Codification of Privileges
Both in Britain and India the members of the legislatures have felt that the privileges should be codified to avoid many a confusion, contradiction and jurisdictional conflict. Only precedents, reports of privileges committees and rulings of successive Speakers could be relied upon for collating the leading principle of parliamentary privileges in Britain. The position is almost the same in India, except for a very brief and unsatisfactory constitutional enactment in Articles 105 and 194. Reflections on the House of Commons, as such, are attacks on the dignity of the House and could certainly be punished as contempts. It is however true that the House has developed a thick skin and is now-a-days not over-keen to take notice of public criticism of its activities or proceedings. In Britain, in the past, public criticism of the members were construed as reflections on the House and brought within the purview of contempt cases. But now the House has been much liberal in ignoring such cases. Moreover, the experts differ on the point. May is of the opinion that in a case of contempt the name of the particular member is not indicated the House is apt to take up the case. But specific and selective references would not be taken as reflections on the House, because the door of the law courts are open for such cases. But Wade and Phillips think that a case of contempt may be taken up by the House even if specific members of the House are identified.


2. Wade and Phillips; Constitutional Law.
So at every step confusions do arise. Libels on the members of the House could be regarded contempt of the House. But to constitute a contempt the libel must concern the character or conduct of a member or a group of members in his or their capacity as members of the House or in relation to the work in the House. But this principle has not been uniformly followed in India, particularly in state legislatures.

Again 'Contempt of the House' is not to be always equated with the expression 'breach of privilege'. The two concepts are indeed quite distinct and has always been made so by the British House of Commons. Parliamentary Privileges are a part of the common law of the land. These are various immunities which members have and which the courts are required by law to recognise. But contempt of the House is different. Contempt is what obstructs the House, its members, officers or others in the performance of their duties. The courts have no power either to rule upon or to punish such obstruction unless, of course, there is in addition, a breach of an acknowledged privilege and the proceedings are taken in respect of that breach. But in India the legislatures have been found to have deviated from the British norms on two counts. First, very often non-contempt cases have been picked up to set a case of breach of privilege, particularly in the case of newspaper reports. The legislature along with its members appears to be over-sensitive in such cases. Second, the legislature has also challenged the jurisdiction of the law-court to entertain any application from a person committed by it.

Contempt is practically undefinable, and a wit rightly goes 'contempt is contempt'. In Britain it is accepted that
the courts will be able to interfere only if the House commits a
contumacy and the warrant states the causes of commitment which may
be no real cause at all. The state legislatures in India, in a
number of cases, protested against this principle. Complications
also arise in India because the superior judiciary in India has, in
relation to parliamentary privileges, powers which do not belong to
English Courts.

A significant privilege of the House of Commons is
embodied in Article 9 of the Bill of Rights, 1688, which reinforced
the statute of 4th, Henry VIII. The Bill recognised the Commons’
claim to exclusive jurisdiction over words spoken in their own House.
The Article did more than this. It comprised, within such exclusive
jurisdiction, the 'proceedings in Parliament' and the proceedings
will include much more than speeches and debates. The question now
is whether this privilege of the Commons can be read in Articles 105(3)
and 194(3) of the Indian Constitution. The answer must be 'no'. The
proceedings of the Indian legislatures are not immune from judicial
scrutiny. According to Article 212 (1), the validity of any proceed-
ings in the legislature of a state cannot be called in question on
the ground of any alleged irregularity of procedure. The corresponding
Article relating to the Parliament is 122(1). The language of the
two Articles is identical. The Supreme Court has held that the pro-
edings of a legislature cannot be scrutinised merely on the ground of
alleged procedural irregularity.

But Sharma's case went to the Supreme Court a second
time in 1959 - 60. Some stray observations of the Supreme Court in

3. M.S.M. Sharma V Shri Krishna Sinha (Searchlight Case),
Sharma's case have led to the notion that the House is the sole judge in the matter of parliamentary privileges. But the Supreme Court itself discourages obiter dicta in constitutional matters and what has been said in Sharma's case has to give way to the considered opinion on the Presidential reference in the matter of U.P. Assembly. The Supreme Court there has held that courts can examine all resolutions of a House of the legislature in its privilege jurisdiction and rectify mistakes resulting from malafides, caprice, arbitrariness etc. The Court has also held that the legislature, like any other authority of the state, would be amenable to the jurisdiction of courts in petitions under Article 226 of the Constitution. In fact, the Supreme Court's opinion on the Presidential reference is the final authority for the proposition that there is no resolution of a legislature concerning the committal of any person or the expulsion of any member by the legislature concerned against which an appeal to the superior judiciary would not lie.

Contrary to the popular notion, the superior judiciary in India, unlike the English Courts, can examine even the internal proceedings of the House, if the allegation is that they are marked by an illegality. Article 212(1) of the Constitution saves the proceedings of a legislature from judicial scrutiny only if they are merely irregular. But whether the proceedings suffer from irregularities, or even from illegalities, is again a justiciable matter in the Indian scheme of things.

The current notion that malafides cannot be attributed to the vote of the House of a legislature has also been effectively countered by the judgment of the Punjab and Haryana High Court.

in Hardwari Lal's case. It has been held that there is always a strong presumption of honesty and good faith in favour of the House, but the presumption is rebuttable and substantial allegations of caprice or mala fides are examinable by the courts under Article 226 of the Constitution. Even the authority of the Supreme Court is available for this proposition. The Supreme Court authorities would seem to point to the conclusion that the superior judiciary can also look into the allegations of denial of natural justice made by persons committed or expelled by the House of a legislature.

In view of the elaborate reasoning of the Supreme Court in A.I.R., 1965, S.C. 745(Paras 103 - 135), it becomes doubtful if Indian legislatures can at all claim the privilege to punish for contempt not committed in the view of the House. The House of Commons has the power to commit, for its contempt, by reason of its descent from the High Court of Parliament. Indian legislatures have never discharged any judicial functions. They were there before independence, but they did not then have the power of committal for contempt. The sole basis for the powers and privileges of Indian legislatures are Articles 105 and 194 of the Constitution. According to the reasoning of the Supreme Court in A.I.R., 1965, S.C., 745, the Power to commit for contempt could not come to the Indian legislatures. That the power of committal is not a necessary incident of the functioning of a Legislative Assembly is shown by the fact that the U.S.Congress does not have the power to commit anybody for its contempt. In the United States, a committal for contempt is a matter

for courts to handle. In any case, adjudication of contempt by
the House is a judicial process and since Indian legislatures do not
have any judicial origin like the British House of Commons, Indian
courts rather than Indian legislatures should have jurisdiction
over matters concerning contempt of legislatures.

In spite of the authoritative and binding
color of the opinion of the Supreme Court on the Presidential
reference (A.I.R., 1965, S.C. 745) and in spite of the plain lan-
guage of Article 226 of the Constitution which gives very wide
powers to High Courts, the notion persists that the Indian Parliament
and state legislatures are the sole and exclusive judges of their
privileges. An attempt was actually made in the Constituent Assembly
to ensure that the Houses of legislatures in India would be the
sole judges of their privileges. Prof. F.T. Shah, a member of the
Constituent Assembly, moved an amendment when Article 105(3) was
under discussion: "In all matters of the privileges of the House
of Parliament or of members thereof, the House concerned shall be
the sole judge and any order, decree or sentence duly passed by
that House shall be enforced by the officers of the House or under
the authority thereof".8

The amendment was negatived. The Presiding Officers
of legislative bodies in India, who gathered in a conference at
Bombay in January, 1965, and passed a strong resolution, criticising
the opinion of the Supreme Court on the Presidential reference
(AIR, 1965, S.C. 745) were misinformed when they said that, in the
matter of privilege, "Cutter of jurisdiction of courts was intended

by the Constitution - makers". They were of course, nearer the truth when they said that "The opinion of the supreme court has reduced legislatures to the status of inferior courts". 9

A federal Constitution can successfully work only if the various organs of the body politic are permeated by the legal spirit. The Indian Constitution contemplates 'checks and balances' in the governance of the country, though not to the extent to which the Federal Constitution of the United States does. If legislatures have a vital role to play in the life of the nation, so has the judiciary, as long as the Constitution subsists in its present shape. It is as well that the legislatures reconcile themselves to the judiciary exercising the powers given to it and performing the duties enjoined on it by the Constitution.

