Chapter II

Freedom of Speech and Immunity from Legal Proceedings ‘In Respect of Anything Said or Vote Given’

In a functional democracy, freedom of speech is indispensable for maintaining the independence of deliberative body like a legislature and to enable its members to fulfill their duties in an effective and efficient manner. The members of the legislature must be able to express their views democratically in the house without the apprehension of being prosecuted by the courts. If they are sued or prosecuted for the statements made in the legislature on the ground of defamation or otherwise, then they will be discouraged from liberally expressing their views on various issues pertaining to public policy.

Further, a judicial intrusion, in the internal affairs concerning the legislative functions of the legislative body, would be violative of ‘Separation of Powers’ which is the universally accepted constitutional principle. Moreover, in the Constitutional Systems like India and U. K., having the ‘Parliamentary form of Executive (Government)’, the legislatures have to perform an additional task of ensuring the accountability of the executive organ of the State to the people. The top brass executive is drawn from the well of the legislature and the Cabinet is collectively answerable to the lower house of the legislature\(^{44}\). The ministers are integral part of the legislature. During the ‘Question Hour’\(^{45}\), the members are free to ask questions to the ministers for the purpose of obtaining information on a matter of public import within the special cognizance of the respective ministers. The members of the legislatures also evaluate the working of the administration and constructively pass judgment on the policies of the Government. In the absence of an absolute freedom to assess the policies of the Government assured to the members of the legislature, the principle of ‘responsible government’ cannot be effectively upheld.


\(^{45}\) In the Lok Sabha, the first hour of every sitting (11.00 a.m. to 12.00 noon) is exclusively devoted to asking questions by the members to the concerned ministers. For detailed discussion on ‘The Question Hour’, See S. G. Deogaonkar, *Parliamentary System in India* (Concept Publishing Company, New Delhi 1997) 77
For these reasons, any violation of the freedom of speech of members of the legislative bodies is regarded as the ‘breach of privilege’ and punishable as such. Similarly, an immunity to an individual who has published any reports, paper, votes or proceedings under the authority of the Legislature, from any legal liability, is the offshoot of the ‘freedom of speech’ in the Houses of Legislature. In the recent times, progressive legislative changes have been made in some countries like United Kingdom\(^{46}\), Australia\(^{47}\) and India\(^{48}\) to allow the publication of true and accurate reports of the proceedings of the Houses, in good faith, even if such publication is made without the authorization of the Houses. However, the right of the Houses to prohibit the publication of the expunged portions of the speeches or to carry out secret meetings has not been affected.

I. Position in other countries

1. United Kingdom

The Freedom of Speech in the British Parliament is recognized under Article IX of the Bill of Rights 1688, which states that the freedom of speech or debates or proceedings in Parliament ought not to be impeached or questioned in any place out of Parliament including the courts. A Member of Parliament in United Kingdom is permitted to speak anything including the statements damaging or offensive to the other individuals and ought not to be made liable to any court for libel or molestation. The immunity from any legal action in respect of anything said during the proceedings of Parliament is also applicable to the statements made in Parliamentary Committees by Members of Parliament and the witnesses appearing before such committees.

According to Erskine May, ‘Subject to the rules of order in debate, a member may state whatever he thinks fit in debate, however offensive it may be to the feelings, or

---

\(^{46}\) See, Defamation Act, 1996 of U.K. s. 18

\(^{47}\) Parliamentary Privileges Act, 1987 of Australia s. 10 (1), See Annexure III for the Full Text of the Act

\(^{48}\) Article 361A inserted by 44\(^{th}\) Constitutional Amendment in 1978, See Annexure I for the Full Text
injurious to the character, of individuals; and he is protected by his privilege from any action for libel, as well as from any other question or molestation.\textsuperscript{49}

The British Parliament also has a right to conduct the close-door debates or proceedings by excluding the strangers and prohibit the publication of the same. Any infringement of this rule may bring about the action for breach of privilege. However, the Parliamentary Papers Act, 1840 of United Kingdom gives summary protection to persons employed in the publication of Parliamentary Papers. Under section 1 of the Act, any person against whom any civil or criminal proceeding are initiated, with regard to the publication of any report, paper, votes, or proceedings by or under the authority of either House of Parliament, is entitled to produce the certificate and affidavit to that effect, in the court. The court shall, thereupon, be required to immediately stay such proceedings. Under section 3 of the Act, it shall be lawful in any civil or criminal proceedings for any person to show that the impugned publication was extract from or abstract of report, paper, votes, or proceedings of either House of Parliament provided that the publication was made in bonafide manner without any malice. Interpreting the said provision, Lord Denning in \textit{Associated Newspapers Ltd. v. Dingle} said:

\textit{….. If a newspaper seeks to rely on the privilege attaching to a parliamentary paper; it can print an extract from the parliamentary paper and can make any fair comment on it and it can reasonably expect other newspapers to do the same. But if it adds its own spice and prints a story to the same effect as the parliamentary paper, and garnishes and embellishes it with circumstantial detail, it goes beyond the privilege and becomes subject to the general law. None of its story on that occasion is privileged. It has "put the meat on the bones" and must answer for the whole joint. If it cannot justify it, it must pay damages: and it cannot diminish these by reference to the privileged reports, which it and others may have given previously.}\textsuperscript{50}

In \textit{Wason v. Walter},\textsuperscript{51} it was held that the publisher had the right to publish an accurate report of the debates of the House of Lords without any malice. The principle


\textsuperscript{50} Associated Newspapers Ltd. v. Dingle, [1964] A. C. 371, p. 411

\textsuperscript{51} Wason v. Walter (1868) L.R. IV Q.B. 73
has now been incorporated in Section 15 of the Defamation Act, 1996, which says that the publication of certain reports or other statements, mentioned in Schedule 1 of the Act, is privileged unless the publication is shown to be made with malice. However, the protection is not extended to the publication of anything, which is not of public concern and not for public benefit.

The Joint Committee of House of Lords and House of Commons on Parliamentary Privileges in its First Report published in 1999 has recommended that advisory guides to members of both Houses on the exercise of the privilege of freedom of speech should be drawn up.

2. Australia

Article IX of the Bill of Rights 1688 also applies to the Parliament of the Commonwealth of Australia by virtue of Section 49 of the Commonwealth Australian Constitution Act. It says that members of the House of Representatives and the Senate, and the members of the Committees of each House, shall enjoy the same privileges as are enjoyed by members of the House of Commons of the U. K. Parliament.

According to Section 16(2) of the Parliamentary Privileges Act, 1987 of Australia, proceedings in Parliament means all the words spoken and acts done in the course of, or for the purposes of or incidental to, the transacting of the business of the House or of a Committee. Section 16(3) of the Act, further, provides that in proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of: (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament; (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or (c) drawing, or inviting the drawing of, inferences or


53 See Annexure II for more details

54 The founding fathers of the Indian Constitution modeled Articles 105 (3) and 194 (3) on Sec. 49 of the Commonwealth Australian Constitution Act

55 See Annexure III for the Full Text of the Act
conclusions wholly or partly from anything forming part of those proceedings in Parliament. The freedom of speech of the Members of the Parliament of Commonwealth in Australia is, however, restricted by the statutory rules of the House of Representative and the Senate.

3. United States

Article 1, Section 6 of the U.S. Constitution provides that for any speech or debate in either house, the Members of the Congress shall not be questioned in any other place. The aides of the Congressmen can also claim this privilege\(^56\). In *United States v. Johnson*\(^57\), a Congressman was convicted on the charge of conspiracy to deliver a favorable speech for compensation in the House of Representatives in order to influence the Justice Department to dismiss pending indictments against certain loan companies. The Government alleged that the speech was delivered in bad faith to serve private interests. The U. S. Supreme Court held that Article 1, Section 6 of the Constitution, barred any judicial inquiry into the motivation for, and circumstances surrounding a speech made by the member of House of Representative. The Court observed that the Speech or Debate Clause was designed to protect the members of Congress against prosecution by a possibly unfriendly executive and conviction by a possibly hostile judiciary\(^58\). The Court upheld the decision of the Court of Appeal to set aside the conviction on the conspiracy count.

