with a bill concerning the subjects enlisted under Article 110 – i.e. taxation, financial obligations undertaken by the Government of India and Consolidated Fund of India – and passing the whole as a Money Bill in clear violation of the word 'only' mentioned under Article 110 of the Constitution.[151] One of the most prominent and highly debated examples of the same is the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 [the 'Aadhaar Act'].[152]

The Aadhaar Act was enacted to create a biometric identity for Indian citizens. It requires every citizen to obtain an Aadhaar number by submitting demographic and biometric information, which could also be used as a proof of identity. The preamble to the Aadhaar Act mentions that the law was introduced to ensure 'targeted delivery of subsidies, benefits and service, the expenditure for which is incurred from the Consolidated Fund of India …'.[153] *Prima facie*, it might seem that the Act falls under the domain of Article 110 since it charges benefits on the Consolidated Fund of India. However, a detailed study of the Act reveals that the Government tacked various additional provisions in the Act, which virtually brings it out of the definition of a Money Bill.[154]

For instance, apart from the voluntary use of the Aadhaar number as a proof of identity, Section 57 of the Act also authorised any individual (private or otherwise) to require the possession of the Aadhaar number as a means of establishing the identity of an individual 'for any purpose'. The Act also empowers the Unique Identification Authority of India, the nodal authority established to perform the core functions outlined in the Act, to specify the manner of use of the Aadhaar number for 'any other purposes', outside of the preamble.[155] Therefore, read cumulatively, the Act creates an ecosystem wherein the possession of a biometric-based Aadhaar number could be made compulsory for availing any service, which might even have no connection with the Consolidated Fund of India.

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[151] Constitution of India, art 110(1) ('For the purposes of this Chapter, a Bill shall be deemed to be a Money Bill if it contains **only** provisions dealing with all or any of the following matters, namely: - …') (Emphasis mine).

[152] Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act 2016, Act No 18 of 2016.

[153] *Ibid*, preamble.

[154] See M.R. Madhavan, 'Name of The Bill' (*The Indian Express,*15 April 2016) <https://indianexpress.com/article/opinion/columns/aadhaar-bill-money-bill-name-of-the-bill-2754080/> 10 May 2021; Pratap Bhanu Mehta, 'Privacy After Aadhaar' (*The Indian Express,* 26 March 2016) <https://indianexpress.com/article/opinion/columns/privacy-after-aadhaar-money-bill-rajya-sabha-upa/> accessed 10 May 2021.

[155] Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act 2016, s 23(h).

The Aadhaar Act is not the only example in this respect. Since 2014, the Speaker has in an unconstitutional fashion, certified many contentious bills as Money Bills.[156] This was especially evident during the Government's first term, when the opposition parties enjoyed a majority in the Rajya Sabha. It is during this time that the Government introduced the dubious electoral bond scheme, which allows a donor to anonymously donate an unlimited amount of funds to political parties by amending various laws through the Finance Act, 2017.[157] Under Part XIV, the Finance Act also amended several statutes that established various tribunals in India,[158] to, *inter alia*, (1) abolish and merge some of the existing tribunals; and (2) empower the Central Government to make rules regarding the conditions of service, qualification, appointment, term of office, salaries and allowances, resignation, and removal of the presiding officers and other members of such tribunals.[159] Compared to the Aadhaar Act, the tacking of general non-money related aspects with a Money Bill is much more explicit here.[160]

Similarly, the Government made it easier for political parties to accept and avoid scrutiny on receipt of foreign funds[161] and got parliamentary sanction for its demonetisation scheme by taking recourse to the Money Bill route.[162] These instances evince how the impartiality of the Chair has been compromised and enervated in the Indian legislative setting. The Chairpersons seem to be prioritising party patronage over ensuring legislative due process and independent functioning.

IV. CONCLUSION

In this paper, I have documented the declining trend of parliamentary deliberation in India, which has contributed to the incremental establishment of an authoritarian rule. It shows how the NDA government has been able to achieve

[156] For a list of the same, see Pratik Datta, Shefali Malhotra and Shivangi Tyagi, 'Judicial Review and Money Bills' (2017) 10(2) NUJS Law Review 75, 76-77.