But our experience over the last four decades suggests that there had been much controversy on the question of jurisdiction and the legislatures are on the whole not satisfied on judicial pronouncements. The controversy can be resolved only if the privileges are codified. The Constitution has in clear terms conferred the powers and privileges of the House of Commons on Indian legislatures. The powers and privileges of the House of Commons are well understood and the British people have managed without any specific legislation. But the situation in India is completely different.

The Press Commission raised two contentions in favour of codification in its report in 1954. First, the conditions are different in India and the powers, privileges and immunities of the House of Commons cannot be engrafted in India without some modification, second, the powers and privileges, as conferred by Article 194 may conflict with other provisions of the Constitution. The Press Commission cited Articles 193 and 22 with which Article 194 may be in conflict.

The question of codification comes to the fore when we discuss the importance of fundamental rights and their relationship with the privileges. In the Searchlight case the Supreme Court observed, "It does not, however, follow that if the powers, privileges or immunities conferred by the latter part of those Articles are repugnant to the fundamental rights, they must also be void to the extent of such repugnancy. It must not be overlooked that the provisions of Articles 105(3) and 194(3) are constitutional laws and not ordinary laws made by Parliament or the state legislatures and that therefore they are as supreme as the provisions of Part III."

This leads to the inference that the privileges shall over ride the fundamental rights. More emphatically it would mean that the Privileges which the legislature in India are entitled to enjoy are the same as that of the House of Commons notwithstanding the fact that it may mean violation of or conflict with other provisions of the Constitution. It was really the generality of

this proposition laid down in the Searchlight case which has created much confusion. This is evident from the fact that the advisory opinion has offered an explanation to the implications of this observation in these words "......We do not think it would be right to read the majority decision laying down as a general proposition that whenever there is a conflict between the provisions of the latter part of Article 194(3) and any of the provisions of the fundamental rights guaranteed by Part III, the latter must yield to the former. The majority decision, therefore, must be taken to have settled (only) that Article 19(1)(a) would not apply, and Article 21 would".

As to the applicability of Article 22, the question was left open. It was observed that "In an earlier case decided by the Supreme Court it was held that Article 22(2) also applied. It was further observed that it was hardly necessary for the majority decision to deal with the point pertaining to the applicability of Article 22(2) because the point did not arise in the proceeding before the Court in Pandit Sharma’s case. That is why we wish to make it clear that the obiter observations, made in the majority judgment about the validity or correctness of the earlier decision of this Court in Gumapati Keshav Ram Reddy’s case should not be taken as having decided the point in question. In other words, the question as to whether Article 22(2) would apply to such a case may have to be considered by this Court if and when it becomes necessary to do so."

13. It was observed, "that our decision proceeded entirely on a concession of Counsel and cannot be regarded as a considered judgment on the subject (2959 S.C. 395 at P.410).
With due respect to their Lordship, the conclusion does not sound logical. When it is admitted that the observations about the correctness of the decision in the Elitz case were obiter and not accurate, there is no necessity of saying that the matter will be considered in a future case, since the Elitz case is already there to serve as a precedent and it is binding on all courts in India till the Supreme Court itself decides to overrule it.

On March 10, 1968, the Allahabad High Court delivered the judgment on the writ Petition of Keshaev Singh which was pending before it since March 19, 1964. The High Court while dismissing the Writ Petition surprisingly did not make any reference to the advisory opinion of the Supreme Court in the above matter. It was held. "In our opinion, the provisions of Article 22(2) of the Constitution cannot apply to a detention in pursuance of a conviction and imposition of a sentence of imprisonment by a competent authority".

This apparently runs counter to the Supreme Court decision in the Elitz case where it was observed that "this is a clear breach of the provisions of Article 22(2) of the Constitution".

It may, however, be noted that the two cases are easily distinguishable. In Elitz case the Petitioner was taken into custody to be produced before the Speaker of the U.P. Legislative Assembly to answer a charge of a breach of privilege, whereas in Allahabad case the petitioner had been held guilty of contempt and

16. Keshaev Singh v Speaker, Legislative Assembly U.P.
was sentenced to a week's imprisonment. The reasoning of the Allahabad judgment is therefore logical and sound. Another judgment of the Supreme Court lends support to this view where it was observed, "There can be no manner of doubt that arrests without warrant issued by a court call for greater protection than do arrests under such warrant. The provision that the arrested persons should within twenty-four hours be produced before the nearest magistrate is particularly desirable in the case of arrest otherwise than under a warrant issued by the Court, for it ensures the immediate application of a judicial mind to the legal authority of the person making the arrest and the regularity of the procedure adopted by him. The language of Clauses (1) and (2) of Article 22 suggests that the fundamental rights conferred by this Article give protection against such arrests as are affected otherwise than under a warrant issued in the Article, that it was designed to give protection against the act of the executive or other non-judicial authority."  

The latest position therefore is that as regards the privileges Article 19(1)(a) and in a proper case Article 22(2) will not apply but Article 21 would.

It can be asked at this point: Is there a single written Constitution in the world where a legislature is given power to neglect the fundamental rights altogether so that its dignity may be kept up? If the Congress of the United States and its members and committees could function properly without having such over-riding powers why cannot our legislatures do the same?

We may briefly trace the line of reasoning put forth by Subbarao J. in his illuminating dissenting judgment in the Searchlight case.

"Provision in Article 194(3) equating the privileges of a legislature to those of the House of Commons, U.K. is a transitory measure. Article 194(3) expressly declares that the law in respect of powers, privileges and immunities is that made by a House of the Legislature from time to time and introduces rider as a transitory measure that till such law is made, the powers, privileges and immunities of the House of Commons should be those of the legislature also. I have no doubt therefore that part two of Clause (3) of Article 194 is intended to be a transitory provision and ordinarily, unless there is a clear intention to the contrary it cannot be given a higher sanctity than that of the first part of Clause (3)."  

Article 194(3) is subject to the provisions of the Constitution relating to fundamental rights. Article 245 enables a state to make laws for the whole or any part of the state. Article 246(3) provides that the legislature of any state has exclusive power to make laws with respect to any of the matters enumerated in List II in the seventh schedule. Item (39) of the "State List" enumerates the following matters among others:

'Powers, privileges and immunities of the legislative Assembly and of the members and the committees thereof'.

Clause 2 of Article 13 which is one of the articles in Part III relating to fundamental rights, prohibits the state from making any law which takes away or abridges the rights conferred by that Part and declares that any law made in contravention of that clause shall to the extent of the contravention

be void. It is, therefore, manifest that the laws made by the legislature in respect of the powers, privileges and immunities of a House of the legislature of the state, would be void to the extent the law contravened, the provision of Article 19(1)(a) of the Constitution, unless it is saved by any law prescribing reasonable restrictions within the ambit of Article 19(2). In article 19(2) exceptions to the right of freedom of speech and expression are enumerated. There is no mention of 'contempt of a legislature' although 'contempt of court' is mentioned. Further, it has been held that fair and reasonable criticism of a judicial act in the interest of the public good are alike open to criticism, and if reasonable argument or expostulation is offered against a judicial act as contrary to law for the public good, no court could or would treat it as contempt of court. As was aptly put by the Privy Council:

"Where the authority and position of an individual judge or the due administration of justice is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising in good faith in private or public the public act done in the seal of justice. The path of criticism is a public way: the wrong headed are permitted to err therein provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they

20. R.V. Gray (1900) 2 Queen's Bench Division, 36.
are immune. Justice is not a cloistered virtue, she must be allowed to suffer the scrutiny and respectful though outspoken criticisms of ordinary men".

