PART II

THE UNION [OR LESS FORMALLY] OF INDIA AS A CONSTITUTIONAL ENTITY

Structurally, the Union may be resolved into three institutional components: (*a*) Legislative as represented by Parliament; (*b*) Executive as represented by the President and the Council of Ministers; and (*c*) Judicial as represented by the Supreme Court of India.

The composition, structure and powers of these three components, and their relationship *inter se* with each other, are discussed in the following few Chapters.

Articles 53 to 151 of the Constitution deal with the Union. Of these, Arts. 52 to 78 and 123 deal with the composition and powers of the Central Executive, Arts. 79 to 122 and 148-151 lay down the composition, powers and procedures of Parliament, and Arts. 124 to 147 deal with the Constitution and powers of the Supreme Court.

CHAPTER II

PARLIAMENT

SYNOPSIS

A. CONSTITUTION OF PARLIAMENT

India's Parliament is bicameral. The lower House is designated as the 'House of the People' or Lok Sabha, and the Upper House as the 'Council of States' or Rajya Sabha. The two Houses along with the President constitute Parliament [Art. 79]. All these three organs are essential to the process of legislation by Parliament.[1]

The President does not sit or participate in the deliberations in any House but he is a constituent part of Parliament in the sense that he has certain important functions to discharge in relation thereto, as for example, he summons the Houses, dissolves the Lok Sabha, prorogues the meetings of the Houses, gives assent to the Bills passed by the two Houses, etc.[2]

In Britain, Parliament consists of the Crown, the House of Commons and the House of Lords. India thus follows the British model in making the President, a counterpart of the British Crown, a constituent part of Parliament. In the United States, the central legislature, known as the Congress, consists of the Senate and the House of Representatives. Unlike India or England, the President is not regarded as a constituent part of the Congress because of the doctrine of separation of powers.[3]

The two Houses of Parliament in India differ from each other in many respects. They are constituted on entirely different principles, and, from a functional point of view, they do not enjoy a co-equal status.

Lok Sabha is a democratic chamber elected directly by the people on the basis of adult suffrage. It is thus designed to reflect the popular will and in this lies its strength. It is to Lok Sabha that the Council of Ministers is responsible[4] and it has the last word in such matters as taxation and expenditure of public money[5].

Rajya Sabha, on the other hand, is constituted by indirect elections. Constitutionally the Council of Ministers is not responsible to it. Because of these rea-

---

1. See. J., *infra.*
2. See, *infra*, under "Meeting of Parliament", Sec. G.
3. *Infra*, Chapter III, Sec. E.
4. See, *infra*, Ch. III, Sec. B.
5. *Infra*, this Chapter, Sec. J(ii).

sons, the role of Rajya Sabha in the country's affairs is somewhat secondary to that of Lok Sabha, and this is so in spite of the fact that there are a few powers in the arena of Centre-State relations which can be exercised only by the Rajya Sabha and not by the Lok Sabha[6].

Rajya Sabha is designed to fulfil a number of purposes. First, it has been envisaged as a forum to which seasoned and experienced public men might get access without undergoing the din and bustle of a general election which is inevitable for finding a seat in the Lok Sabha. In this way, senior public men are enabled to apply their mature judgment and wisdom to solving the problems facing the country. The value of the Upper House, therefore, lies in the talent, experience and knowledge which it can harness to the service of the country which might be lost otherwise.

Secondly, Rajya Sabha serves as a debating chamber to hold dignified debates and acts as a revising chamber over the Lok Sabha which, being a popular chamber, may at times be swayed to act hastily under pressure of public opinion or in the heat of passions of the moment. The existence of two debating chambers means that all proposals and programmes of the government are discussed twice and that these will be adopted after mature and calm consideration, and thus precipitous action may be prevented. As a revising chamber, the Rajya Sabha may also help in improving Bills passed by the Lok Sabha.

Lastly, the Rajya Sabha is designed to serve as a chamber where the States of the Union of India are represented as States in keeping with the federal principle. The House has, therefore, been given some federal functions to discharge in its character of a House representing the States.[7] In practice, however, the Rajya Sabha does not act as a champion of local interests, or as a battle ground between the Centre and the States. Even though elected by the State Legislatures, the members of the Rajya Sabha vote not at the dictate of the State concerned, but according to their own views and party affiliation. Rajya Sabha has thus emerged as a forum where problems are discussed and considered from a national rather than a local perspective.

Demands are made now and then to abolish the Rajya Sabha. The Lok Sabha discussed a private member's resolution to this effect on March 30, 1973, but the general view was in favour of its retention.

B. COMPOSITION OF RAJYA SABHA

The maximum strength of Rajya Sabha has been fixed at 250 members. Of these, up to 238 members are the elected representatives of the States and the Union Territories [Art. 80(1)(b)], and twelve members are nominated by the President from amongst those who have special knowledge or practical experience of such matters as literature, science, art and social services [Arts. 80(1)(a) and 80(3)].