In *Hutchinson v. Proxmire*\(^59\), the U. S. Supreme Court has made it clear that the ‘Speech or Debate Clause’ is not intended to create absolute privilege from liability for defamatory statements made outside the legislative Chambers by the members of the Congress. In this case, the respondent Senator made a speech in the Senate about the wasteful governmental spending by the federal agencies that had funded the petitioner scientist’s study of behavioral patterns of certain animals. The text of the speech was later included in the press release and in the newsletters sent out by the

\(^{56}\) Gravel v. United States, 408 U. S. 606 (1972)


\(^{58}\) Ibid. p. 179

\(^{59}\) Hutchinson v. Proxmire 443 U. S. 111 (1979)
Senator. The Court held that the press release and the newsletters being part of informing function of the member were not vital part of the deliberative process of the Senate and they represented the views and will of the single individual member and not the collective view of the Congress.

Commenting upon the nature and scope of the Speech & Debate Clause, Craig Ducat has observed—

…any grant of absolute immunity carries the potential for mischief. If a representative or senator makes defamatory statements outside the halls of Congress, he is subject to suit by the injured party as anyone else. But if those statements are made on the floor or in the Committee rooms, such statements - no matter how irresponsible or damaging - cannot legally be held against him. The tension between maintaining the integrity of the Congress and preserving immunity that frequently appears to place the legislator above law pervades all decisions interpreting the Speech and Debate Clause. The Supreme Court has endeavored to walk this Constitutional tightrope by distinguishing conduct that is part of the legislative process from that which is not.60

The above-stated comments indicates that a clear distinction should be made between the statements made by the members of legislatures in the course of the proceedings of the House and statements made or published by them outside the House. Any interpretation of provision of the Constitution guaranteeing the immunity in respect of anything said in the house should be interpreted in consonance with the object to be achieved by the provision. The primary purpose of the constitutional protection given to the freedom of speech is to guarantee the independent and effective functioning of the legislative body. The individual member of the legislative body should not be permitted to make colourable use of the immunity enjoyed by him and reproduce the objectionable/defamatory statements, made by him in the house, outside the house. Such an act would amount to playing fraud on the provisions of the Constitution and would also defeat the very purpose of conferring the said immunity on the member of the legislative body.

60 Craig Ducat, Constitutional Interpretation (8th edn Thomson West 2004) 173
II. Genesis of the Constitutional Provisions in India

According to Articles 105(1) and 194(1) of the Indian Constitution, there shall be freedom of speech in Parliament and State Legislatures, respectively, which is subject to “other provisions of the Constitution and the rules and standing orders regulating the procedure of the House”. According to Articles 105(2) and 194(2), the members of the Parliament and State Legislatures have the immunity from the liability to any proceedings in any court in respect of anything said or vote given by them in the Houses or in any Committee. They further provide that no person shall be so liable in respect of the publication by or under the authority of the Houses of any report, paper, votes or proceedings. These provisions are based on clause 1 of Sec. 28 of the Government of India Act, 1935 which was applicable to the Federal Legislature existed before the independence of India.\(^{61}\) Section 71 (1) of the Act was the analogous provision in respect of provincial legislature. It was couched in the similar language as used in section 28 (1), and it conferred the freedom of speech on the members of the pre-independence Provincial Legislatures.

There was no debate in the Constituent Assembly as to the adoption of principles laid down in clause 1 of Sec. 28 and 71 of the Government of India Act regarding the freedom of speech. The said provisions were made applicable, with necessary modifications, to the Parliament and State Legislatures under Articles 105 and 194 of the newly drafted Constitution. The Assembly improved upon Sec. 28 (1) of the Government of India Act, 1935 and used two separate clauses to deal with the freedom of speech and immunity of a Member of Parliament and State Legislatures from liability to any proceedings in any court in respect of anything said or vote given. In Clause 1 of Articles 105 and 194, which guarantees the freedom of speech, the restrictive words “Subject to the other provisions of the Constitution” are used. Clause 2 of Articles 105 and 194, however, does not contain any such restrictive words and grants absolute immunity on the members of the Parliament and State

\(^{61}\) Sec. 28, Clause 1, of the Government of India Act provided that: Subject to the provisions of this Act and to the rules, and standing orders regulating the procedure of the Federal Legislature, there shall be freedom of speech in the Legislature, and no member of the Legislature shall be liable to any court in respect of anything said or vote given by him in the Legislature or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of either Chamber of the Legislature of any report, paper, votes or proceedings.
Legislatures from proceedings in any court in respect of anything said or vote given in the House.

There was, however, intense debate in the Constituent Assembly as to the right of the Houses to prohibit the publication of its debates, proceedings etc., which is the derivative of the ‘freedom of speech’ and implicit under Articles 105(3) and 194(3). The draft Article in this regard provided that if the member caused the speech made in the House to be published on his own, without the authority of the concerned legislature, then he could not escape the legal liability in respect of the said publication.

In the Constituent Assembly, Prof. Shibban Lal Saksena recommended that the immunity should not be qualified but absolute to protect the publication of a speech made by the member even without the authority of the concerned legislature. Prof. Saksena made the following recommendation:

If the public is not to know what I said here, I can not discharge my duties to the electorate which has chosen me……It is important that journals and newspapers should have the privilege of publishing all that is said here. Sir, if any member of the House abuses his privilege as a member, the house has a power to remove him from the House. I do not think that any fear of abuse of such privileges need prevent us from granting such rights to members. If the President finds that any member is abusing his rights and privileges he will check him and expunge objectionable passages from his speech. I hope the learned Doctor Ambedkar will see that the privileges of members are made absolute with reference to publication of their speeches both inside and outside and not confined to publication by or under the authority of Parliament.

Some members like Nazeeruddin Ahmed, Dr. P. S. Deshmukh, Shri Rohini Kumar Chaudhary and Pandit Lakshmi Kanta Maitra also expressed the similar views in the Constituent Assembly. Shri M. Ananthasayanam Ayyangar did not concur with these views and he was of the opinion that such an arrangement would amount to conferring not a privilege but a license. He observed:

---

62 Constituent Assembly Debates (Vol. 8, 4\textsuperscript{th} Reprint, Lok Sabha Secretariat, New Delhi,2003) 146
…..In facts, it is a special weapon given into our hands and that weapon has to be used carefully. Members must be able to speak freely in the House without constant fear of any one dragging them into court of law; otherwise, to that extent they will not be discharging their duty to the country properly. It is for that purpose that this privilege is given but it must be restricted to free speech inside the House. Repetition outside cannot be allowed. Merely because a person is a member he cannot do anything he likes, that is the position. That is the position in the British Parliament and we want to be in line with them with this. I am opposed to any amendment and I want the clause as it stands to be accepted\textsuperscript{63}.

After Shri M. Ananthasayanam Ayyangar expressed his strong views against granting an absolute privilege, no amendment was moved in this regard and the President of the Constituent Assembly, Dr. Rajendra Prasad, put the said clause of the Draft Constitution for votes.

The above-stated view expressed by Shri M. Ananthasayanam Ayyangar was more consistent with the very purpose of conferring the freedom of speech on the members of a legislature i.e. to allow the members to express their views in free and independent manner so as to enable the legislature to perform its functions effectively. The views expressed by the members outside the legislature cannot be said to be the part of deliberative process of the legislature and they ought to be subject to the general law of the land. In contrast, Prof. Shiban Lal Saksena advocated for wider immunity for the members of the legislature, which would have permitted them to repeat or publish the views expressed by them in the legislature. Such a broad immunity was likely to be misused by the members to make defamatory or scandalous remarks against their political adversaries.

Before the insertion of Article 361A by way of 44\textsuperscript{th} Amendment in 1978, the immunity granted to the members under Articles 105(2) and 194(2) in respect of publication made by or under the authority of the House could not be claimed if the member had published the defamatory statements made by him inside the house. The courts, while interpreting the provisions, also took a narrow view and did not extend the immunity to the publication of the speech made by a member of the House at his own instance i.e. without the authority of the House.

\textsuperscript{63} Ibid, 155
On 13 March, 1951 Dr. Suresh Chandra Banerji, MLA, West Bengal Legislative Assembly, allegedly made a speech in the assembly containing defamatory statements against One Mr. Punit Goala. Next day, “Lok Sevak”, a Bengali newspaper published the report of the speech of Dr. Suresh Chandra Banerji, who was also member of the editorial board of the said newspaper. Mr. Punit Goala filed a complaint under Section 500 of the Indian Penal Code in the court of Chief Presidency Magistrate against editors of the newspaper for publishing a defamatory matter in bad faith. Dr. Suresh Chandra Banerji and others filed a counter petition before the court in which they contended that the reports of proceedings of the Legislature were privileged under Article 194 (3) of the Constitution and no prosecution could be launched in respect of anything contained in such reports. The Chief Presidency Magistrate directed the service of legal process upon them. They were asked to answer the allegations made against them under Section 500 of the Indian Penal Code.