These remarks fully apply to a legislature. The law of contempt is not made for the protection of legislators who may be sensitive to the winds of public opinion. They are supposed to be men of fortitude, able to thrive in a hard climate. But in India the legislators being oversensitive are not reconciled to this status. Since any attempt to codify the privileges may invite the question of repugnancy under article 15(2) the legislators seem unwilling to clear the deck.

Quite recently a question was raised as to whether in view of article 20(5) of the Constitution which provides that 'no person accused of any offence shall be compelled to be witness against himself', a person who is alleged to have committed a breach of privilege of the House should be treated as an accused, and whether the evidence which he has to tender before the committee of privileges, voluntarily or on being asked by a committee should be taken on oath or not?

It has been held by Justice Goyajee of Bombay High Court in Wilts case in 1956 that

"Article 194 makes sub article (1) subject to the provisions of the Constitution but sub article (3) is not made subject to the provisions of the Constitution. The founders of the Constitution did not make article 194(3) subject to the provisions of the Constitution. The fundamental rights are to be read as limitations on the Government or on the Legislature but not as
controlling other parts of the Constitution".

A parliamentary committee or a committee of State Legislature is, therefore, by virtue of article 105(3) and article 194(3) free to exercise the powers exercised by the Committee in the House of Commons, U.K. to take evidence of witnesses on oath the provisions of Article 20(5) being not attributed at all.

No legislative authority that is subject to a written constitution which it is bound to obey possesses sovereign powers to the fullest extent. No legislative authority can make laws which are not according to and consistent with, the fundamental laws that have been presented for the government by the people.22

When the liberty of the citizen and the enactment of a legislature are in conflict owing to the effect of the legislation being left in doubt, the benefit of the doubt, should be given in favour of the liberty of the citizen. Undue restriction on the fundamental rights is not a healthy trend. The argument that article 194 should be preferred to article 19(1) and not vice versa cannot be appreciated. Under the Constitution it is the duty of the courts to give a harmonious construction to both the provisions that full effect may be given to both, without the one excluding the other. There is no inherent inconsistency between the two provisions. Article 19(1) gives freedom of speech and expression to a citizen, while the second part of article 194(3) deals with the powers, privileges and immunities of the legislature and of its members and committees. The legislature and its members have

certainly a wide range of powers and privileges and the said privileges can be exercised without infringing the rights of a citizen, and particularly of one who is not a member of the legislature. When there is a conflict the privilege should yield to the extent it affects the fundamental rights. This construction gives full effect to both the articles.

It is the duty of the courts to protect the rights of the citizens who in theory reserved to themselves certain rights and parted only the others to the legislature. Every institution created by the Constitution should function within the allotted field and cannot encroach upon the rights of the people who created the institution.

But unfortunately this has not happened in India. The members of the legislature expressed their oversensitivity to public criticism. The speaker acted in many a case in a partisan way. The privileges have been declared more important and sacred than the fundamental rights, particularly freedom of speech and expression, as if an inherent inconsistency exists between the two. The courts are not sure whether the legislature reserves absolute right in matters of privilege including the right of committal. The legislatures are not prepared to accept any kind of judicial penetration in their domain as if it is sacrosanct, being forgetful of the fact that they are not as sovereign as the British House of Commons. In many cases the judiciary intervened when right to personal liberty under Article 21 was violated, but such promptness had always been lacking when freedom of speech and expression under
Article 19(1) was called in question. All this could be resolved only when the Parliament brings out a piece of law codifying its privileges.

In fact, the question of undertaking legislation on the subject has engaged the attention of the Presiding Officers since 1939. Before 1947, the question was whether sections 28 and 71 of the Government of India Act, 1935, should be so amended so that privileges of the Indian legislatures were made the same as those enjoyed by the House of Commons.

At the Conference held in 1939 the discussion proceeded on the basis of the Bengal Legislative Assembly Powers and Privileges Bill 1939 introduced in the Bengal Legislative Assembly on the 12th July, 1939. The Conference agreed mainly on two points. First, the privileges should be legally defined. Second, all the privileges enjoyed by the House of Commons could not be applied to the Indian legislatures. So the extent of incorporation should be decided upon. But no law was ultimately passed by the Bengal Assembly.

In 1947 the Presiding Officers' Conference took a wise decision to bring the matter to an end. Each Province should prepare a draft bill on Parliamentary Privileges and then send the same to the Central Assembly Department. Then the matter would be placed before a special session of the Conference which would then prepare a bill to be placed later to the Central and Provincial legislatures for enactment. On 20th February, 1947, the British Government announced transfer of power to India and the matter was shelved for the time being. Every one was eagerly looking forward
for the setting up of the Constituent Assembly which was in the
offing and which was expected to take up the issue in all its
ramifications.

In September, 1949, when the Presiding Officers' Conference considered the question of enacting legislation on the
subject, the Chairman expressed the view:

"It is better not to define specific privileges just at the moment but to rely upon the precedents of the British
House of Commons. The disadvantage of codification at the present
moment is that whenever a new situation arises, it will not be
possible for us to adjust ourselves to it and give members additional
privileges. Today, we are assured that our privileges are the same
as those of the members of the House of Commons. In the
present set up any attempt at legislation will very probably curtail
our privileges. Let us, therefore, content ourselves with our being
on a par with the House of Commons. Let that convention be firmly
established and then we may, later on, think of putting it on a
firm footing."

So the Chairman pointed out a few practical difficulties of codification and broadly outlined the shape of things to
come. The Conference discussed the issue at some length and ultima-
tely resolved in favour of setting up a committee composed of four
speakers to go through the recommendations sent or the bills enacted
by the provinces on the form and content of a law of privileges.

23. Shri G.V. 'avalkar.
24. Address by G.V. 'avalkar at the Conference of Presiding
Officers held in September, 1949 (Report of the Presiding
Officers' Conference, 1949, Govt. of India).
Later on, the Committee of Speakers, made, inter alia, the following observations:

"Article 194(3) of the Constitution of India provides that in other respects - other than those referred to in Clauses (1) and (2) of the article - the powers, privileges and immunities of a House of the Legislature of a state, and of the Members and the Committees of a House of such Legislature shall be such as may from time to time be defined by the Legislature by law, and, until so defined, shall be those of the House of Commons of the Parliament of the United Kingdom, and of its Members and Committees at the commencement of the Constitution. It seems from this that, as soon as a legislature enacts a law defining the powers, privileges and immunities of its Members, the privileges of the House of Commons will not be available to the Members of the Legislature. The committee is doubtful as to whether under Article 194(3) a Legislature can enact a law defining the powers, privileges and immunities of its Members in certain respects only and also providing therein that in other respects the powers, privileges and immunities will be those of the House of Commons. The Committee is of the opinion that if it is competent to a Legislature under this article to enact such a law, then only the Legislature should undertake a legislation defining the powers, privileges and immunities of Members. Otherwise, it would not be advisable to undertake any legislation at present, whether it is open to the Legislature to do so or not depends upon the interpretation of article 194(3). As the question is one of legal interpretation, the Committee has left the matter for the decision of the Speakers' Conference."