The seats in the House are allotted among the various States and the Union Territories on the basis of population, the formula being one seat for each million of population for the first five millions and thereafter one seat for every two mil-

---

6. See, *infra,* Ch. X.
7. See, under "Federalism", *infra,* Ch. X.

lion population or part thereof exceeding one million. A slight advantage is thus given to the States with smaller population over the States with bigger population. Proportionately larger representation has been given to the Union Territory of Delhi in view of the fact that it has no local legislature of its own and Parliament itself functions as such.

In the Constituent Assembly, a view was propounded that, on the analogy of the American Senate,[8] the States in India should have equal representation in the Rajya Sabha irrespective of their differences in area or population. This view, however, did not prevail and the distribution of seats in the House came to be fixed on a population basis with a slight weightage in favour of comparatively less populous States. The allocation of seats in the House among the States and the Union Territories is as follows [Art. 80(2) and the Fourth Schedule]:

Andhra Pradesh, 18; Assam, 7; Bihar, 16; Goa, 1; Chhattisgarh, 5; Gujarat, 11; Haryana, 5; Jharkhand, 6; Kerala, 9; Madhya Pradesh, 11; Maharashtra; 19; Karnataka, 12; Orissa, 10; Punjab, 7; Rajasthan, 10; Tamil Nadu, 18; Uttar Pradesh, 31; Uttaranchal, 3; West Bengal, 16; Jammu and Kashmir, 4; Nagaland, 1; Delhi, 3; Himachal Pradesh, 3; Manipur, 1; Pondicherry, 1; Tripura, 1; Meghalaya, 1; Mizoram, 1; Arunachal Pradesh, 1; Sikkim, 1; Total 233.

The representatives of a State in Rajya Sabha are elected by the elected members of the State Legislative Assembly in accordance with the system of proportional representation by means of a single transferable vote [Arts. 80(1)(b) and 80(4)]. This method of election ensures that only such members are chosen for Rajya Sabha as are cognisant with the needs and attitudes of the State concerned. It also underlines the idea that Rajya Sabha represents the States as such.

However, in order to be eligible to be elected to the Council of States, a person need not be a representative of the State beforehand nor an elector or a voter registered nor a resident in the State itself. It is only when he is elected to represent the State that he becomes a representative of the State. Therefore, the word "representative" simply means a person chosen by the people or by the elected Members of the Legislative Assembly to represent their several interests in one of the Houses of Parliament.[9]

The system of proportional representation helps in giving due representation to minority groups as well. As all the Union Territories do not have Legislatures of their own, the method of electing members of Rajya Sabha from a Union Territory has been left to be prescribed by Parliament by law [Art. 80(5)].

As regards the nominated members, objection was taken in the Constituent Assembly to the nominative principle on the ground that it fundamentally mars the principle of election; that it militates against the symmetry of the Constitution of our legislative bodies; and that the presidential nominations might be criticised on the ground of favouritism. But the objection did not prevail and the nominative principle was adopted with a view to give representation to certain non-political interests which might not otherwise get any representation in Parliament.[10]

In making nominations to Rajya Sabha, the President acts on the advice of the Council of Ministers. Further, the Courts do not interfere with the presidential

---

8. See, *infra*, p. 37.

9. *Kuldip Nayar v. Union of India*, (2006) 7 SCC 1, at page 88 et seq : AIR 2006 SC 3127.

10. VII *CAD* 1200, 1221; AUSTIN, *THE INDIAN CONSTITUTION; CORNERSTONE OF A NATION*, 156-163 (1966).

power to make nominations.[11] There is no difference of status between the elected and the nominated members of Rajya Sabha, except that the former do, and the latter do not, participate in the election of the President of India.[12]

Rajya Sabha is a continuing body and is not subject to dissolution [Art. 83(1)] One-third of its members retire every two years [Art. 83(1)], and their seats are filled up by fresh elections and presidential nominations. This rotational system ensures continuity of Rajya Sabha while still enabling each State Legislative Assembly to elect periodically a few members to the House so that the prevailing party strength and contemporary views and attitudes in the State are reflected therein. Consequently, Rajya Sabha does not get stale and remains in touch with the current problems of the community due to the periodic infusion of fresh blood.

It will be illuminating to compare the composition of Rajya Sabha with that of the upper chambers in England and some federations.

(a) HOUSE OF LORDS

The House of Lords is one of the oldest chambers of the world. Its composition is not, however, particularly rational as there is no elective or popular element involved in it. It consists mostly of hereditary peers created by the Crown on the advice of the Ministers, and had been characterised as the 'common fortress of wealth' as most of its members were either landlords or leaders of trade and industry, who inherit the 'peerage' and the right to sit in the House from their ancestors.

Nowadays, peerage is also conferred for 'political and public service' on retired Ministers and former members of the House of Commons who wish to take leave of active politics but do not wish to snap their relationship with Parliament completely. Due to this factor, the traditional aristocratic character of the House is being gradually diluted. Because of its preponderantly hereditary composition, and lack of responsibility to the electorate, the House was regarded as an "indefensible anachronism," in the modern democratic era.[13] It was logically indefensible, and an anachronism that a House consisting primarily of unelected hereditary peers should have a significant role to play in democratic government.