A petition was then filed in the Calcutta High Court against the decision of the Presidency Magistrate. The High Court held that Article 194 (2) had no application in the instant case because the publication of the speech made by Shri Bannerjee in the House in “Lok Sevak” was not made by or under the authority of the Legislative Assembly as required under the said provision. The Court also referred to the English cases of Rex v. Lord Abingdon (1794) 1 Esp. 226 and Rex v. Greevey, (1813) 1 M & S 273. In these cases, it was held that if a Member of British Parliament caused his speech made in the House of Commons to be published in a newspaper, then he might be liable both, civilly and criminally.

In 1956, the Parliament passed the Parliamentary Proceedings (Protection of Publication) Act, 1956, which conferred qualified immunity on the newspapers and radio broadcasts from any civil or criminal liability for publication any proceedings of either house of Parliament, provided that such a publication – (a) is a substantially true report of such proceedings; (b) is not actuated by malice; (iii) is for the ‘public good’. During the National Emergency in 1976, the Parliamentary Proceedings

---

64 Sec. 500 of the Indian Penal Code says that whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

65 Dr. Suresh Chandra Banerji v. Punit Goala, AIR (38) 1951 Calcutta 176
(Protection of Publication) Act, 1956 was repealed by way of the Parliamentary Proceedings (Protection of Publication) Repeal Act, 1976. In 1977, the Parliament passed the Parliamentary Proceedings (Protection of Publication) Act, 1977 and revived the 1956 Act. Subsequently, Article 361A\(^{66}\) inserted by 44\(^{th}\) Constitutional Amendment in 1978, which now confers a qualified privilege on the Press to publish the substantially true reports of any proceedings of either House of Parliament or State Legislatures if such publication is not actuated by malice except the reports of the proceedings of a secret sitting. The publication of the report or proceedings of a secret sitting of the Houses have been excluded from the qualified immunity and to that extent the Houses can exercise absolute right to prohibit the publication of its proceedings. Commenting upon the improvement made by Article 361A of the Constitution over the Parliamentary Proceedings (Protection of Publication) Act, 1956 [Now the Parliamentary Proceedings (Protection of Publication) Act, 1977], Dr. D. D. Basu observes:

One important point on which the provision in Art. 361A constitutes an improvement upon the provision in the Act of 1956 is that the latter required an additional condition for the immunity, namely, that the publication must have been made for the ‘public good’. In other words, it was necessary for the newspaper concerned to show specifically that the publication of the particular report was made in the public interest…………The provision in Article 361A assumes that a newspaper is an organ for dissemination of information in the public interest and therefore, omits the condition of ‘public good’. The immunity will be available once it is shown the publisher etc. of the newspaper were not actuated by ‘malice’. In order to claim immunity under Article 361A, it would not be necessary for the journalist to show that any kind of public interest would be served by reproducing the defamatory matter in question, provided the other conditions are satisfied.\(^{67}\)

It is pertinent note here that while the Parliamentary Proceedings (Protection of Publication) Act, 1977 is applicable to publication of proceedings of Parliament and not to the proceedings of State Legislatures, Article 361A extends the immunity from civil or criminal liability in respect of not only the publication of proceedings of Parliament but also of the Legislatures of State.

\(^{66}\) See Annexure I for Full Text of Article 361A

By virtue of Articles 105(4) and 194(4), freedom of speech and the immunity from legal consequences in respect of the same, is to be enjoyed not only by a member of the legislature but also by a non-member when he is speaking as a member of the committee or even as a witness. The various sub-committees of the legislatures are required to call non-member experts for giving evidence before them so that the right decisions are made. The broader phraseology of these provisions would enable such non-members to speak fearlessly before the said sub-committees. The Constitution provides for the participation of some other non-members to participate in the proceedings of the Houses under certain circumstances. The views expressed by such non-members are also immune from any proceedings in any court under Articles 105 (2) and 194 (2).

The President of India, who is an integral part of Parliament under Article 79 and who has the right to address both the houses of Parliament under Articles 86 and 87, can also enjoy the privileges available to the members. The Vice-President, who is an ex-officio Chairman of the Rajya Sabha, is also entitled to the privileges under Article 105 (1) & (2). A non-member Minister and Attorney General, having right to speak or otherwise participate in the proceedings of either House under Article 88, are also covered within the ambit of Article 105. Similarly, in case of a State Legislature, the Governor under Articles 175 and 176 and State Ministers and the Advocate General under Article 177, who have right to speak or otherwise participate in the proceedings of either House are also eligible to enjoy the privileges available to the members under Articles 194(1) and (2).

III. Freedom of Speech under Article 105(1) and 194(1)

1. The Scope and Limitations

The framers of the Constitution have not bestowed the ‘absolute’ freedom of speech upon the legislators but only the qualified freedom subject to the “other provisions of the Constitution and the rules and standing orders regulating the procedure of the

---

68 The amendment to that effect was moved in the draft articles 85 and 169 in the Constituent Assembly by Shri Jaspat Roy Kapoor- Constituent Assembly Debates (Vol. 8, 4th Reprint, Lok Sabha Secretariat, New Delhi,2003) 144
House”. Hence, it has to be exercised under the supervisory powers of the presiding officers of the Houses. Commenting upon the scope the said freedom, former Research Officer of the Institute of Constitutional and Parliamentary Studies, Mr. D. C. Jain has observed:

Privileges have been conferred not with a view to indicating eminence of the members but to assist them in discharging their duties…..Also, privilege should not be looked on as being a convenient excuse to make any wild remark in the House which cannot be made in the normal course of business.

The National Commission to Review the Working of the Constitution has elucidated the object of the freedom of speech guaranteed to the members of Parliament in the following words:

………The only idea behind parliamentary privileges is that members who represent the people are not in any way obstructed in the discharge of their parliamentary duties and are able to express their views freely and fearlessly inside the Houses and Committees of Parliament without incurring any legal action on that account. Privileges of members are intended to facilitate them in doing their work to advance the interests of people. They are not meant to be privileges against people or against the freedom of the press……...

The expression “other provisions of the Constitution” used in Articles 105(1) and 194(1) includes Articles 121 and 211 which prohibit any discussion in the Parliament and State Legislatures as to the conduct of the judges of superior courts. Article 121 of the Constitution says that no discussion shall take place in Parliament in respect of the conduct of any Judge of the Supreme Court or a High Court in the discharge of his duties. Similar bar is imposed on the State Legislatures under Article 211. In case of Parliament, however, the Constitutional bar under Article 121 is lifted when any Member of Parliament gives notice of motion for the removal of a Judge.

---


71 See Annexure I for the Full Text of Articles 121 and 211
under Article 124(5) read with the Judges (Inquiry) Act, 1968 and the entire allegations leveled by him would be open for discussion in the House itself.\textsuperscript{72}

Though the Constitutional prohibitions under Articles 121 and 211 are mandatory in nature, there is no legal sanction for the same as no proceedings can be brought against the members in any court in respect of anything said in the Houses of Parliament and State Legislatures under Articles 105(2) and 194(2), respectively. In the \textit{Keshav Singh} case\textsuperscript{73}, the Supreme Court has held that if a question arises as to whether a speech made by a member contravenes Article 211 or not, it would be for the Speaker to give his ruling on the point. The Court further observed that whereas Article 194(2) protected a speech made in contravention of Article 211 from action in a court, no such exception or protection was provided in prescribing the powers and privileges of the House under the latter part of Article 194(3). The conduct of a judge in relation to discharge of his duties cannot be made subject matter of contempt proceedings under Article 194(3). It implies that the judge cannot be punished for the contempt of the legislature under Article 194 (3) in violation of prohibition under Article 211.

Articles 118 and 208 confer the power on the Parliament and State Legislatures, respectively, to make rules for regulation of procedure and the conduct of their business. Rule 186(viii), Chapter XIV of the 'Rules of Procedure and Conduct of Business in Lok Sabha' (Hereinafter referred to as ‘the Lok Sabha Rules’) dealing with Motions lays down that any motion relating to any matter which is under adjudication by a Court of law having jurisdiction in any part of India, shall not be admissible. Similar prohibition is prescribed under Rule 157(V), Chapter XI of the Rules of Procedure of Rajya Sabha (Hereinafter referred to as ‘the Rajya Sabha Rules’).