Again in the Conference of Presiding Officers in 1950 the issue along with the Report of the Committee of Speakers was discussed in great details. In his inaugural address Shri G. V. Dave, the Chairman, observed:

"I believe it might not be out of place here if I were to express as to how I feel about the question of legislation on matters of privileges, I may at once say that I have an open mind and would willingly abide by the decisions that the Conference takes. But my own reaction for the time being is that we may allow the matter to rest for the present where it is, specially in view of the present level of Parliamentary life in the country and set-up of Governments. The Constitution has granted the maximum possible privileges when the same are equated with those of the House of Commons. Legislation in respect thereof is, therefore, now not at all necessary, or at least not so necessary as it was when the privileges were very much restricted. Further, I feel two great difficulties and handicaps if we were to think of any legislation in respect of the privileges. These are:

1. Any legislation at the present stage would mean legislation only in regard to matters acceptable to the executive Government of the day. It is obvious that, as they command the majority, the House will accept only what they think proper to concede. It is important to bear in mind that the privileges of Members are not to be conceived with reference to this or that party, but as privileges of every Member of the House, whether he belongs to Government or the opposition party."
"...fears are, therefore, that an attempt at legislation would mean a substantial curtailment of the privileges as they exist today. We may think, therefore, of legislation after a few years, by which time we may expect that sound parliamentary conventions will grow.

1) "...second reason is that any legislation will crystallize the privileges and there will be no scope for the presiding authorities to widen or change the same by interpretation of the privileges as they exist in the British Parliament. Today they have an opportunity of adapting the principles on which the privileges exist in the United Kingdom to conditions in India.

I may here invite your attention to the secretary's (Shri M.N. Kaul's) note on the subject which is being circulated to you. It points out a fundamental aspect of the question which deserves careful and anxious consideration.26

In his note referred to above, Shri M.N. Kaul had emphasised inter alia:

"Our constitution has one important peculiarity in that it contains a declaration of fundamental rights and the courts have been empowered to say that a particular law or a part of a law is void or invalid because it is in conflict with a particular fundamental right and therefore beyond the powers of Parliament. At the present time, and until Parliament had codified its privileges, the privileges of Parliament are defined in the constitution itself as being the same

as those of the House of commons in the United Kingdom. It follows from this fact that at the present time the privileges of Parliament are part and parcel of the Constitution and therefore, of what is known as the fundamental law. The Courts will, therefore, be compelled to reconcile the existing law of privilege, which carries with it the power of the Speaker to issue warrant without stating the grounds on the face of it, with the fundamental rights. It will be extremely difficult for the Supreme Court to say that what is explicitly provided in a part of the constitution in regard to the existing privileges of Parliament is in any way restricted by the fundamental rights.

Once, however, the privileges are codified by an Act of Parliament in India, the position changes entirely....... the statute will be examined in the same way as any other statute passed by Parliament, and the Courts may well come to the conclusion that, in view of the provisions in the fundamental rights, it is not open to any legislature in India to prescribe that the Speaker may issue valid warrant without disclosing the grounds of commitment on the face of the warrant - all matters would (then) come before the courts and Parliament would lose its exclusive right to determine matters relating to its privilege. 27

It may be mentioned here that the Supreme Court in their majority judgment in the Searchlight case in 1958 upheld this view and declared: "It is true that 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)

27. "J.J. Kaul, Codification of the Law on Privilege (Note circulated at the Conference of Presiding Officers in August, 1950)
will not be a law made in exercise of constituent power .......
but will be one made in exercise of its ordinary legislative
powers under Article 246 read with the entries referred to above
and that consequently if such a law takes away or abridges any of
the fundamental rights, it will contravene the pre-emptory provisions
of Article 13(2) and will be void to the extent of such contravention
as it may well be that is precisely the reason why our Parliament
and the State Legislatures have not made any law defining the
powers, privileges and immunities just as the Australian Parliament
had not made any under section 49 of their constitution correspon-
ding to Article 194(3) ....... It does not, however, follow that if
the powers, privileges or immunities conferred by the latter part
of those Articles are repugnant to the fundamental rights, they
must also be void to the extent of such repugnancy. It must not
be overlooked that the provisions of Article 105(3) and Article
194(3) are constitutional laws and not ordinary laws made by
Parliament or the state legislatures and that, therefore, they are
as supreme as the provisions of Part III.

Article 19(1)(a) and Article 194(3) have to be
reconciled and the only way of reconciling the same is to read
Article 19(1)(a) as subject to the latter part of Article 194(3)...
In our judgment the principle of harmonious construction must be
adopted and so constructed, the provisions of Article 19(1)(a),
which are general must yield to Article 194(1) and the latter
part of its clause (3) which are special." 23

Mr. Justice K. Subba Rao, in his minority judgment in the same case, however observed:

"The first thing to be noticed in clause 3 of Article 194 is that the constitution declares that the powers, privileges and immunities of a House of Legislature or a staff and of the Members and Committees of a House of such Legislature are such as defined by the Legislatures by law. In the second part, as a transitory measure it directs that till they are so defined, they shall be those of the House of Commons of the Parliament of the United Kingdom and of its Members and Committees, at the commencement of the constitution.

I find it impossible to accept the contention that the second part is not a transitory provision, for the said argument is in the teeth of the express words used therein. It is inconceivable that the Constituent Assembly, having framed the Constitution covering various fields of activity in minute detail, should have thought fit to leave the privilege of the Legislatures in such a vague and nebulous position compelling the Legislatures to ascertain the content of their privileges from those obtaining in the House of Commons at the commencement of the Constitution.

I have no doubt, therefore, that part 2 of clause (5) of Article 194 is intended to be a transitory provision and ordinarily, unless there is a clear intention to the contrary, it cannot be given a higher sanctity than that of the first part of clause (5).

When the Constitution expressly made the laws prescribing the privileges of the Legislature of a State there is no apparent reason why they should have omitted that limitation (of fundamental rights) in the case of the privileges of Parliament of the United
Kingdom in their application to a State Legislature.

The contention also, if accepted, would lead to the anomaly of a law providing for privileges made by Parliament or a Legislature of our country being struck down as infringing the fundamental rights, while the same privilege or privileges, if no law was made, would be valid.

It may not be out of place to suggest to the appropriate authority to make a law regulating the powers, privileges and immunities of the Legislature instead of keeping this branch of law in a nebulous state, with the result that a citizen will have to make a research into the unwritten law of the privileges of the House of Commons at the risk of being called before the Bar of the Legislature.29

Speaking in Lok Sabha on the 20th February, 1959, on a private member's "The Parliamentary Privilege Bill" which sought to include Members' letters to Ministers within the meaning of the term 'Proceedings in Parliament', the former Law Minister A.K. Sen observed:

"After all, it is now acknowledged more or less universally that matters of privileges should be left uncodified rather than codified........ It is all the more so in the country.

Though in "noland", Parliament may, if it so chooses, pass any law concerning privilege without any limitation, whatsoever either by way of extending it or restricting it, in this

29. A.I.R. 1959, S.C. 395 - 422
country the moment we think of passing any law we shall have to contend with the limitations which the Constitution imposes upon us. Let us not be deluded into the idea that this House can pass any law concerning its privileges. It is all right to stick to those which have been inherited by reason of Article 105 of the Constitution. But the moment we try to codify them by passing any laws ourselves, for, the whole of the limitations in Part III of the Constitution and the other limitations will have full play the moment the Parliament seeks to legislate. That matter has been made quite clear in the recent judgment of the Supreme Court in the Patna Searchlight case, wherein it appears to have been laid down that if Parliament sought to pass a law seeking to confer some privilege which it now enjoys, it might have been bad in law as well as against the Constitution.