A few steps have been taken to rationalise its structure to some extent. With the passing of the House of Lords Act, 1999 the number of members who are hereditary life peers has been considerably reduced. Currently, the number is 92 out of a total membership of 721. The old rule barring a woman peeress from sitting in the House has been abrogated. Provision has been made to confer life peerage. Life peers can sit and vote in the House. A life peerage may be conferred on a woman. This had made it possible to strengthen the House of Lords by nominating politicians and statesmen as life peers, without swelling the ranks of hereditary peers. The Peerage Act, 1963, enables a hereditary peer to renounce his title.

---

11. See, *infra*, *GOVERNOR'S POWER TO MAKE NOMINATIONS TO STATE LEGISLATIVE COUNCIL*, Ch. VI.
12. See, *infra*, Ch. III.
13. FINER, *THEORY AND PRACTICE OF MODERN GOVERNMENT*, 407-8 (1956); JENNINGS, *PARLIAMENT*, 381-453 (1970); DE SMITH, *CONSTITUTIONAL LAW AND ADMINISTRATIVE LAW*, 287, 300 (1977); MARRISON, *GOVERNMENT AND PARLIAMENT*, 187 (1954); LASKI, *PARLIAMENTARY GOVERNMENT IN ENGLAND*, 111-138 (1959).

The House is a permanent body in the sense that dissolution of Parliament does not involve the Lords to lose their seats in the House, for they sit under a hereditary or life title and represent no constituency.

As will be seen, Rajya Sabha is composed on an entirely different basis. There is no hereditary principle involved in its composition. It is elected, though indirectly, and thus represents, to some extent, the current public opinion. Its membership is not for life but for six years. Needless to say, an institution like the House of Lords, has no place in a modern democracy.[14]

(b) FEDERATIONS

In some federal countries, the Upper House has been designed so as to reflect the interests or views of the constituent States and provide a means of protecting the States or their inhabitants against improper federal measures.[15]

In the United States, the Senate is composed on, what is known as the federal principle. Each constituent State, irrespective of its size or population, sends two Senators and thus has an equality of representation in the House. On the other hand, the House of Representatives is constituted on population basis.

This 'partly federal, partly national, character of the U.S. Congress resulted from a dispute between the smaller and bigger States at the time of Constitution-making. The smaller States, fearing that they would be overwhelmed by the more populous States, demanded equal representation in the federal legislature. The bigger States saw in equal suffrage the possibility of dominance by a minority of the population. Further, all the States whether big or small shared a common apprehension that the federal centre might unduly encroach on their interests and authority. The final solution was thus a practical compromise : in one House, equality of representation to the constituent States and, in the other, representation according to population. Equal representation in the Senate gives some security to the smaller States that the Central Government would not exercise its powers only in the interests of a few big States.

The Senators are elected by the popular vote of the people in their States. The tenure of a Senator is six years. The Senate is a continuing body and one-third of its members retire every two years.

With the passage of time, the original role of the Senate of guarding the interests of the States as political units has largely disappeared. It now functions more as a national institution rather than as a champion of local interests. This transformation has taken place due to several factors, such as, direct election of the Senators by the people on a State wide franchise, development of strong political parties advocating national programmes, development of a national consciousness and national integration. The Senate is a powerful body and equal representation here gives to the smaller States a voice much greater than what they could otherwise hope to have in federal affairs.

Similarly, in Australia, the thinly populated agricultural States, concerned at the prospect of domination by the larger commercial States, insisted on an upper

---

14. LORD CHORLEY, *HOUSE OF LORDS CONTROVERSY*, 1958 Public Law, 216; WADE & PHILLIPS, 184-6 (IX Ed.)

15. BOWIE & FRIEDRICH, *op. cit.*, 4, 7, 8, 55, 62, 71; WHEARE, *FEDERAL GOVERNMENT*, 87 (1964); SCHWARTZ, *AMERICAN CONSTITUTIONAL LAW*, 53-55 (1955).

chamber having an equal number of Senators from each State regardless of its size or population. Thus, each State sends 10 Senators who are elected by means of proportional representation. This ensures that Senate membership will reflect party popularity in the country. A State is treated as a single constituency.

The term of the Senators is six years and half of them rotate every three years. The Senate is subject to dissolution. Because of the growth of strong national parties cutting across State loyalties, the Senate has lost much of its value as a protector of the smaller States and now tends to reflect party views rather than regional interests.

In Canada, Senate is composed on an entirely different principle. Each Province is assigned a fixed, although unequal, number of Senators. Provinces are grouped into regions and there is regional, rather than provincial, parity in the House. The Senators are appointed until the age of 75 by the Governor-General on the advice of the Federal Prime Minister. These appointments are made on party lines in order to ensure Senate approval of government programme. The allegiance of the Senators is usually to the party which appoints them. The fact that the Senate consists of political appointees has made it almost ineffective. The appointive nature of the Senate necessarily makes its role subordinate to the elective House.[16]

Rajya Sabha resembles the American Senate insofar as it is also a continuing body, is not subject to dissolution, and is based on the principle of rotation of members. Rajya Sabha, however, differs from its American counterpart in so far as its members are not elected directly by the people in the States and there is no equality of representation of the constituent States. Rajya Sabha has much larger membership than the Senate.