Rule 352 of the Lok Sabha Rules and Rule 138 of the Rajya Sabha Rules, dealing with rules to be observed while speaking, require that a member while speaking, shall not, refer to any matter of fact on which a judicial decision is pending [Clause (i)] or

\textsuperscript{72} Sub-Committee of Judicial Accountability v. Union of India, (1991) 4 SCC 699, Para 34

\textsuperscript{73} The President’s Reference No.1 of 1965 AIR 1965 SC 1186
utter treasonable, seditious or defamatory words [Clause (vii)]. According to the Rule 353 of the Lok Sabha Rules and Rule 138A of the Rajya Sabha Rules, no allegation of a defamatory or incriminatory nature shall be made by a member against any person unless the member has given adequate advance notice to the Speaker and the Minister concerned. However, the Speaker/Chairman may, at any time, prohibit any member from making any such allegation if he is of the opinion, that such allegation is derogatory to the dignity of the House or that no public purpose is served by making such allegation.

The Committee of Privileges of Rajya Sabha in its 12th Report, adopted by Rajya Sabha on 20 December 1968, has recommended that:

If disclosures made by a member on the floor of the Rajya Sabha/Lok Sabha are relevant to a criminal investigation, the investigating authority may make report to the Minister of Home affairs and then the minister would request the member through the Presiding Officer to meet him. If the member agrees to meet the Home Minister and also agrees to give information, the Home Minister can use it in a manner which will not conflict with any parliamentary right of the member.74

The freedom of speech guaranteed to the members of the legislatures is much broader than the similar freedom guaranteed to the other citizens/press under Article 19(1) (a) of the Constitution.75. The freedom of speech and expression under Article 19 (1) (a) is not absolute in nature and reasonable restrictions can be imposed on the same by law. Such a law is required to be made in relation to the grounds laid down in Article 19(2) i.e. the sovereignty of India, the security of the State, friendly relations with the Foreign States, public order, decency, morality, contempt of court, defamation or incitement to an offence. On the contrary, the freedom of speech under Articles 105 and 194 is controlled only by the other provisions of the Constitution regulating the procedure of Parliament and State Legislatures and the rules and standing orders of regulating the procedure of the Houses and not by any law made under Article 19(2) of the Constitution.

74 Quoted in Parliamentary Privileges, a booklet published by the Bureau of Parliamentary Studies and Training, Lok Sabha Secretariat, New Delhi 2004

2. Judicial Enforceability of the Limitations

By virtue of Articles 105(2) and 194(2), the members of Parliament and State Legislatures are immune from any court proceedings in respect of the speeches made by them in the house or in any committee of the house. In *Tej Kiran Jain v. N. Sanjiva Reddy*, the Supreme Court considered the scope and ambit of the freedom of speech enjoyed by the members. In March 1969, a World Hindu Religious Conference was held at Patna wherein the Shankaracharya of Govardhan Peeth, Puri allegedly defended the practice of untouchability in Hinduism and criticized the law coming in its way. He also allegedly walked out when the national anthem was being played. On 2 April 1969, Shri Narendra Kumar Salve, a Member of Parliament, moved a calling attention motion in Lok Sabha about the said incident, which was followed by a discussion in the house. Later, the admirers of the Shankaracharya filed a suit in the High Court of Delhi for damages against the Speaker and some other members for making the defamatory remarks lowering the dignity of the Shankaracharya during the course of the discussion in the house.

The Government then filed an application under Order 7, Rule 11 and Order 27A of the Code of Civil Procedure r/w Article 105 of the Constitution for rejection of the plaint in limine. The Delhi High Court dismissed the suit accordingly on 4 August, 1969, on the ground that according to the Order 7, Rule 11, and the plaint should be rejected if the suit was barred by law (including Article 105). In appeal filed before the Supreme Court against the decision of the High Court, the Court observed that the expression ‘anything said’ used in Article 105 (2) was of widest import and was equivalent to ‘everything said’. The Court further observed that the immunity was of the essence of Parliamentary system of Government and the people’s representatives should be free to express themselves without fear of legal consequences. The freedom

---

76 *Tej Kiran Jain v. N. Sanjiva Reddy* AIR 1970 SC 1573; See also, *Parliamentary Privileges Court Cases*, (Lok Sabha Secretariat, New Delhi 2002)

77 Shankaracharya is the religious guru of Hindus in India.

78 ‘Calling Attention Motion’ is a Parliamentary device in India by which the member may, with the prior permission of the speaker, call the attention of a minister concerned to any matter of urgent public importance.
of speech was only subject to the discipline of the rules of Parliament, the good sense of the members and the control of proceedings by the Speaker.

In A.K. Subbiah v. The Chairman, Karnataka Legislative Council, Bangalore⁷⁹, two members of the State Legislature filed a writ petition under Article 226 of the Constitution in the Karnataka High Court in regard to a violation of Article 211 by one of the members of State Legislative Council. The petitioners alleged that the member made certain derogatory remarks touching the conduct of the judges of the High Court and requested the court to issue a writ of mandamus to the Chairman of the Council to produce the records of the proceedings relating the same and to quash the proceedings. The petitioners also contended that the words “proceedings in any court” in Article 194(2) of the Constitution related only to criminal or civil proceedings and not to proceedings under Article 226.

The High Court held that the expression “proceedings in any court” should be given the widest meaning possible and it was inclusive of writ proceedings under Article 226 of the Constitution. The Court further held that it would not be open to the Court to call for the records of the House in the light of the prohibition under Article 212 (1) of the Constitution which provides that the validity of any proceedings in the Legislature of a State shall not be called in question in any court on the ground of any alleged irregularity of procedure. The Court clarified that whether a member, while exercising his freedom of speech, had contravened Article 211 or not was a matter which fell within the exclusive jurisdiction of the Presiding Officer. It is submitted that as the petition was not concerning the violation of any Fundamental Right, the court probably refrained from interfering with internal proceedings of the House. Later, the Supreme Court in Keshav Singh’s Case clarified that though, by virtue of Article 212 (1)⁸⁰, any action in the house cannot be challenged in any court on the ground of any irregularity of the procedure, the same would be open to scrutiny in a Court of law on the ground of patent illegality and unconstitutionality.

⁷⁹ A.K. Subbiah v The Chairman, Karnataka Legislative Council, Bangalore AIR 1979 Kant. 24
⁸⁰ See Annexure I for the Full Text of Article 212 and 122
In *Kihota Hollohan v. Zachilhu*\(^{81}\), the validity of the Tenth Schedule of the Constitution inserted by 52\(^{nd}\) Constitutional Amendment, which sought to disqualify the members of the Parliament and State Legislatures on the ground of unprincipled defection, was challenged, *inter alia*, on the ground of its contravention with freedom of speech under Articles 105 (1) and 194(1)\(^{82}\). Para 2 of the X Schedule, *inter alia*, provides that a member of a House belonging to any political party shall be disqualified 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.

It was contended that X Schedule was destructive of the freedom of speech, right to dissent and freedom of conscience as the provisions of the Tenth Schedule sought to penalize and disqualify elected representatives for the exercise of these rights and freedoms which were essential to the sustenance of the system of Parliamentary democracy. The Court has observed that the freedom of speech of a member is not an absolute freedom and the provisions of the Tenth Schedule do not purport to make a member of a House liable in any Court for anything said or any vote given by him in Parliament. According to the Court, it is difficult to conceive that Article 105(2) is a source of immunity from the consequences of unprincipled floor crossing. The Court has observed:

> The freedom of speech of a Member is not an absolute freedom. That apart, the provisions of the Tenth Schedule do not purport to make a Member of a House liable in any 'Court' for anything said or any vote given by him in Parliament. It is difficult to conceive how Article 105 (2) is a source of immunity from the consequences of unprincipled floor-crossing.\(^{83}\)

### 3. The Freedom of Speech in the House vis-à-vis Contempt of the Court

A question whether a Member of the State Legislature can be held guilty of the Contempt of the High Court for making contemptuous remarks in a speech made on

\(^{81}\) *Kihota Hollohan v Zachilhu* AIR 1993 SC 412


\(^{83}\) *Ibid*, Para 17
the floor of the House, was raised in *Surendra Mohanty v. Nabakrishna Chaudhary*\(^{84}\). The former Chief Minister of Orissa, Sri Naba Krishna Choudhury made a speech in the Orissa Legislative Assembly on 8-3-1956 in which he said that the High Court was immature and its decisions had been corrected by the Supreme Court on many occasions. He also said that the Supreme Court had held that in many instances the High Court abused the powers given to it. The extract of the said speech was published in a local daily known as ‘Matrubhumi’ on 10-3-1956. Shri Surendra Mohanty, a Member of Parliament, filed a petition in the Orissa High Court against the Chief Minister, Sri N. K. Choudhury and the Editor, Printer and Publisher of ‘Matrubhumi’ requesting the Court for initiating the contempt proceedings.