Yet since no law has conferred it, and it is only a matter of inheritance, we continue to enjoy it. That is the position. Therefore, I think it will be a good rule of caution and prudence if we do not indulge in large scale legislation or indiscriminate legislation concerning the privileges of this House or of the other House. After all, centuries of experience of other Parliaments, have cautioned them against landing themselves into a body of codified laws of privilege. I think we can safely follow it as a rule of caution.30

A pronouncement on the subject by the Supreme Court was made in their Opinion on the Special Reference (No 1 of 1964) made by the President in Keshav Singh's case. The majority opinion

30. Lok Sabha Debates, dated 20-2-1959, CC 2275-76.
of the Supreme Court observed: "The implications of the first part of clause (3) may, however, be examined at this stage. The question is, if the Legislature of a state makes a law which prescribes its powers, privileges and immunities, would this law be subject to Article 13 or not? It may be recalled that Article 13 provides that laws inconsistent with or in derogation of the fundamental rights would be void. Clause (1) of Article 13 refers in that connection to the laws in force in the territory of India immediately before the commencement of the Constitution, and clause (2) refers to laws that the state shall make in future. Prima facie, if the Legislature of a state were to make a law in pursuance of the authority conferred on it by clause (3), it would be law within the meaning of Article 13 and clause (2) of Article would render it void if it contravenes or abridges the fundamental rights guaranteed by Part III. As we will presently point out, that is the effect of the decision of this court in Pandit Sharma's case.

In other words, it must now be taken as settled that if a law is made under the purported exercise of the power conferred by the first part of clause (3), it will have to satisfy the test prescribed by the fundamental rights guaranteed by the Constitution. If that be so, it becomes at once material to enquire whether the Constitution makers had really intended that the limitations prescribed by the fundamental rights subject to which alone a law can be made by the Legislature of a state prescribing its powers, privileges and immunities should be treated as irrelevant in construing the latter part of the said clause. The same point may conveniently be put in
another form. If it appears that any of the Powers, privileges and immunities claimed by the House are inconsistent with the fundamental rights guaranteed by the Constitution, how is the conflict going to be resolved. Was it the intention of the Constitution to place the powers, privileges and immunities specified in the latter part of Clause (3) on a much higher pedestal than the law which the Legislature of a state may make in that behalf on a future date? As a matter of construction of Clause (3), the fact that the first part of the said clause refers to future laws which would be subject to fundamental rights, may assume significance in interpreting the latter part of Clause (3).”

"Mr. Justice Sarkar in his dissenting opinion however observed:

"The Constitution-makers had before them when they made the Constitution in 1950, more or less similar provisions in the Australian Constitution Act, 1901, and they were aware that during fifty years, laws had not been made in Australia, defining the privileges of the House of Legislatures there but the Houses had been content to carry on with the privileges of the House of Commons conferred on them by their Constitution. With this example before them I have no reason to think that our Constitution makers, when they made a similar provision in our Constitution, desired that our Legislatures should make laws defining their own privileges and get rid of the privileges of the House of Commons conferred on them by the second part of Article 194(3). I think it right also to state that even if the rights conferred by the second part of Article 194(3) were transitory, that would not justify a reading 31. Keshav Singh v Speaker, Legislative Assembly, U.P."
the result of which would be to delete a part of it from the Constitution".32

Again in the Madras High Court the question of legislation defining the privileges and immunities came in 1960. The Court observed:

"It is very difficult to see how any theory of automatic lapse, or lapse due to in-action can apply to Article 194(3) in its relation to the State Legislature .... We may take notice of the fact that certain petitions have been submitted to Parliament and to the state Legislature, stressing the need for early enactment, in the interest of the Rule of Law, but it is impossible to arrive at any conclusion that the in-action is deliberate, far more so, to sustain any theory that such inaction has the effect of a lapse or extinction. Per contra, where the Constitution intends setting a term to any situation or rights, it explicitly says so, and Articles 354, 357 and 343 are very clear instances".33

In the United Kingdom the privileges of the House of Commons are still mainly based upon custom and precedents as they are not codified. In this connection, the Select Committee of the House of Commons in the United Kingdom on the Official Secrets Act, in their report in 1939, observed:

"The privileges of Parliament, like many other institutions of the British Constitution, are indefinite in their nature and stated in general and sometimes vague terms. The elasticity thus secured has made it possible to apply existing privileges

33. C. Subramaniam V. Speaker of the Madras Legislative Assembly, A.I.R. 1969, Madras I.O.
in new circumstances from time to time. Any attempt to translate them into precise rules must deprive them of the very quality which renders them adaptable to new and varying conditions, and new or unusual combinations of circumstances, and indeed, might have the effect of restricting rather than safeguarding Members' privileges, since it would imply that, save in the circumstances specified, a member could be prosecuted without any infringement of the privileges of the House. 'The dignity and independence of the two Houses', says Sir William Blackstone with great force, 'are in great measure preserved by keeping their privileges indefinite'. If all the Privileges of Parliament were set down and ascertained and no privileges to be allowed but what was so defined and determined, it were easy for the executive power to devise some new case, not within the line of privilege, and under pretence thereof to harass any refractory Member and violate the freedom of Parliament'.

The question of defining Parliamentary Privileges was again raised in the House of Commons, United Kingdom, when on the 11th April, 1957, Mr. Iremonger, M.P. stated that there was considerable public doubt and anxiety on the general question of the nature and extent of Parliamentary Privileges and requested the leader of the House to grant sometime for discussion of a motion put on the Order Paper in the name of six members including himself. The motion read as follows:

"That it be an instruction to the Committee of Privileges, in view of the prevailing Public uncertainty and anxiety on the matter to prepare and submit to the House a report which shall

34. House of Commons Committee 101 (1953-59), P.(xiv), Para 22.
define the nature and clarify the purpose of Parliamentary Privilege and recommend a procedure designed to secure its equitable protection. 35

Mr. Butter, Lord Privy Seal and Leader of the House, promised to give due consideration to the motion, but advised the member to take his chances through a ballot for the Private Member's Motion.

He also recommended to the House to consider some very valuable statements contained in the Report of the Select Committee on the Official Secrets Acts of 5th April, 1949, which included the following weighty words of Sir William Blackstone:

"The dignity and independence of the two Houses are in great measure preserved by keeping their privilege indefinite. 36

The question of codification of categories of contempt was also considered by the Select Committee on Parliamentary Privilege (1966-67) of the British House of Commons. The Committee reported 37 inter alia as follows:

"It has been suggested to your Committee that the categories of contempt should be codified. They have given careful consideration to this proposal but have been compelled to reject it. The very definition of 'contempt' which they have proposed for the future guidance of the House clearly indicates that new

forms of obstruction, new functions and new duties may all contribute to new forms of contempt. They are convinced therefore that the House ought not to attempt by codification to inhibit its powers.

In South Australia Parliament had been empowered by Section 35 of the Constitution Act, 1855-56, to define by Act the privileges, immunities and powers of two Houses and its members, provided they did not exceed the privileges, immunities and powers of the British House of Commons, as at the time of passing the Act. In pursuance of this authority, Parliament of South Australia in 1858 enacted the Parliamentary Privileges Act, which set out in comprehensive detail the privileges of the local legislatures. This Act, however, was repealed by the South Australian Parliament in 1872, since in its actual working great difficulties were experienced. For example, it was provided in the said Act that any warrant issued by the Speaker for the apprehension and imprisonment of any person adjudged guilty of contempt should contain a statement not only that the person named therein had been adjudged guilty of contempt by the House, but also specify the nature of such contempt in the words of the Act defining the same, or in equivalent words. Power was given to every court that had jurisdiction in such cases to decide upon the validity of the warrant, and it was not sufficient to plead the warrant alone in answer to an application under the Habeas Corpus Act, as the validity of it could be questioned by the Court. In fact, if in the judgment of the Court, before which it came, the warrant of the Speaker was not held to be correct, "it was not worth the paper on which it was written."
James P. Boucaut, the Attorney General while speaking on the second reading of the Bill he had introduced in 1872 to repeal the Parliamentary Privileges Act, 1858, quoted Lord Cairns as saying:

"Parliament's most important privilege is not to define their privileges. A privilege to commit which is dependent upon the chance or some other body to whom a narrative shall be given of that which was done before their own eyes, being of the same opinion as you are as to whether it was a contempt or not, is no privilege at all."