Rajya Sabha resembles the Australian Senate in so far as both are based on the principle of rotation. But the two Houses differ from each other in several respects. Rajya Sabha is a continuing body and is not subject to dissolution but the Australian Senate can be dissolved to resolve a deadlock between the two Houses; members of the Rajya Sabha are not elected directly by the people in the States as is done in Australia; States do not have parity of representation in the Rajya Sabha whereas each State in Australia has equal representation in the Senate; and Rajya Sabha has a much larger membership than the Australian Senate.

The only common elements between the Canadian Senate and the Rajya Sabha is that in none of these the constituent units have uniform representation, and none is subject to dissolution. In other respects, the two Houses differ radically. In Canada, members are appointed by the Executive; in India, they are elected for six years by the State Legislative Assemblies. The Indian House is bigger than the Canadian House.

The upper chambers in the federations surveyed here have exhibited one common tendency, *viz*., with emergence of national consciousness and national political parties, they have lost much of their assigned role of acting as the protectors of the State rights and by and large they now function as national institutions.

---

16. HOGG, *CONSTITUTIONAL LAW OF CANADA*, 9-14 (1997).

C. COMPOSITION OF LOK SABHA

Lok Sabha is the popular chamber and is elected directly by the people.

The maximum strength of Lok Sabha has been fixed at 550 members, of whom not more than 530 are elected by the voters in the States, and not more than 20 represent the Union Territories [Art. 81(1)(a) and (b)] . Members from the States are elected by the system of direct election from territorial constituencies on the basis of adult suffrage [Art. 81(1)(a)].

Every citizen of India who is not less than 18 years of age on a date fixed by Parliament and does not suffer from any disqualification as laid down in the Constitution, or in any law on the ground of non-residence, unsoundness of mind, crime, or corrupt or illegal practice, is entitled to vote at an election for the Lok Sabha [Art. 326][17].

Seats in the House are allotted to each State in such a way that, as far as practicable, the ratio between the number of seats allotted to a State and its population is the same for all the States [Arts. 81(2)(a) and Art. 81(3)]. This provision does not apply to a State having a population of less than six millions [Proviso to Art. 81(2)].

Up to the year 2026, for purposes of Art. 81(2)(a), the 1971 census figures will be used to ascertain the population of a State. This means that the allocation of seats to the States in the Lok Sabha has been frozen at the level of 1971. No revision is to be made therein until the first Census is taken after the year 2026.[18]

Each State is divided into territorial constituencies in such a manner that the ratio between the population of a constituency and the number of seats allotted to it, so far as practicable, is the same throughout the State [Art. 81(2)(b)]. After each census, a readjustment is to be made, by such authority and in such manner as Parliament may by law prescribe, in allocation of seats to the various States in the Lok Sabha as well as in the division of each State into territorial constituencies [Art. 82].

Accordingly, Parliament has enacted the Delimitation Commission Act, 2002, for this purpose.[19] The idea is that the commission will demarcate each state into single member constituencies equal in number to the seats allotted to the State in Lok Sabha. For this purpose, the commission is to use the census figures of the Census of 2001. But, as stated above, there is to be no readjustment of seats among the States in Lok Sabha till the year 2026.[20]

Also, any such re-adjustment will not affect representation in the House until the existing House is dissolved. Further, such readjustment shall take effect from the date specified by the President by order. Until such readjustment becomes effective, election may be held to the House on the basis of territorial constituencies existing before such readjustment [Proviso to Art. 82].

---

17. See, *Infra*, Ch. XIX, under 'Elections'.

18. Proviso to Art. 81(3).
See, the 84th Amendment of the Constitution, Constitutional Amendments, *infra*, Ch. XLII.

19. For details see, *infra*, under 'Elections', Ch. XIX.

20. Proviso to Arts. 80(3) and 82 as amended by the Constitution (Eighty-seventh Amendment) Act, 2003 w.e.f. 22.6.2003.

It is for Parliament to prescribe by law the manner in which members to the Lok Sabha are to be chosen from the Union Territories [Art. 81(1)(b)][21]. Provision has been made for reservation of seats in the Lok Sabha for Scheduled Castes and Scheduled Tribes.[22] The President can nominate not more than two members of the Anglo-Indian Community if in his opinion this community is not adequately represented in the House. [Art. 331].

Lok Sabha has been organised on practically similar lines as the lower chambers in Britain, U.S.A., Canada and Australia. The House of Commons in Britain, like the Lok Sabha, is elected directly by the people for five years by adult suffrage. In Australia, the House of Representatives is elected directly by the people for three years from single-member constituencies by preferential vote. All citizens without disabilities have a right to vote and voting is compulsory.[23] Seats in the House are distributed among the States according to population, with a minimum of five to each State.

In Canada, representation in the House of Commons is based on provincial population with some weightage in favour of the smaller Provinces. There is universal suffrage. The normal life of the House is five years.[24] In the U.S.A., the House of Representatives is elected directly by the people for two years. Seats are apportioned among the several States by the Congress on the basis of population.