The respondent argued that the petitioner Sri Surendra Mohanty had no right to apply to the Court for initiating contempt proceedings. The Court, however, rejected this argument by saying that a Member of Parliament, by virtue of the oath taken by him while sitting as a member, is duty-bound to bear true faith and allegiance to the Constitution and can rightfully bring action against a member of the State Legislature who has misused the right of freedom of speech conferred on him by the Constitution by making a speech which has a tendency to impair the dignity and prestige of the High Court. The Court rather commended the public spirit shown by the petitioner in bringing the matter to the notice of the Court. It was contended by the respondent that the so called offending passages in the speech of Sri Nabakrishna Choudhury would not amount to contempt. In response to the same, the Court held that the impugned speech made by the respondent was objectionable and contained an imputation to the effect that the powers were used improperly by the Court, which lowered the authority of the High Court to a considerable extent and brought the Judges into contempt.

The respondent Sri Nabakrishna Choudhury also argued that he was immune from proceedings for contempt in view of the provisions of Clause (2) of Article 194 of the Constitution. It was further argued that unlike Article 194 (1) which opened with words “Subject to the other provisions of the Constitution”, Article 194 (2) was not subjected to the other provisions of the Constitution including the provision dealing

---

\(^{84}\) Surendra Mohanty v. Nabakrishna Chaudhary AIR 1958 Orissa 168
with the contempt of the High Court\textsuperscript{85}. It was contended that it was a deliberate omission on the part of the framers of the Constitution who intended to give absolute immunity to a member of the Legislature from interference by a Court of law in respect of a speech made by him in the Legislature.

The petitioner, however, contended that the proceedings in Courts contemplated in Clause (2) of Article 194, would be only ordinary proceedings, in law Courts including the High Court and would not include a proceeding for contempt which is a special proceeding in a High Court based on the express power conferred by Article 215 of the Constitution. Similarly, Article 215 did not open with the words “Subject to the other provisions of the Constitution” and hence there could be no absolute immunity for any member of the State Legislature from contempt proceedings in respect of anything said by him in the Legislature. It was also urged that Clause (2) of Article 194 was a mere ancillary provision to Clause (1) which alone conferred the substantive right of freedom of speech and when that substantive right itself was made subject to certain restrictions, there was no justification for saying that the immunity of the members flowing from that right should be absolute.

The Court observed that the power of the Legislature or the Speaker, to take suitable action against a member who, while exercising his freedom of speech under Clause (1), transgresses the limits laid down in that clause is not affected by the limited immunity from any action in a Court of law under Article 194 (2). A reference was also made to the improvement made by the framers of the Constitution in adopting section 71 of the Government of India Act, 1935 which dealt with the freedom of speech and immunity from court proceedings in respect of anything said or vote given in the legislature, both of which were made “Subject to the other provisions of the Act”. Under Article 194 (1), the freedom of speech was made subject to the “Other provisions of the Constitution” but these restricted words were not used in Article 194 (2) which guaranteed the immunity from court proceedings in respect of anything said or vote given in the legislature.

The Court held that the language of Clause (2) of Article 194 was quite clear and unambiguous, and was to the effect that no law Court could take action against a

\textsuperscript{85} Article 215 provides that every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself.
member of the Legislature for any speech made by him there and the immunity appeared to be absolute. The Court, however, clarified that Editor, and the Printer and Publisher of Matrubhumi could not claim immunity under Clause (2) of Article 194 because their daily was not an authorised publication. In view of their unconditional apology, the Court did not pass any sentence on them, but directed them to pay Rs. 100/- (one hundred only) as costs to the petitioner.

In July 1996, Sri Vayalar Ravi and other 14 members of Parliament criticized two of the Hon'ble Judges of Allahabad High Court on the floor of the Parliament, for issuing notices to Sri H. D. Deve Gowda in response to a writ petition filed before the court in which the validity of his appointment as Prime Minister was challenged. They also advised him not to appear before the court. In Smt. Saroj Giri v. Vayalar Ravi and Ors.\(^{86}\), a contempt petition was filed against the members of the Parliament in the Allahabad High Court. The Court expressed the view that in the light of Article 121 of the Constitution and the Rules of Procedure of the Houses, the discussion was not permissible as the issues were \textit{sub-judice} before the Court and amounted to the interference with administration of justice. The Court concurred with the earlier decision of the Orissa High Court in Surendra Mohanty v. Nabakrishna Chaudhary\(^{87}\), in which it was held that the High Court had no jurisdiction to take action against a member of the Legislature for his speech in the Legislature, even if it amounted to contempt of the Court. The Court held that the appropriate procedure would be to leave the matter to the State Legislative Assembly to be referred to its Committees of privileges for examination, investigation and report as may be necessary in accordance with its own rules of procedure and the provisions of the Constitution.

It is submitted that the above-discussed decisions are inconsistent with the established principles of interpretation of the Constitution. According to the rule of “harmonious construction”, if there is any direct conflict between the two provisions of the Constitution then the special provision prevails over the general provision. Article 194 (2), being general provision, should give way to Article 215 which is a special provision. Thus, a member of State Legislative Assembly is amenable to the jurisdiction of High Court for its contempt and the immunity under Article 194 (2)


\(^{87}\) Surendra (n 84)
cannot be extended to his case. Such an interpretation would be valid because Articles 194 (2) and 215, both, do not open with the words-“Subject to the other provisions of the Constitution”. In Keshav Singh’s Case, the Supreme Court has resolved a similar conflict between Article 194 (3) and Article 211 by holding that the powers of the House under Article 194 (3) are controlled by a constitutional prohibition under Article 211 in respect of any discussion as to the conduct of any judge in the House.

**IV. Immunity from Legal Proceedings**

A Member of Parliament or State Legislature is immune from any proceedings in any court in respect of anything said or any vote given by him in the House by virtue of Articles 105(2) and 194(2) respectively. The provisions do not open with the words, “Subject to other provisions of Constitution” like Clause (1) of Articles 105 and 194 guaranteeing the freedom of speech and hence they prevail over all other provisions of the Constitution including Fundamental Rights. The provisions are based on Article IX of the Bill of Rights in United Kingdom, which exclude the jurisdiction of the Common Law Courts in respect of any speech made in the Parliament. A question whether Article IX was subjected to any written Constitutional guarantees like Fundamental Rights did not arise because there was no Supreme and Written Constitution in United Kingdom.

The United Kingdom is, however, part of European Union and signatory to the European Charter on Human Rights. A question whether Article IX of the Bill of Rights was subjected to Article 6 of the E.C.H.R guaranteeing right of access to court, was raised before the European Court of Human Rights in 2002. In *A v. United Kingdom*[^88], the European Court held that Article IX of the Bill of Rights did not violate Article 6 (1)[^89] of the Charter. The applicant who was a British national complained to the European Court of Human Rights that the absolute Parliamentary privilege in United Kingdom protecting the statements made by a Member of Parliament about her violated her right to access to court under Article 6 (1) of the E.C.H.R. She contended that the absolute immunity enjoyed by the M. P.s in respect


[^89]: Article 6 (1) of the European Convention of Human Rights (E.C.H.R.) provides for right of access to court and fair trial by an independent and impartial tribunal.
of words spoken by them in Parliament was an aspect of procedural law and hence it fell within the scope of Article 6 (1) of the Convention. The court held that ‘the Parliamentary immunity enjoyed by the M.P. in the present case pursued the legitimate aims of protecting free speech in Parliament and maintaining the separation of powers between the legislature and the judiciary’. The Court, however, made it clear that no immunity could be claimed in respect of the statements made by the M.P. outside Parliament including the repetition of the statements made during the course of Parliamentary debates and the press statements published prior to Parliamentary debate.

In United Kingdom, acceptance of a bribe by either House of the Parliament is regarded as contempt of the House and punishable as such. The common law offence of bribery in connection with his parliamentary duties extends to a Member of Parliament. Article 9 of the Bill of Rights, however, prohibits any evidence relating to Parliamentary proceedings being adduced before any court. Hence, it is practically difficult to successfully prosecute any Member of Parliament on the charge of bribery. The Joint Committee of House of Lords and House of Commons on Parliamentary Privileges in its First Report published in 1999 has made the following recommendation:

Members of both Houses should be brought within the criminal law of bribery by legislation containing a provision to the effect that evidence relating to an offence committed or alleged to be committed under the relevant sections shall be admissible notwithstanding Article 9. This would be fair, workable and acceptable to the public. Corruption is serious and insidious, and particularly damaging if it takes hold in a democratic institution. It must be treated as a serious crime. Its seriousness must be brought home to everyone, including the intermediary who receives a fee to resolve a problem for his client and may be tempted to use some of this money in ‘oiling the wheels’. This means bribery can only be dealt with effectively by using the police and the courts. There are too many disadvantages in any other solution. In particular, this option is the only credible remedy. It is also the only credible deterrent for any briber, as well as being the best means of retaining public confidence.