These principles were recognised in the 1872 Act, and the 1958 Act, setting out details of parliamentary privileges was repealed. In essence the 1872 Act declared that the privileges, powers and immunities of the two Houses and its members and committees were to be the same as those of the House of Commons at the time of passing of the South Australian Constitution Act in 1856. This is still the law of parliamentary privilege today in South Australia.

Thus we have seen that while a number of Commonwealth states have codified privileges many others have not yet done so. In India demand for codification has been a long one. The matter was pressed on a number of occasions both inside and outside Parliament. On 23rd March, 1967, when the Speaker made an announcement in Lok Sabha regarding a writ petition filed in the Supreme Court against the Speaker and members of the Committee of privileges, questions were raised in the House whether legislation
should be undertaken to define the privileges of the House. The then Minister of Law, Shri P. Govinda Menon, thereupon, stated that if the view of the House was that legislation should be undertaken on the subject defining the privileges of Parliament, that would be a step in the right direction. The Minister of Law had further in reply to a question on the 21st June, 1967, stated that the question of defining the privileges was under consideration.

In this connection, Shri M. Hidayatullah, Ex-Chief Justice of the Supreme Court, has made the following observations:

"If there is mutual trust and respect between Parliament and courts there is hardly any need to codify the law on the subject of privileges. With a codified law more advantage will flow to persons bent on vilifying Parliament, its members and committees and the courts will be called upon more and more to intervene. At the moment, given a proper understanding on both sides, parliamentary right to punish for breach of its privileges and contempt would rather receive the support of courts than otherwise. A written law will make it difficult for Parliament as well as Courts to maintain that dignity which rightly belongs to Parliament and which the courts will always uphold as zealously as they uphold their own."

When we analyse the view of Shri M. Hidayatullah we discover an unrealistic chord of optimism in it. In the sphere of parliamentary privileges we have already noticed a lack of understanding and mutual respect between the state legislatures and the courts. Moreover, one cannot agree to the submission that codified privileges would make it difficult for both the Parliament and the

38. A Judge Miscellany, Bombay, 1972. PP 210-211.
Judiciary to preserve their respective dignity. So the arguments cited against codification do not stand rational scrutiny.

It has been clear that the arguments put forward against codification have been mainly four. First, codification of privileges would make the privileges of Parliament and state legislatures subject to the fundamental rights secured in Part III of the Constitution, and therefore subject to the review of the Judiciary.

Against this argument we may submit that in our system of freedom and democracy - rule of law, rights of the individual, independent judiciary and constitutional government - it is ideal that the fundamental rights enforced by the Constitution should have priority over any privilege or special right of any class of people including the elected representatives of the people. Moreover, all such privileges or special claims should be subject to judicial scrutiny, for situations may arise where the rights and freedom of the individual may have to be protected even against the Parliament or against captive or capricious parliamentary majority of a given time.

Our second submission is that the theory of sovereignty of Parliament has historically emerged in the soil of Britain in a struggle against the authority of the autocratic monarchy. But at the present moment the myth has been exploded. In India and for that matter in a democratic state sovereignty resides in the people who exercise it in times of general election. So the privileges of the Parliament and its members could not claim a pre-eminence over and above the rights of the people.
Thirdly, the founding fathers of our Constitution, after due and prolonged consideration, provided in Articles 109(5) and 194(3) that the Parliament and the state legislatures may define from time to time their privileges and until so defined the privileges would be similar to those of the House of Commons. So the reference to the House of Commons was not intended to be a permanent feature. The framers wanted codification of privileges in due course and naturally the privileges, if and when codified, were intended to be subject to judicial review.

Fourthly, under our Constitution the courts have full power to enquire into the existence of privileges, powers and immunities claimed by the Houses of Parliament. So there is no reason why the courts should not be allowed to look into the exercise of the privileges by the Parliament and to set aside any order made by the Houses or to give interim relief to a complainant pending final disposal of the case.

With these four counter arguments we set aside the first argument forwarded against codification of privileges.

The second argument against codification is that if the privileges are defined by law they will be fixed and specific, but a certain degree of elasticity is required for the smooth and efficient working of Parliament particularly in its formative stage. Once codified by law it would not be possible to add to the existing stock of privileges at a later date.

Against this argument we may submit, first, that the question of privileges being created anew does not arise even to-day. The Constitution while equating Parliamentary privileges in
India with those of the British House of Commons at the time of the commencement of the Constitution on January 26, 1950, does not leave any scope for the enlargement of privileges, second, even in Britain it is not possible for the House of Commons to create new privileges. By a stroke of analogy we may hold that it is not possible for the Indian Parliament as well to extend the present stock of privileges. Third, about forty years have elapsed since the Constitution was adopted and there has not been any break or abrupt interruption in the life of the Indian Parliament, unlike most of its Asian or African counterparts. So it is futile to refer to the nascent stage of the Parliament. The Indian Parliament in terms of time at least has achieved youth. Fourth, what is the necessity of adding new privileges to the existing ones, when the institution of privileges is not a new constitutional device? Through British history the entire scope and use of Parliamentary Privileges must have been clear by this time. So it is not at all difficult for the Parliament to enact a comprehensive piece of legislation defining its privileges.

The third argument is that in the interest of understanding between the Parliament and the Judiciary the privileges should not be codified. We do not see sense in it. First, conflict of power and jurisdiction between the two vital organs of government is nothing new in Constitutionalism. In India as well we have had ample experience of it over the last four decades. In February, 1967, the Supreme Court gave its controversial judgment in Golknath v State of Punjab39 virtually making it impossible for the Parliament to bring about any change in the fundamental rights enshrined in 39. Golknath v State of Punjab, A.I.R. 1967, S.C.1645.
Part III of the Constitution. But it also did not create any constitutional deadlock. So the question of rancour is no logic at all. Some also go to the length of saying that for a country like India a limited jurisdictional conflict between the Parliament and the Judiciary is good for the health of polity.\textsuperscript{40(a)}

The fourth and the last argument against codification is that centuries of experience of other Parliaments have cautioned them against enacting a body of privilege laws and so it is better for the Indian Parliament as well not to indulge in codification. But this argument does not hold good as what is suitable for other countries may not well be suitable for India. Indian experience over the last few decades has been distinctive in many respects.

So codification of privileges is vitally necessary. The case for codification has been that:

1) It is most in-appropriate for a fully independent and sovereign country like India to make a reference in the Constitution to the British House of Commons for determining the privileges of its Parliament and state legislatures. It is not a question of sentiments of a free people alone; it is a question of practical difficulties. Since the privileges are not codified very often the question is to be judged in terms of the British Constitution which is the result of a long process of evolution. The Indian Parliament and the state legislatures may claim a privilege which the British House of Commons last exercised in the nineteenth century. So there should be a clear exposition of the various privileges, powers and immunities which the Houses of Parliament, their

\textsuperscript{40(a)} R.Nukhopedhyay - The Indian Constitution, A few unsettled issues (Ratna, Calcutta, 1982) P.102.
Members and Committees enjoy and they should be made definite and
precise in their meaning.

2) The Courts should have full power to enquire
into the existence of privileges, powers and immunities claimed by
the houses of the legislatures and their proper exercise by the Houses,
and to set aside any order made by the Houses or to give interim
relief to a complaint pending final disposal of the complaint. But
it is not possible unless the privileges are enacted and the juris-
diction of the courts clearly defined. In the United Kingdom, dualism
which assumed an ugly shape during the earlier part of the nineteenth
century, still persists, but only in theory. The courts in the United
Kingdom will not tread on the toes of the Parliament; nor will the
House of Commons want to enter into the domain of the Judiciary. In
India, there is no dualism, even in theory. The sovereign power is
distributed among three institutions by the Constitution, though
there is no strict separation of powers. In the matter of the inter-
pretation of the Constitution and everything concerning parliamentary
privileges, it will depend on the interpretation to be put on Articles
105 and 194 by the Judiciary. But it is a little unfortunate that
this constitutional position is not fully appreciated by the legisla-
tures. The legal spirit, the existence of which is sternly postulated
by a federal Constitution, is still to permeate Indian life. The
Indian legislatures find it difficult to accept the position they
are not sovereign in the sense in which the British House of Commons
is. All this is productive of confusion and conflict.