[157] The Finance Act 2017, No 7 of 2017; Anjali Bhardwaj and Amrita Johri, 'Ensuring Trust in the Electoral Process' (*The Hindu,* 8 March 2021) <https://www.thehindu.com/opinion/op-ed/ensuring-trust-in-the-electoral-process/article34022063.ece> 11 May 2021.

[158] Finance Act 2017, see Part IV.

[159] *Ibid* s 184.

[160] *See* Suhrith Parthasarathy, 'Trickeries of the Money Bill' (*The Hindu,* 10 April 2019) <https://www.thehindu.com/opinion/lead/trickeries-of-the-money-bill/article26799226.ece> accessed 12 May 2021.

[161] PTI, 'Lok Sabha Passes Bill to Exempt Political Parties from Scrutiny on Foreign Funds, Without Debate' *The Hindu*(18 March 2018) <https://www.thehindu.com/news/national/lok-sabha-passes-bill-to-exempt-political-parties-from-scrutiny-on-foreign-funds-without-debate/article23285764.ece> accessed 13 May 2021.

[162] The Specified Bank Notes (Cessation of Liabilities) Act 2017, No 2 of 2017; 'To Bypass RS, Demonetization to Come as A Money Bill' (*DNA*, 28 January 2017 <https://www.dnaindia.com/india/report-to-bypass-rs-demonetization-to-come-as-money-bill-2296844> accessed 13 May 2021.

this by exploiting certain widely drafted constitutional provisions without the need to execute any overt constitutional or legal change.

This paper may also act as the foundation of the argument that the Indian Parliament needs to be redeemed, urgently. The ruling NDA government has reduced the Parliament into an institution that is functioning only to present the veneer that the Government has enough numbers to fulfill the minimum constitutional requirements for passing a bill. It is functioning in an abjectly formalistic manner, putting a mask that falsely portrays a healthy parliamentary democracy in India. It is being utilised solely to ascribe legitimacy to governmental actions.

In a parliamentary democracy, Parliament is the only institution that directly represents the people and holds the Government to account. However, as this system fuses the legislative and the executive wing of the State to a great extent, it is vital for the Constitution to envisage sufficient checks against the Government's dominance over the Parliament. The current Indian constitutional and parliamentary framework fails in this regard. It vests several important powers within the exclusive domain of the ruling party, including the power to summon Parliament, decide how the Parliament functions, set the agenda for debate and discussion, refer a bill to a parliamentary committee, etc. In such a situation, debate and deliberation become *the* crucial tools for the opposition and the backbenchers to seek accountability from the Government. However, as discussed in this paper, several constitutional and institutional design flaws support the current NDA government in bypassing Parliament and its deliberative procedure while pursuing its ideological goals. There is an urgent need to register these design flaws in light of the manner of allocation and actual exercise of power by the constitutional authorities. Only then would we be able to fruitfully mull over possible design changes and check the abuse of power by the executive.

One of the possible solutions to redeem the balance of power between the Parliament and the executive could be to enable the opposition and give it considerable power, at least in procedural matters.[163] This could perhaps be done by instituting a form of submajority rule that would enable opposition parties to set parliamentary agenda and 'force public accountability and transparency upon majorities.'[164] As Adrian Vermeule has argued, 'an institution that is committed to making final substantive decisions by majority or supermajority vote, for the standard reasons, might work better if minorities have the power to force accountability upon the majority.'[165]

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[163] See Daryl J Levinson and Richard H Pildes, 'Separation of Parties, Not Power' (2006) 119(8) Harvard Law Review 2311, 2368-2375.

[164] Adrian Vermeule, 'Submajority Rules: Forcing Accountability Upon Majorities' (2005) 13(1) The Journal of Political Philosophy 74.

[165] *Ibid*, at 79.