90 A v. United Kingdom (n 88) Para 77
The ‘JMM Bribery Case’: *P. V. Narsimha Rao v. State*

In *P. V. Narsimha Rao v. State (CBI/SPE)*, a question before a Constitutional Bench was whether by virtue of Article 105 (2) of the Constitution a Member of Parliament could claim immunity from prosecution on a charge of bribery in a criminal court. In 1993, a ‘No Confidence Motion’ was moved against the minority government led by Late Shri P. V. Narsimha Rao in Lok Sabha. The government was short by 14 members for simple majority. The motion was defeated with 251 members voting in favour of the motion and 265 voting against it. On February 28, 1996, one Shri Ravindra Kumar of Rashtriya Mukti Morcha filed a criminal complaint with the Central Bureau of Investigation stating that P. V. Narsimha Rao and others bribed Members of Parliament of different political parties, individuals and groups of an amount over Rs. 3 crores. Cases were also registered against Shibu Soren, Simon Marandi, Shailendra Mahto of the Jharkhand Mukti Morcha and some other alleged bribe-taking Members of Parliament. It was alleged that they accepted the illegal gratification to vote against the No-confidence motion to save the Government led by Late Shri P. V. Narsimha Rao.

The accused persons raised an objection before the Trial Court that the jurisdiction of the court was barred under Article 105(2) of the Constitution because the matter was related to motive and action of Members of Parliament with respect to the ‘vote given’ by them in Parliament. It was also contended that a Member of Parliament was not a ‘public servant’ for the purposes of the Prevention of Corruption Act, 1988. The Special Judge rejected the contentions and aggrieved by the same, the accused filed Revision Petitions in the Delhi High Court. The High Court held that ouster of jurisdiction of court would amount to claiming a privilege to commit a crime. The Court also rejected the argument that the Prevention of Corruption Act, 1988 would not apply to a Member of Lok Sabha because there was no competent authority to remove them from their office for the purpose of granting sanction under sec. 19(1)(c) of the 1988 Act. The court held that absence of an authority to remove a Member of Parliament did not mean that the 1988 Act would not be applicable to him.

---

92 *P. V. Narsimha Rao v. State (CBI/SPE)* AIR 1998 SC 2120
In appeal, the Supreme Court held that the expression ‘in respect of’ under Article 105(2) must receive a broad meaning so as to include the conspiracy, which constituted motive behind the votes given by the alleged bribe-taking Members of Parliament. According to the Court, the object of granting the immunity under Article 105(2) is to enable the members to speak their mind in the Parliament without fear of prosecution in courts and it must be extended to proceedings that bear a nexus to their speech or vote. Only corrupt promise to vote or receipt of bribe is not sufficient to prove that an agreement was to influence the legislative act of bribe-taking Member of Parliament unless a reference is made to his motive. The motive, according to court, bears nexus to the vote given by the bribe-taking members of Parliament and hence, it is beyond the scope of the judicial scrutiny.

The Court relied on the dissenting judgments of Brennan J. and White J. in United States v. Brewster, in which a former US Senator had been charged with accepting bribes in respect of being influenced in his official acts. The Majority in this case held that the immunity under the ‘Speech and Debate Clause’ of the U.S. Constitution was not meant for private benefit of members of Congress or to protect them from criminal responsibility but to protect the integrity of the legislative process by ensuring the independence of individual legislators. It was feared that financial abuses by way of bribes would gravely undermine legislative integrity and defeat the right of the Public to honest representation. Justice Burger took the view that the speech and debate clause of the U. S. Constitution should be interpreted broadly to protect the independence of legislative branch but its purpose was not to make members of Congress super-citizens immune from criminal liability. Brennan J. in his dissenting opinion said that it was not for courts to deal with such controversies and self-discipline and voters must be the ultimate reliance for discouraging or correcting such abuses. He also took the view that permitting the executive to initiate the prosecution of a member of Congress for the specific crime of bribery was subject to serious potential abuse that might endanger the independence of the legislature. Brennan J. followed the earlier decision of the U. S. Supreme Court in United States v. Johnson

93 Article 1(6) of the U.S. Constitution provides that ‘for any speech or debate in either House, they (Members of the Congress) shall not be questioned in any other place’.

in which it was held that a member of the Congress could be prosecuted under a
criminal statute provided that the Government’s case did not rely on legislative acts or
the motivation for legislative acts. According to him, no inquiry could be made into
the motives behind the legislative act of the member of the Congress. Relying upon
the dissenting opinion of Brennan J., the Indian Supreme Court held:

We draw support for the view that we take from the decision of United
States Supreme Court in Johnson and from the dissenting judgment of
Brennan J. in Brewster. In Johnson the United States Supreme Court
held that the speech or debate clause extended to prevent the allegation
that a Member of Congress had abused his position by conspiring to
give a particular speech in return for remuneration from being the
basis of a criminal charge of conspiracy. The essence of such a charge
was that the Congressman’s conduct was improperly motivated, and
that was precisely what the speech or debate clause foreclosed from
executive and judicial inquiry. The argument that the speech or debate
clause was meant to prevent only prosecutions based upon the content
of the speech, such as libel action, but not those founded on antecedent
unlawful conduct of accepting or agreeing to accept a bribe was
repulsed. Also repulsed was the argument that the speech or debate
clause was not violated because the grave man of the charge was the
alleged conspiracy, not the speech. The indictment focused upon the
motive underlying the making of the speech and a prosecution under a
criminal statute dependent on such inquiry contravened the speech or
debate clause.\footnote{P. V. Narsimha Rao (n 92), Para140 and 141}

The Supreme Court held that the alleged bribe-taking Members of Parliament had the
protection of Article 105(2) and not answerable to any Court. According to the Court,
to enable members to participate fearlessly in Parliamentary debates, they need the
wider protection of immunity against all civil and criminal proceedings that bear a
nexus to their speech or vote. The court also held that the said immunity would not be
available to a Member of Parliament who, after receiving an illegal consideration,
have not made a speech or given any vote. The Court said that the charge against
alleged bribe giver members of Parliament would proceed.

However, Justice S. C. Agrawal, in his dissenting opinion, held:

…. the object of the immunity conferred under Article 105 (2) is to
ensure the independence of the individual legislators. Such
independence is necessary for healthy functioning of the system of
parliamentary democracy adopted in the Constitution. Parliamentary Democracy is a part of basic structure of the Constitution. An interpretation of the provisions of Article 105 (2) which would enable a Member of Parliament to claim immunity from prosecution in a criminal court for an offence of bribery in connection with anything said by him or a vote given by him in Parliament or any committee thereof and thereby place such Members above the law would not only repugnant to healthy functioning of Parliamentary democracy but would also be subversive of the Rule of Law which also an essential part of the basic structure of the Constitution.  

It is submitted, that the decision will cause harm to the principle of ‘Rule of Law’, which is one of the foundations of democratic polity. The doctrine of ‘Rule of Law’ requires that there should be equality before law and equal subjection of all classes to the ordinary law. The general law of the land should be equally made applicable to all persons irrespective of any other considerations including the status of the person. According to Prof. K. D. Gaur, ‘such an artificial distinction between a common man and a lawmaker in a democracy is untenable ad is against the very concept of Rule of Law’. In *Indira Nehru Gandhi v. Raj Narain*, the Supreme Court has held that ‘Rule of Law’ is a Basic Structure of the Constitution and struck down Article 329A inserted by 39th constitutional amendment which made unreasonable classification between the Prime Minister and other Members of Parliament so far as application of the electoral law was concerned. Non-application of Prevention of Corruption Act to the Members of Parliament under Article 105 (2) cannot be said to be a reasonable classification between ordinary citizens and Members of Parliament and hence violative of Article 14. There is no reasonable nexus between the basis of such classification and object to be achieved by Article 105 (2). In this context, P. Ishwara Bhat observes:

"..........the majority judgment in *P. V. Narsimha Rao* abstains from the application of equality principle in determining the extent of Parliamentarian’s privilege and immunity for speech made, vote cast or act done in Parliament under Art. 105(2) even when it is motivated by"  