The Supreme Court and the High Courts in India are
empowered under the Constitution to issue writs of habeas corpus
for production before them of persons committed by the House. 40 (b)
40(b) Articles 32(2) and 226 of the Indian Constitution and Section 491
of the Criminal Procedure Code.
This power was exercised by the Supreme Court in 1954 in respect of a person who was in custody in pursuance of a warrant issued by the Speaker of the Uttar Pradesh Legislative Assembly in connection with contempt proceedings. This position was made clear by Nidayatulla on 26th January, 1950: "The House had the right to commit for breach of its privileges or for conduct amounting to contempt of its authority but the court acting under the Habeas Corpus Acts were bound to entertain the petition for habeas corpus. But unfortunately our legislatures are not reconciled to this position."

Delivering a series of lectures on the Indian Constitution at the University of Madras in 1952, Sir Ivor Jennings, an acknowledged authority on Constitutions, observed that the Indian Constitution would be the paradise of lawyers. His prediction has come out to be true. The superior Judiciary is groaning under the weight of writs concerning questions of Constitution. No situation could be happier for the legal profession. We have a lengthy, detailed and very complicated Constitution and the task of interpretation of various provisions has been made specially difficult by some articles having been made expressly subject to the provisions of the Constitution, some having been made subject to specified articles of the Constitution and some made effective notwithstanding other provisions of the Constitution. In such cases courts very often have to ascertain the intentions of the Constituent Assembly, which is again a very difficult task in cases such as parliamentary privileges. In his 'Constitutional Law' Cooley has observed that

however carefully Constitutions may be made their meaning must often be drawn in question. So he suggests a guiding rule. "The whole instrument is to be examined with a view to determining the intention of each part"42.

During the public hearing arranged by the Election Commission, for the determination of the question whether or not Mrs. Gandhi's expulsion from the Lok Sabha implied the vacation of her seat, certain newspapers mentioned in the headlines43 a lawyer who argued before the Commission that, as a result of the passage of the Constitution 42nd Amendment Act, 1976, Indian legislatures were no longer dependent on the British House of Commons with regard to their privileges.44 The lawyer making the point forgot that according to Section 2 of the Act in question, the Act was to come into force on such date as the Union Government might, by notification in the Official Gazette, appoint and different dates might be appointed for different provisions of this Act. The provisions relating to the amended articles 105(3) and 194(3) have not yet come into force at all45. Had the amended Articles come into force, matters already confounded would have been worse confounded. Various ticklish questions would have arisen for decision. The powers, privileges and immunities of Indian legislatures would have been those claimed and exercised by the House of Commons on the date of the commencement of Sections 21 and 34 of the Constitution 42nd Amendment Act.

42. Cooley - Constitutional Law. P.487.
44. P. Mathew was the name of the lawyer.
All the difficulties mentioned so far in regard to the interpretation of Articles 105(3) and 194(3) would have remained as before. The coming into force of the amended Sections 21 and 34 would have introduced an additional difficulty. Could any legislature evolve for itself powers, privileges and immunities which it did not have at the time when the amended Articles of the Constitution came into force? This and allied questions would have defied answers. So it is fortunate for the Supreme Court and the Parliament that the amended Sections 21 and 34 of the Constitution 42nd Amendment Act, 1976, have not come into force and might never come into force.

But the problem cannot be shelved for all time to come. Already it has assumed large proportion and unless solved through codification might stand in the way of a proper and harmonious relation between the Judiciary and the Legislature. For one thing all the privileges vested in the House of Commons and still enjoyed by it cannot be claimed by the Indian legislatures. Certain privileges cannot come to Indian legislatures in the very nature of things. These relate to audience of the Commons with the British sovereign to the traditional prayer of the Commons to the sovereign for the continued extension of essential parliamentary privileges and for a favourable construction to be put on the privileges of the House. Certain other privileges cannot come to Indian legislatures, because of their patent inconsistency with the provisions of India's detailed written constitution. The Indian Constitution would not countenance impeachment of any functionaries, not mentioned in the Constitution as impeachable. Nor does the Constitution provide for the Bill of Attainder. The privileges of the House of Commons to
provide for or to regulate its own constitution cannot also be claimed by any Indian legislature whether at the Centre or in the states. The Constitution contains meticulous provisions regarding the constitution or composition of the Parliament and the state legislatures and there is no question of any of them providing for or regulating their own constitution. This fundamental difference between the House of Commons and the Indian legislatures is ignored by those who continue to maintain that Indian legislatures are entitled to claim all the powers, privileges and immunities of the British House of Commons.

Once and again the Supreme Court has pointed out that 'in other respects' in Articles 105(3) and 194(3) mean only 'to the extent possible'. In Sharma's case, the Court agreed that all the powers, privileges and immunities which the House of Commons had on 26 January, 1950 would also belong to the Indian legislatures. But in the Keshtav Singh case the Court held that this would not be the case, because there are some powers which cannot, obviously, be claimed by the Indian legislature. For instance, the privilege of the House of Commons in regard to its own constitution is expressed in three ways, first, by the order of writs to fill vacancies that arise in the Commons in the course of a Parliament; second, by the trial of controverted elections; and third, by determining the qualifications of its members in cases of doubt. These privileges cannot be claimed by the houses of the Indian legislatures. In that case the Court further said that while the conclusiveness of the general warrants of the House of Commons cannot be questioned.

in courts, general warrants issued by the Indian legislatures could certainly be challenged in the Indian courts. The submission of the court was based on the reasoning that the House of Commons is a descendant of the High Court of Parliament and takes rank with Supreme Courts of record, while Indian legislatures have never had the rank or the status or the functions of the Courts of record. Again the Commons can still take action, at least in theory, against judges, even with regard to their judicial conduct, if they chose to sit on the decisions of the Commons. Both the institutions in the United Kingdom are mature enough to realise that neither should tread on the toes of the other. But the House of Commons is legally and constitutionally free to take the action in question, Indian legislatures cannot do this.

But over the last two decades the Indian legislatures do not appear to be reconciled to this position. They exercised even the power of expulsion, which follows in the United Kingdom from the privilege of the House of Commons to control its own proceedings. In the Indian Constitution there are a few basic principles which are more important than other provisions of the Constitution. The principle of representation is one such principle and the parliamentary privileges are there merely to subserve and reinforce this basic principle. The power of a House of the legislature to punish a member or an outsider for its contempt only strengthens the principle of representation. Through the protection of the dignity of the House, the dignity of the electors is preserved. But the power of expulsion would be violative of the dignity of the electors and the principle of representation. Evidently, to expel a member is to rule that he is no longer so and the electors
be put to a second choice even though the second choice may fall on the expelled member. But the Constitution does not provide for a second choice by the electors during the subsistence of a term of election, except when a vacancy is caused by death, resignation or supervening disqualification, which, once again, all constitute situations subserving the principle of representation.

The electors have no right to recall. It will be a violation of the principle of representation and the dignity of the electorate if the elected representatives taken collectively claim the power of unseating a duly elected member, through expulsion. The power which the Constitution denies even to electors could not be available to the representatives of the people, explicitly or implicitly.