The U.S. Constitution does not prescribe any voting qualification for election to the House. The regulation of suffrage for the House is within the control of each State subject to the stipulation that this should be the same as that requisite for electors of the most numerous branch of the State Legislature, and that none is to be excluded from voting on the grounds of sex, colour or previous condition of servitude.[25] This pattern differs from that in India where adult suffrage has been prescribed by the Constitution.[26]

D. PARLIAMENTARY MEMBERSHIP—QUALIFICATIONS AND DISQUALIFICATIONS

Only a citizen of India is qualified to be chosen a member of a House of Parliament [Art. 84(a)]. He should not be less than 30 years of age for Rajya Sabha, and 25 years for Lok Sabha [Art. 84(b)]. He should make and subscribe to the prescribed oath or affirmation before a person authorized by the Election Commission for this purpose [Art. 84(a)][27]. He should also possess such other qualifications as Parliament may by law prescribe for this purpose [Art. 84(c)]. He should not suffer from any disqualification prescribed either by the Constitution or a law made by Parliament [Art. 102(1)(e)].

Parliament has prescribed the necessary qualifications and disqualifications for parliamentary membership in the Representation of the People Act, 1951. Thus, a

---

21. See, *infra*, , Ch. V, under "Union Territories."
22. *Infra*, under "Safeguards to Minorities", Ch. XXXV.
23. BOWIE and FREIDRICH, *op. cit.*, 30.
24. HOGG, *op. cit.*, 149.
25. SCHWARTZ, *op. cit.*, 54.
26. See, *infra*, Ch. XIX.
27. The form of the oath is set out in the Third Schedule to the Constitution.

person is not qualified to be chosen as a member of Rajya Sabha unless he is an elector for a parliamentary constituency in the concerned State or the Union Territory. To be a member of Lok Sabha, a person should be an elector for some parliamentary constituency in India. Also, he should be a member of any Scheduled Caste or Scheduled Tribe in any State, if he wants to contest a seat reserved for them. A person belonging to the Scheduled Castes or Scheduled Tribes is not, however, disqualified for being elected to a seat not reserved for these castes or tribes. Disqualifications laid down in the Act, stated briefly, are:

(1) corrupt practice at an election;

(2) conviction for an offence resulting in imprisonment for two or more years, or for an offence under certain provisions of the Indian Penal Code [Ss. 153A, 171E and 171F, 505(2) or 505(3)], or of the Representation of the People Act, 1951 [Ss. 125, 135 or 136 (2)(a)], or under the Protection of Civil Rights Act, 1955 or the Commission of the Sati (Prevention) Act, 1987 (3 of 1988); or the Prevention of Corruption Act, 1988 (49 of 1988); or The Prevention of Terrorism Act, 2002 (15 of 2002) or conviction for contravening a law providing for the prevention of hoarding or profiteering or of adulteration of food and drugs and sentenced to imprisonment for not less than six months;

(3) failure to lodge an account for election expenses;

(4) having a subsisting contract for supply of goods to, or execution of any works undertaken by, the government;

(5) being a managing agent, manager or secretary of a corporation in which government has not less than 25 per cent share;

(6) dismissal from government service for corruption or disloyalty to the state.

Some of these disqualifications subsist only for a period of 3 to 6 years[28], but the Election Commission is authorised to remove or reduce this period. Detention of a person under any law pertaining to preventive detention is not a disqualification for membership of Parliament[29] nor is a Member expelled by the legislature *ipso facto* disqualified for re-election.[30]

However, when an electoral candidate is convicted of a criminal offence and the High Court grants stay of such conviction before the last date of filing nomination, the stay would render the order of conviction non-operative from the date of stay and consequently the disqualification arising out of conviction would also cease to operate.[31]

Under Art. 102(1), a person is disqualified from being chosen as, and from being, a member of a House of Parliament if—

(*i*) a competent court has declared him to be of unsound mind [Art. 102(1)(b)]; or

---

28. *V.C. Shukla v. Purshottam Kaushik,* AIR 1981 SC 547 : (1981) 2 SCC 84.

29. *Baboolal v. Kankar Mujare,* AIR 1988 MP 15. For discussion on *Preventive Detention, see, infra, Ch. XXVII.*

30. *Raja Ram Pal v. Hon'ble Speaker, Lok Sabha,* (2007) 3 SCC 184, at page 392 : (2007) 2 JT 1.

31. *Ravikant S. Patil v. Sarvabhouma S. Bagali,* (2007) 1 SCC 673 : (2006) 10 JT 578.

(*ii*) he is an undischarged insolvent [Art. 102(1)(c)]; or

(*iii*) he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgement of allegiance or adherence to a foreign State [Art. 102(1)(d)];[32] or

(*iv*) he holds an *office of profit* under the Central or the State Government [Art. 102(1)(a)].

(a) OFFICE OF PROFIT

Dependence of a large number of members of Parliament on government patronage would weaken the position of Parliament *vis-à-vis* the Executive; for, such members may be tempted to support the government without considering any problem with an open mind. The rationale behind the Constitutional provision [Art. 102(1)(a)] which debars a holder of an office of profit under the government from being elected to a House of Parliament, is that, as explained by the Supreme Court,[33] there should not be any conflict between the duties and the interests of an elected member and to see that the elected member carries on his duties freely and fearlessly without being subjected to government pressure.