It is true that scholars have been sceptical about the relative success of constitutional design in checking executive aggrandisement.[166] However, by making certain constitutional and institutional design changes that ensure internal balancing of executive power and creation of channels for opposition parties to impose checks on the executive,[167] certain benefits for the Indian constitutional democracy can be achieved. Such an imposed deliberative exercise might allow the opposition to seek justifications from the Government for their legislative proposals and bring on record their counter opinion, which would display to the public alternative policy package to choose from in the next election. Moreover, given that democratic backsliding in India has been achieved through the manipulation of the existing constitutional framework, making amends to the same is a necessary beginning point. As Stephen Gardbaum has also argued, while developing the anti-concentration principle,[168] constitutional and institutional design measures are relevant "because of the nature of the acts of assault themselves. It is the choice of structural populists to employ the tool of constitutional law as their preferred weapon against separation of power that renders constitutional design relevant and creates the contingent opportunity for constitutional lawyers and scholars to use their professional expertise indefence of constitutional democracy. … institutional design has facilitated, and can also hinder, some of the moves that structural populists have taken to undermine the diffusion of political power."[169]

Importantly, Gardbaum also immediately qualifies the significance of constitutional design solutions to check the authoritarian impulse of a governance regime. He writes, "relying on constitutional, institutional, and democratic design to render the concentration of political power more difficult for structural populists to achieve is not a panacea and can only be part of any solution …".[170] Since India is already on the path of authoritarianism, expecting any constitutional design changes from the present Government is unrealistic.

Therefore, apart from changes in constitutional and institutional design, external checks in the form of judicial review could be envisaged as a suitable solution. As Vikram Narayan and Jahnavi Sindhu have shown, it is possible

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[166] See Wojciech Sadurski, 'On the Relative Irrelevance of Constitutional Design: Lessons from Poland' (2019) Sydney Law School Legal Studies Research Paper Series, No. 19/34.

[167] See Anmol Jain, 'Political Process Failure in the Indian Parliament: Studying Abuse of Power by the Chair and How It Can be Addressed' (2022) 6(2) Comparative Constitutional Law and Administrative Law Journal 87 (In this paper, I discuss a few institutional design changes that can be introduced to safeguard the Chairs of the two House of Parliament from partisan functioning.)

[168] Stephen Gardbaum, 'The Counter-Playbook: Resisting the Populist Assault on Separation of Powers' (2020) 59(1) Columbia Journal of Transnational Law 1, at 28 ('the anti-concentration principle aims to counter the assault on the separation of powers that has been the distinctive and signature strategy of structural populists over the past few years by identifying and fortifying the actual or likely targets of the attack.').

[169] *Ibid*, 23-24.

[170] *Ibid*, 6, 23.

under the existing Indian constitutional framework to employ direct as well as an indirect form of judicial review of the legislative process to quash the laws enacted without transparency, participation, and deliberation.[171]

Perhaps for those laws that are fast-tracked by the Parliament, for instance, owing to the speaker's undue interference, Indian courts could develop a weak form 'pure procedural review', as envisioned by Stephen Gardbaum, to reinforce representative law-making and democratic practices in the process. As Gardbaum notes, this form of judicial review 'protects the legislative-executive separation of powers and the distinct role of the legislature from executive overreach.'[172] One significant example of this approach is the decision of the Israel Supreme Court in *Quantinsky v The Israeli Knesset*,[173] wherein the Court struck down a tax law due to certain defects in the legislative process, particularly the lack of proper deliberation on the bill due to its fast-tracking.

However, it is important to state that the viability of these suggestions and accompanying changes need to be comprehensively studied by scholars. Such a study is beyond the scope of this paper. Nevertheless, these changes must be realised, and as I have demonstrated through multiple examples, there is a need to institutionalise realism in the way we design our institutions and their procedural aspects. Otherwise, the challenging times that the Indian democracy is facing today would sustain for a long time, perhaps even beyond the present regime, and could again be re-imposed by a future autocrat.

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[171] Vikram Narayan and Jahnavi Sindhu, 'A Case for Judicial Review of Legislative Process in India?' (2020) 53(4) World Comparative Law 358.

[172] Stephen Gardbaum, 'Comparative Political Process Theory' (2020) 18(4) International Journal of Constitutional Law 1429.

[173] *Quantinsky v The Israeli Knesset* HCJ 100042/16 (2017).