The power of expulsion, which the Indian legislatures have so far exercised once and again would be calculated to nullify the free choice of the electors. The House may expel him even after he is re-elected. The process can go on if the House has the power to expel and decides to use it. Obviously the process results in practical disenfranchisement of a part of the electors. Then hard political realities should not be overlooked. It must be remembered that, in India, a by-election is not a simple and quick affair, which is the case in the United Kingdom. In Haryana, for instance, a particular by-election took two years to come into effect47. Many other by-elections have been taking more than one year on an average, to be effective. The Election Commission that is charged with the duty of arranging elections and by-elections,

recently decided, after 'Mrs. Gandhi's expulsion from the Lok Sabha, that the by-election in Chikkamagalur, the constituency which had first elected her, would have to wait for at least six months more. Factors such as the weather, the convenience of the state concerned, if not also the wishes of the ruling party, that be to delay things, could be and often are in the way of quick by-elections. Elections are expensive too.

Under these conditions codification is necessary to decide finally whether the Indian legislatures could affirm the power of expulsion. Even the power of the House of Commons to expel members is not clear in the ordinary sense of the term. Its power depends on precedents and on a convention of the Constitution. For centuries, the House has claimed and exercised the power of expelling a member and it has never been defined by law as to in what cases the power could be used. The only limit to the power has been the discretion and the good sense of the House itself. Maitland submits that if the House were to vote the expulsion of any member on the funny ground of ugly appearance, the expelled member could get no relief from any court. In fact the House of Commons once expelled a member on the ground that the conduct of the member was unlike that of an officer and a gentleman. During the seventeenth century, the House often chose to declare an expelled member to be incapable of being re-elected. On 27th May, 1641, Taylor, a member of the House, was expelled and adjudged to be incapable of being a member of the House of Commons for ever.

48. The period was longer in effect. The decision of the Commission came to us through a press release in December 24, 1978 that the by-election is likely to be held not before Oct, 1979. But the Gazette of India and the Lok Sabha Bulletin of Dec, 19, 1978 declared that the seat would be considered vacant from afternoon of December 18, 1978.

49. In support of this argument of Maitland it is necessary to consult the Report of the Select Committee on Parliament

50. House of Commons Journals (1640-42) p. 158.
In fact, the incapacity for serving the Parliament for duration of the Long Parliament was often a part of the sentence of expulsion. After the Restoration, in 1666, one Wallop was expelled and was even forbidden to hold any office of public trust in the land not to speak of re-entry into the House. The famous Robert Walpole was expelled and when he got re-elected in 1712, he was declared incapable of serving in the 'present Parliament'. A little earlier, Asgill was expelled on the ground of his unacceptable religious beliefs.

So any reference to the House of Commons would make things more complicated. Any of the above cases of expulsion could, for instance, be invoked by the Indian legislatures because the House of Commons has nowhere defined the circumstances in which a member could be expelled. If Indian legislatures get the power of expulsion and come to exercise it untrammeled, absurd consequences can follow in the prevailing political climate of the country. There will be nothing to prevent a few members who may happen to be present at a particular sitting from expelling the members who might be absent. Expulsions, so far, have had clear political overtones. To cite only two recent examples:

(a) Hardwar Lal's expulsion from the Haryana Assembly in 1975 was a dangerous episode enacted by the Bansilal - dominated Assembly to teach a political opponent of Bansi Lal the lesson of his life, (b) the expulsion of Indira Gandhi, decided by the Lok Sabha on the findings of the Privileges Committee that she

51. House of Commons Journals (1660-67) P.60.
52. House of Commons Journals (1711-14) P.128.
had 'misused her office of Prime Minister with an intention to protect the interest of the Maruti Limited controlled and managed by her son', cast a sinister shadow on the future exercise of the penal powers of Indian legislatures. So under this political climate the power of expulsion is admittedly a most sinister power, which unless restricted and properly defined through codification would spell disaster.

The press plays a vital role in parliamentary democracy. Most of the raw material for Parliamentary questions, motions and debates comes from the daily press and this is an important tool on which a member very often relies. A few years ago sensations were created by the opposition members in revealing follies of the government, but now they had to follow the lead of the daily in this regard. It is of great public and national importance that the proceedings of Parliament are communicated to the people who are interested in knowing what passes within its walls, because on what is said and done there, the welfare of the community depends. The press can discharge this function effectively only if it enjoys what is termed as 'freedom of the press'. As it stands to-day the Parliamentary privileges are a possible source of threat to freedom of the press.


54. Wason Walter, Law Reports, Queen's Bench, 4. P.73.

55. In the words of Shastri J. of the Supreme Court, freedom of speech and the press lay at the foundation of all democratic organizations, for without free Political discussion, no public education, so essential for the proper functioning of the processes of popular government is possible. - Ramesh Thappar V State of Madras (1950) SCR 594(602). In the judgment delivered in the case of Bennett Coleman & Co. the Supreme Court declared : "Freedom of the press is the Ark of the Covenant of Democracy because public criticism is essential to the working of its institutions". AIR. 1973, S.C. 106.
The question of privileges of Parliament vis-à-vis the press emerges chiefly in four ways. First, the press publish the proceedings of Parliament and the Parliament may consider that the publication is false or contains something that has already been expunged by the Speaker. Second, in giving comments the newspaper casts reflection on either house, its committees or members and thereby causes contempt of the house. Third, the newspaper item may divulge budget proposal and thereby commit breach of privilege. Fourth, if the House passes an order that strangers withdraw followed by another order to the effect that the rest of the session be in secret session, any member or press who disregard the orders of the House and let the outside world know about the secret session would technically be in contempt of the House for disobeying its orders.56

Absolute immunity from proceedings in any court of law has been conferred under the Constitution on all persons connected with the publication of proceedings of either House of Parliament, if such publication is made by or under the authority of the House.57 But this immunity does not extend to the publication of reports of parliamentary proceedings in newspapers, whether published by a member of the House or by any other person, unless such publication is expressly authorized by either House.58 However, statutory protection has been given to the publication in newspapers

57. (a) Article 105(2), (b) Rule 379.
or broadcasts by wireless telegraphy of substantially true reports of any proceedings of either House of Parliament, provided the reports are for the public good and are not actuated by malice. When debates or proceedings of the House or its committees are reported malafide or there is wilful misrepresentation or suppression of speeches of particular members, it is a breach of privilege and contempt of the House and the offender is liable to punishment. It is also incumbent on the press not to disclose the proceedings or decisions of a secret sitting of the House, until the ban on secrecy is lifted by the House. Any such publication or disclosure is treated as a gross breach of privilege of the House. Similarly, publication of such portions of the debates as have been expunged from the proceedings of the House by order of the Speaker is a breach of privilege and contempt of the House, and accordingly punishable.

The position was stated thus by the Committee of Privileges of Lok Sabha in the Sunderayya Case:

"It is in accordance with the law and practice of the privileges of Parliament that while a Committee of Parliament is holding its sittings from day to day, its proceedings should not be published nor any document or papers which may have been presented to the committee or the conclusions to which it may have arrived at referred to in the Press ..... it is highly desirable that no person including a member of Parliament or Press

60. Rules 251 and 252.
Refer to Observer Case, House of Commons, 94 (1940-41) p iv.
61. Lok Sabha Debates, 14.3.1975.
should without proper verification make or publish a statement or comment about any matter which is under consideration or investigation by a Committee of Parliament.62

It is considered inconsistent with the dignity of the House to take any serious notice or action in the case of publication of every defamatory statement which may constitute a breach of privilege or contempt of the House. In deciding such cases of libel, the extent and circumstances of the publication of the libellous statement as also the standing of the person making such statement are taken into consideration.63 But in India as we have so far seen the legislatures are too much sensitive to public criticism and hostile reporting in the press. In all fairness the problem could be stopped only when the privileges are codified.

62. Sunderayya Case (Committee of Privileges), PP 2-3.

63. Committee of Privileges, 2nd Lok Sabha, 9th Report.