The provision is thus designed to protect the democratic fabric of the country from being corrupted by Executive patronage. It ensures that Parliament does not contain persons who may be obligated to the government, and be amenable to its influence, because they are receiving favours and benefits from it. The provision secures independence of members of Parliament from the influence of the government and thus seeks to reduce the risk of conflict between duty and self-interest in them so that they may discharge their functions and criticise the government, if necessary, without fear or act under governmental pressure.

A similar restriction is imposed by Art. 191(1)(a) in respect of membership in a State Legislature, Art. 243F in respect of Panchayats and Art. 243V in respect of Municipalities.[34] Most of the cases cited below have arisen under Art. 191(1)(a), but these cases are being taken note of here as these are fully relevant to Art. 102(1)(a) as well as both these constitutional provisions are practically identical and in *pari materia*.

The disqualification arises when a person holds an 'office of profit' under the 'Central' or 'State Government'. The expression 'office of profit' has not been defined in the Constitution. It is, therefore, for the courts to explain the significance and meaning of this concept and decide in the context of specific factual situations whether a person is disqualified or not under the above mentioned constitutional provisions.

An 'office of profit' ordinarily means an 'office' capable of yielding some profit to the holder of the office. The disqualification arises when a person—

(i) holds an office;
(ii) the office is *under* the Central or State Government; and
(iii) the office is one of profit.

---

32. On Citizenship, see, *infra*, Ch. XVIII.

33. *Ashok Kumar Bhattacharya v. Ajoy Biswas,* AIR 1985 SC 211, 215 : (1985) 1 SCC 151. Also, *Satrucharla Chandrasekhar Raju v. Vyricherla Pradeep Kumar Dev.,* AIR 1992 SC 1959 : (1992) 4 SCC 404.

34. For discussion on "State Legislature", see, *infra,* Ch. VI.

Thus, if a person does not hold an 'office' he is not disqualified even if he is making a profit. For example, a lawyer engaged by the government to appear in a case on its behalf and paid fees by it[35], a person holding a permit to ply buses, or a licensed stamp vendor or deed writer,[36] or a shareholder in a company transporting postal articles and mail bags,[37] holds no 'office' and is thus not disqualified to seek election to a House.

Further, the 'office' should be such to which some pay, salary, or allowance is attached. The word 'profit' connotes the idea of pecuniary gain. If there is really a gain, its quantum or amount is not material; but the amount of money receivable by a person in connection with the office he holds may be material in deciding whether the office really carries any 'profit'. Thus, a member of a government appointed committee, who draws a fee to meet his out-of-pocket expenses to attend committee meetings does not hold an office of profit, as what is paid to him is not by way of profit but only as a compensatory allowance.[38]

In *Jaya Bachchan v. Union of India*[39] it was held that the decisive factor in determining whether one is holding an office of profit or not, is whether the office is capable of yielding a profit or pecuniary gain and not whether pecuniary gain is in fact received or received negligibly by the individual holding that office,

In *Divya Prakash v. Kultar Chand,*[40] the Supreme Court ruled that the post of Chairman of the Board of School Education, Himachal Pradesh, as such, was an office of profit under the State Government as the post carried remuneration. But, as the holder of the office was appointed in an honorary capacity without any remuneration, he was not holding an office of profit and so was not disqualified to be a member of the State Legislature.

Hegde, a member of the Karnataka State Legislative Assembly, was appointed as the Deputy Chairman of the Planning Commission. He drew no salary but only allowances, *e.g.*, travelling allowance, daily allowance, conveyance allowance, house rent allowance, *etc*. A question arose whether Hegde became subject to disqualification. The High Court ruled that Hedge was not disqualified. Though he held an office under the Central Government, it was not one of 'profit' as he was not getting any salary but only allowances. The Court also ruled that Hegde was not disqualified because of the Karnataka Legislature (Prevention of Disqualification) Act, 1956.[41]

The Supreme Court has rationalised this approach as follows in *Madhukar*:[42]

---

35. *Kanta Kathuria v. Manak Chand,* AIR 1970 SC 694 : (1969) 3 SCC 268.

36. *Yugal Kishore Sinha v. Nagendra Prasad Yadav,* AIR 1964 Pat. 543; *Banomali Behera v. Markanda Mahapatra,* AIR 1961 Ori 205.

37. *Satya Prakash v. Basir Ahmed Qureshi,* AIR 1963 MP 316. Also, *Brahma Dutt v. Paripurna Nand,* AIR 1972 All 340.

38. *Ravanna Subanna v. Kaggeerappa,* AIR 1954 SC 653; *Shivamurthy Swami Inamdar v. Agadi Sanganna Andanappa,* (1971) 3 SCC 870.

39. (2006) 5 SCC 266 : AIR 2006 SC 2119.

40. AIR 1975 SC 1067 : (1975) 1 SCC 264.

41. *Ramakrishna Hegde v. State of Karnataka,* AIR 1993 Kant 54; *infra,* footnote 90, p. 56.
Under Art. 191(1)(a) [equivalent to Art. 102(1)(a)], the State Legislature can declare by law that an office would not disqualify its holder to be a member of a House of State Legislature. Parliament also has a similar power : see, *infra,* p. 51.