---

96 *P. V. Narsimha Rao* (n 92), Para 47
98 *Indira Nehru Gandhi v. Raj Narain* 1975 (Supp) SCC 1
99 Article 14 lays down that the State shall not deny to any person equality before law and equal protection of laws.
bribe. Unfortunately, LORD SALMON’s view that equality before law is one of the pillars of freedom was not recognized.\textsuperscript{100} (emphasis added)

The immunity granted to the members of Parliament under Article 105(2) should only ensure that the members are able to discharge their functions fearlessly and without any outside interference and, nothing more than that. It must not be extended to any criminal acts committed by the Member in order to make a speech or to give his vote in Parliament. The immunity under Article 105(2) cannot be claimed for an act committed outside the Parliament as it is only available in respect of “anything said” or “any vote given” inside Parliament or in any committee thereof. Again, the said immunity cannot be extended to the conduct of a Member of Parliament preceding giving of any vote by him, but only to the actual act of saying something or voting in the Parliament. The framers of the Constitution would not have intended such immunity for legitimizing the criminal acts of Members of Parliament\textsuperscript{101} In this regard, Dr. Shobha Saxena has observed:

> With due respect to the Supreme Court judgment the logic given to declare Shibo Soren, Suraj Mandal etc. innocent in the JMM bribery case despite their having taken bribe does not seem to be very sound. Their culpability should not be condoned under Parliamentary Privileges because the bribe that was given and taken was neither given nor taken within the holy precincts of the house, (Article 105 protects only those which are done inside the Parliament, not outside). The vote they had given may not be questioned under the Parliamentary Privileges, but this will amount to stretching the logic too far. Even the British Parliament did not give its members the privilege to take bribes. Such an act was frowned upon as an undignified act.\textsuperscript{102}

The Supreme Court has, recently, held in \textit{B. R. Kapur v State of Tamilnadu} \textsuperscript{103} that a person, who is not the member of the State Legislative Assembly and who is otherwise disqualified to contest the election on account conviction for criminal offence under Sec. 8 (3) of the Representation of the People Act, 1951 cannot be


\textsuperscript{101} See Balwant Singh Malik, ‘P.V.Narsmha Rao v State: A Critique’, (1998) 8 SCC (Jour) 1

\textsuperscript{102} Dr. Shobha Saxena, \textit{Parliamentary Privileges and the JMM Case}, A.I.R. 2000 Journal 26

\textsuperscript{103} B. R. Kapur v State of Tamilnadu, (2001) 7 SCC 231
appointed as Chief Minister of a State under Article 164 (4). The said provision otherwise authorize the appointment of a non-member as the minister or Chief Minister for the maximum period of 6 months. The Court has refused to interpret Article 164 (4) in such a manner so as to allow the persons guilty of corruption to become ministers. It is submitted that Article 105 (2) should also be interpreted in the same spirit as shown by the Court in the said Case. It would also be pertinent to note here the following observations made by the Supreme Court in Supreme Court Advocates-on-Record Association v. Union of India\(^{104}\) regarding the principles of interpretation of the constitutional provisions:

To combat and deal with all these controversies, issue and problems which are always open for judicial interpretation, the Courts have to undertake an onerous mission in exploring the ‘real intention’ and ‘original meaning’ of the Constitution beyond all obscurities and to expound the principles underlying the philosophy of the Constitution and declare what the Constitution speaks about and mandates\(^{105}\)

With due respect to the Supreme Court, it is humbly submitted that in *P. V. Narsimha Rao v. State*\(^{106}\) the Court has failed to explore the ‘real intention’ and ‘original meaning’ behind Article 105 (2) in specific and to expound the philosophy of the Constitution in general. The object of Article 105 (2) is not to grant license to the members of Parliament to indulge in corrupt acts demeaning the dignity and prestige of the august body i.e. the Parliament. The immunity granted under Article 105 (2) is to enable the Parliament to perform its functions in free and independent manner. If the members accept bribe in order to discharge their official functions, then they would rather be preventing the Parliament from performing its functions in free and independent manner and they would be committing breach of trust of the voters who are entitled to honest representation. The Constitutional philosophy unequivocally negates the institutionalization of corruption and this is evident from the various constitutional provisions discouraging acts of corruption. For example, any act of bribery in respect of the duties imposed on the Members of Parliament by the Constitution would be violative of the Oath and Affirmation required to be taken by

\(^{104}\) (1993) 4 SCC 441

\(^{105}\) Ibid, Para 94

\(^{106}\) *P. V. Narsimha Rao* (n 92)
the Members of Parliament before taking their seat under Article 99 read with Form B of the Schedule III of the Constitution which reads as follows:-

‘I, A.B., having being elected (or nominated) a member of the Council of States (or the House of People) do swear in the name of God/solemnly affirm that I will bear true faith and allegiance for the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India and that I will faithfully discharge the duty upon which I am to about to enter’ (emphasis added)

Moreover, Section 8 (3) of the Representation of the People Act, 1951 disqualifies any person convicted with offence involving 2 years or more imprisonment from contesting the Parliamentary election. The offences relating to the acceptance of illegal gratification under the Prevention of Corruption Act are punishable with more than 2 years imprisonment. It would be anomalous to hold that a candidate responsible for any serious offence including bribery cannot become the member of the Parliament but after becoming a member if any person commits the act of bribery in respect of his official duties in the Parliament, he is immune from prosecution under Article 105(2).

In U.K., the Joint Committee of House of Lords and House of Commons on Parliamentary Privileges in its First Report published in 1999 has recommended that Members of both the Houses should be included within the scope of the proposed legislation on corruption and Article 9 of the Bill of Rights should be set aside in any criminal proceedings for bribery. The Committee in its Executive Summary has expressed the following views:-

The Joint Committee concluded that corruption, a serious and insidious offence, can only be dealt with effectively by using the police and the courts. Prosecution through the courts is the only credible remedy. It is also the only credible deterrent for any briber. This will involve only a minimal encroachment upon the territory safeguarded by article 9. The Joint Committee is confident there are very few instances of corruption involving members of Parliament. The occasions when a court will be called upon to question a parliamentary proceeding will be rare. The proposed bribery legislation will expose members of Parliament and other public figures to a high risk of vexatious allegations or private prosecutions.

Accordingly, prosecution under the new legislation should require the consent of the Attorney General or the Lord Advocate.\footnote{108}

It is also pertinent to take note of the following remarks made by the National Commission for Review the Working of the Constitution, which submitted its report in 2002 to the Government of India:

The law of immunity of members under the parliamentary privilege law was tested in P V Narsimha Rao v. State (CBI/SPE), (AIR 1998 SC 2120). The substance of the charge was that certain members of Parliament had conspired to bribe certain other members to vote against a no-confidence motion in Parliament. By a majority decision the Court arrived at the conclusion that while bribe-givers, who were members of Parliament, could not claim immunity under Article 105, the bribe-takers, also members of Parliament, could claim such immunity if they had actually spoken or voted in the House in manner indicated by the bribe-givers. It is obvious that this interpretation of the immunity of members of Parliament runs counter to all notions of justice, fair pay and good conduct expected from members of Parliament. Freedom of Speech inside the House cannot be used by them to solicit or to accept bribes, which is an offence under the criminal law of the country. The decision of the court makes it necessary to clarify the true intent of the Constitution. To maintain the dignity, honour and respect of Parliament and its members, it is essential to put it beyond doubt that the protection against legal action under action Article 105 does not extend to corrupt acts\footnote{109} (emphasis added)

The Commission has recommended that:

Article 105 (2) may be amended to clarify that the immunity enjoyed by the Members of Parliament does not cover corrupt acts committed by them in connection with their duties in the House or otherwise.............For such acts they would be liable for action under the ordinary law of the land. It may be further provided that no court will take cognizance of any offence arising out of a member’s action in the House without prior sanction of the Speaker or the Chairman, as the case may be. Article 194 (2) may also be similarly amended in relation to the Members of State Legislatures\footnote{110}

\footnote{108} Ibid
\footnote{110} Ibid, [5.15.6]
Recently, Justice G. N. Ray, Former Judge of the Supreme Court and the Chairman of the Press Council of India, who happened to be part of the majority decision in the *JMM Bribery Case*, has said:

The majority judgment clearly said that it was for the Parliament to amend the Constitution to rope in the bribe-taking MPs, irrespective of whether they voted or not, into the catchments of law. Parliament has done nothing till date. In the present scenario, the judgment definitely requires review. A re-look is necessary. *I shall not be unhappy, even though I was part of the majority judgment. It was not sacrosanct judgment. The time has come for its review* (emphasis added)  

V. Right to Prohibit the Publication and the Freedom of Press: The *Searchlight Case* (I)

By virtue of Article 105(3) and 194(3), the publication of the expunged proceedings of the House is regarded as the breach of privilege and contempt of the House because similar power is available to the House of Commons in U. K. If the member makes a speech and it is published by or under the authority of the Legislature, the member making the speech as well as the publisher shall not be held liable in any legal proceedings. The question whether the expunged portions of the speech made by the member in the State Assembly can be validly published and protected by the fundamental right of freedom of speech and expression under Article 19(1) (a) was raised before the Supreme Court in *M. S. M. Sharma v. Shri Krishna Sinha* (The *Searchlight Case* I). In this case, the validity of the show cause notice for alleged ‘breach of privilege’, arising out of the publication of the expunged portion of the speech made on the floor of the Bihar Assembly, issued to the editor of *Searchlight* was challenged.