42. *Madhukar v. Jaswant,* AIR 1976 SC 2283 : (1977) 1 SCC 70.

> "After all, all law is a means to an end. What is the legislative end here in disqualifying holders of 'offices of profit under government'? Obviously, to avoid a conflict between duty and interest, to cut out the misuse of official position to advance private benefit and to avert the likelihood of influencing government to promote personal advantage. So this is the mischief to be suppressed. At the same time we have to bear in mind that our Constitution mandates the State to undertake multiform public welfare and socio-economic activities involving technical persons, welfare workers, and lay people on a massive scale so that participatory government may prove a progressive reality. In such an expanding situation, can we keep out from elective posts at various levels many doctors, lawyers, engineers and scientists, not to speak of an army of other non-officials who are wanted in various fields, not as full-time government servants but as part-time participants in people's projects sponsored by government? For instance, if a National Legal Services Authority funded largely by the State comes into being, a large segment of the legal profession may be employed part time in the ennobling occupation of legal aid to the poor. Doctors, lawyers, engineers, scientists and other experts may have to be invited into local bodies, legislautres and like political and administrative organs based on election if these vital limbs of representative government are not to be the monopoly of populist politicians or lay members but sprinkled with technicians in an age which belongs to technology. So, an interpretation of 'office of profit' to cast the net so wide that all our citizens with specialities and know-how are inhibited from entering elected organs of public administration and offering semi-voluntary services in para-official, statutory or like projects run or directed by government or Corporation controlled by the State may be detrimental to democracy itself. Even athletes may hesitate to come into Sports Councils if some fee for services is paid and that proves their funeral if elected to a panchayat. A balanced view even if it involves 'judicious irreverence' to vintage precedents is the wiser desideratum".

However the view expressed by the Karnataka High Court in *Ramakrishna Hegde's* case[43] does not appear to be good law in view of the recent pronouncement of the Supreme Court in *Jaya Bachchan* where it was held that "payment of honorarium, in addition to daily allowances in the nature of compensatory allowances, rent free accommodation and chauffeur driven car at State expense, are clearly in the nature of remuneration and a source of pecuniary gain and hence constitute profit"[44].

For purposes of disqualification, the office in question must be *under* the government. If the office is not under the government, no disqualification will arise. To determine whether a person holds an office under the government, the several tests which are ordinarily applied are:

(i) whether the government makes the appointment;
(ii) whether the government has the right to remove or dismiss the holder of the office;
(iii) whether the government pays the remuneration;
(iv) whether the functions performed by the holder are carried on by him for the government and
(v) whether the government has control over the duties and functions of the holder.[45]

---

43. (2006) 5 SCC 266 : AIR 2006 SC 2119.
44. (2006) 5 SCC 266 at page 270 : AIR 2006 SC 2119.
45. *Biharilal Dobray v. Roshan lal Dobray,* AIR 1984 SC 385 : (1984) 1 SCC 551; see, *infra,* footnote 64.

Whether an office to be characterised as one under the government should satisfy all, or one or more of these tests may be decisive of its true nature, has been the subject matter of a number of judicial pronouncements, but no decision lays down conclusively the characteristics of an office under the government. The courts determine from case to case whether the specific office involved may be characterised as an office *under* the government having regard to its various features. As the Supreme Court has observed in *Ashok Kumar v. Biswas*:[46]

> "For determination of the question whether a person holds an office of profit under the government each case must be measured and judged in the light of the relevant provisions of the Act".

The power of appointment, dismissal and control exercised by the government is an important consideration to determine whether the person is holding an office under the government. The fact that he is being paid not out of the government revenues is by itself a 'neutral', and not a decisive, factor as regards the nature of the office. It has been judicially emphasized that payment from a source other than the government revenues is not always a decisive factor as to the nature of the office. The mere fact of appointment to an office by the government may not make the office as one under the government. A person was appointed by the government as chairman of a statutory board. The Supreme Court refused to hold the office as being one 'under' the government as the government did not pay the remuneration and the holder of the office performed no functions for the government.[47]

A government servant is disqualified to be a member of a House. A government servant filed his nomination paper after being relieved from his service. The Supreme Court ruled that he was not disqualified to be a member of Lok Sabha as he was no longer a government servant at the time he submitted his nomination paper.[48]

A Minister either in the Central or State Government is not regarded as holding an office of profit.[49] The term 'Minister' includes a 'Deputy Minister".

A member of Parliament receives such salaries and allowances as may be determined by Parliament by law [Art. 106]. Nevertheless, he does not hold an office of profit under the government. The membership of Parliament is not an office under the government. Accordingly, a sitting member of Lok Sabha is not disqualified from contesting the next general election for Lok Sabha.[50]

A hereditary village office under the Mysore Village Offices Act, 1908, has been held to be an office of profit under the government because, though the office is hereditary to which the eldest heir in the eldest branch of the last holder is entitled to succeed, yet he would not get the office till appointed by the government; and he is removable by, and he works under the control and supervision of the government, and government lands are allotted to the office by way of

---

46. AIR 1985 SC 211 at 217 : 1985 (1) SCC 151. See also *Som Lal v. Vijay Laxmi,* (2008) 11 SC 413.

47. *Surya Kant Roy v. Imamul Hak Khan,* AIR 1975 SC 1053 : (1975) 1 SCC 531.