One Shri Maheshwar Prasad Narayan Sinha, a member of the Bihar Assembly, delivered a speech in which he referred to the alleged acts of corruption and political impropriety committed by the Chief Minister. The Speaker of the assembly ordered

---

111 *The Times of India* (24 July, 2008)

112 These provisions imply that the Parliament and State Legislatures may codify the other privileges and until they are so defined, the privileges enjoyed by the House of Commons and its members at the time of commencement of the Indian Constitution would be applied in India.

113 *M. S. M. Sharma v. Shri Krishna Sinha* AIR 1959 SC 395
that certain portion of the said speech be expunged from the proceedings of the House. On May 31, 1957, the *Searchlight* published a report of the entire speech of Shri Maheshwar Prasad Narayan Sinha including the portion of the speech which the Speaker had directed to be expunged from the proceedings of the House. On June 10, 1957, a notice to the Secretary, Bihar Legislative Assembly was given by Shri Nawal Kishore Sinha, a member of the Bihar Legislative Assembly, in which a question of the breach of privilege of the House was raised against the editor of *Searchlight*. The Assembly then passed a resolution and referred the matter to the Privilege Committee of the House. The Secretary to the Bihar Legislative Assembly served a show cause notice for ‘breach of privilege of the House’ against the editor of *Searchlight*, Mr. M. S. M. Sharma.

A petition under Article 32 was then filed by the editor in which it was contended that the said notice and the proposed action by the Committee of Privileges were in violation of the his fundamental rights to freedom of speech and expression under Article 19(1) (a) and to the protection of his personal liberty under Article 21. It was contended by the Assembly that under Article 194(3) of the Constitution, all the powers, privileges and immunities enjoyed by the House of Commons of the British Parliament, including the right to prohibit the publication of the parts of speeches which had been directed to be expunged and consequently were not contained in the official report and power to punish the concerned person for ‘breach of privilege’.

The Court observed that the power to prohibit the publication of any report of the debates and proceedings and exclude strangers from the House and holding debates within closed doors flow from and necessary corollary of the freedom of speech in the House in United Kingdom. It was held that the similar power could also be claimed by the Assembly under Article 194(3) of the Indian Constitution. The Court rejected the contention of the petitioner that the power of the house to prohibit the publication under Article 194(3) was controlled by petitioner’s fundamental right under Article 19(1) (a). The court applied the principle of harmonious construction and held that the provisions of Article19 (1) (a), which are general, must yield and the to Article 194(1) latter part of its clause (3) which are special. The Court, however, agreed that if a law made by Parliament in pursuance of the earlier part of Article 105 (3) or by the State Legislature in pursuance of the earlier part of Article 194 (3) would be a ‘law’ within
the meaning of Article 12 and would be void if it violated any of the fundamental rights including one under Article 19 (1) (a). According to the Court, this is precisely the reason why our Parliament and the State Legislatures have not made any law defining the powers, privileges and immunities.

Justice Subba Rao, however, did not agree with the majority view and wrote a dissenting judgment. According to him, the second part of Article 194(3), implying that until the privileges are codified the privileges enjoyed by the House of Commons would be applied to the Legislatures in India, was intended to be a transitory provision. He argues that it cannot be given a higher sanctity than that of the first part of clause (3) of Article 194 requiring the State Legislature to codify the other privileges by ‘law’, which would be subject to fundamental rights. He laid down the following proposition:

When the Constitution expressly made the laws prescribing the privileges of the Legislature of a State of our country subject to the fundamental rights, there is no apparent reason why they should have omitted that limitation in the case of the Privileges of the Parliament of the United Kingdom in their application to a State Legislature.............Except the far-fetched suggestion that the Constitution-makers might have thought that all the privileges of the House of Commons, being the mother of Parliaments, would not in fact offend the fundamental rights and that, therefore, they designedly left them untouched by Part III as unnecessary or the equally untenable guess that they thought that for temporary period the operation and the extent of the said privileges need not be curtailed, no convincing or even plausible reason is offered for the alleged different treatment meted out to the said privileges in the said two parts of clause (3). If the Constitution intended to make the distinction, it would have opened the second part of clause (3) with the words "Notwithstanding other provisions of the Constitution or those of Article 19114.

Justice Subba Rao held that it was the duty of the Court to give a harmonious construction to both the provisions [Article 19(1) (a) and 194 (3)] so that full effect could be given to both, without the one excluding the other. There was no inherent inconsistency between the two provisions.

114 Ibid, Para 56
It is submitted that the decision needs reconsideration in the light of the subsequent judgment of the Supreme Court in *Keshav Singh* case\(^{115}\) in which the Supreme Court held that the power of the legislature to punish for its contempt [Under Article 194(3)] was not absolute and it was controlled by Article 21. Though the Court in the said judgment has not made any specific reference to relation between Article 194(3) and other fundamental rights (except one under Article 21), it would be anomalous to assume that the legislative privileges are controlled by a particular fundamental right and not others including the freedom of speech and expression under Article 19 (1)(a). One of the prominent Constitutional experts in the country Mr. A. G. Noorani has criticized the decision of the Supreme Court in the *Searchlight Case* in the following words:-

The ruling suffers from these grave defects. First, its construction of Article 19(1) (a) and 194(3) was manifestly wrong. Secondly, Chief Justice Das accepted that once privileges are codified by law, that law, like any other, would be subject to fundamental rights and even accepted..............He cited Australia’s inaction to do so as well. Section 49 of the Commonwealth Act, 1900, contains an identical provision, which framers of our Constitution borrowed. But Australia, unlike India, had no constitutionally guaranteed Bill of Rights. Chief Justice Das thus conferred greater potency to an admittedly transitory provision than the permanent one had, ignored the mandate of the Constitution for codification and opened a vista of “sky high” powers our legislators never dreamt of.\(^{116}\)

It is, further, submitted that contrary to the reasoning given by Justice Das, Australia later in 1987 codified the privileges in the form of a law- the Parliamentary Privileges Act, 1987. It seems that Mr. A. G. Noorani had overlooked this fact while making the above-mentioned comments in 2003.

In *M. S. M. Sharma v. Shri Krishna Sinha (The Searchlight Case II)*\(^{117}\), the petitioner raised almost the same controversy as raised in the *The Searchlight Case I*\(^{118}\). The Supreme Court applied the principle of *res judicata* and held that the questions

---

\(^{115}\) The President’s Reference (n 73)


\(^{117}\) AIR 1960 SC1186

\(^{118}\) *M. S. M. Sharma* (n 113)
determined by the previous decision of this Court could not be reopened in the present case and must govern the rights and obligations of the parties.

Recently, the Supreme Court has examined the validity of the expulsion orders made by both the Houses of Parliament as against the fundamental right under Article 19 (1) (g) of the Constitution in *Raja Ram Pal v. The Hon’ble Speaker, Lok Sabha*119. The Court has also made it clear that Fundamental Rights can be invoked in the matters concerning the Parliamentary Privileges. This judgment has impliedly overruled the judgment of the Supreme Court in the *Searchlight Case* in which it was held that the legislative privileges under Article 194 (3) were not controlled by fundamental right under Article 19 (1) (a).

Having discussed two very important privileges enjoyed by the individual members of the Parliament and State Legislatures, it is essential to deal with the powers enjoyed by these bodies in their institutional capacity. The next chapter analyses the power of the legislative bodies in India to punish for their own contempt and its relation with fundamental rights particularly the right to life and personal liberty of the individuals.

---

119 *Raja Ram Pal v. The Hon’ble Speaker, Lok Sabha and Others* (2007) 3 SCC 184