48. *Sitaram v. Ramjibhai,* AIR 1987 SC 1293 : (1987) 2 SCC 262.
Also, *State of Gujarat v. Raman Lal Keshav Lal Soni,* AIR 1984 SC 161 : (1983) 2 SCC 33.

49. Explanation to Art. 102(1).
Also, explanation to Art. 191(1) for State Legislatures : *Shriram Haribhau Mankar v. Madhusudan Atmaram Vairale,* AIR 1968 Bom 219.

50. *Bhagwati Prasad v. Rajeev Gandhi,* AIR 1986 SC 1534 : (1986) 4 SCC 78.

emoluments for services rendered, and some cash allowance is also paid out of the government funds.[51]

The Vice-Chancellor of a University appointed by the Governor in his capacity as the Chancellor of the University,[52] or a member of a State Legislature,[53] or pramukh of a zila parishad,[54] does not hold an office of profit under the government as in none of these cases government has power to appoint or dismiss.

The Jharkhand Area Autonomous Council was created by an Act of the State Legislature. The Chairman of the Council was held to hold an office of profit under the State Government in *Shibu Soren v. Dayanand Sahay*.[55] He was appointed to the post by the State Government and he held his office during the "pleasure of the State". This meant that he could be removed or dismissed by the State. He was receiving an honorarium of Rs. 1750/- p.m. plus daily allowance, rent free accommodation and a car with a driver. All this could not be regarded as compensatory allowance; it amounted to salary and so the office was one of profit. As the person concerned was a member of the Rajya Sabha, the disqualification could be removed only by Parliament,[56] and not by the State Legislature.[57]

An office held under some body juridically distinct from, and independent of, the government is not regarded as an office *under* the government and so does not attract the disqualification under discussion. If, however, the government exercises control over the concerned body, the office held under it may or may not be regarded as an office *under* the government depending on how much control the government exercises over it. Is the concerned body still autonomous, or is it merely an instrumentality of the government? A few examples will illustrate the point.

The accountant-in-charge of a municipality was held not to be disqualified from being a member of the legislature. He was appointed and could be removed by the municipality but, in both cases, subject to the sanction of the government; he was paid out of the municipal funds which the municipality was competent to raise.[58] The government did exercise some control and supervision over the municipality, but still the municipality enjoyed a lot of autonomy. On this point, the Supreme Court observed:

> "Government controls various activities in various spheres and in various measures. But to judge whether employees of any authority or local authorities under the control of the government become government employees or not or holders of office of profit under the government the measure and nature of the control exercised by the government over the employee must be judged in the light of the facts and circumstances in each case so as to avoid any possible conflict between his personal interests and duties and of the government."[59]

It may be pointed out that in case of election of President or Vice-President, the Constitution specifically provides that the candidate is disqualified if he is

---

51. *Ramappa v. Sangappa*, AIR 1958 SC 937 : 1959 SCR 1167.
52. *Joti Prasad v. Kalka Prasad*, AIR 1962 All 128.
53. *Ram Narain v. Ram Chandra*, AIR 1958 Bom 25.
54. *Umrao Singh v. Yeshwant Singh*, AIR 1970 Raj 134.
55. AIR 2001 SC 2583 : (2001) 7 SCC 425.
56. See, *infra*, p. 51.
57. See, *infra*, Ch. VI.
58. *Ashok Kumar v. Ajoy Biswas*, AIR 1985 SC 211 : (1985) 1 SCC 151. Also see, *Surya Kant Roy v. Imamul Hak Khan*, AIR 1975 SC 1053 : (1975) 1 SCC 531.
59. *Ashok Kumar, ibid.*

holding an office of profit under a local or any other authority under the control of the Central or the State government.[60] But in case of election as a member of a House of Parliament or a State Legislature, no such disqualification is specifically laid down in the Constitution.[61]

The Durgah Committee is a statutory body, being a body corporate with perpetual succession. Its members are appointed, and are removable, by the government of India. The manager of a school run by the Durgah Committee was held to be not holding an office of profit under the government. The members of the Durgah Committee, the Supreme Court held, were not government servants; the manager was neither appointed, nor was removable, by the government, nor was he paid out of the government revenues. He was holding an appointment under a statutory body and was paid out of the Durgah funds and, therefore, he could not be regarded as holding an appointment under government control.[62]

A teacher in a government aided school does not hold an office under the government, for the school, though under government's control and supervision, still has its own separate personality, property and funds.[63]

But an assistant teacher employed in a basic primary school run by the Board of Basic Education constituted by an Act of the Legislature was held disqualified from being a member of the State Legislature. The Court said : "Even though the incorporation of a body corporate may suggest that the statute intended it to be a statutory corporation independent of the Government, it is not conclusive on the question whether it is really so independent. Sometimes the form may be that of a body corporate independent of the Government but in substance it may be just the alter ego of the Government itself."

The rules framed under the Act laid down that the appellate authority in case of disciplinary proceedings in respect of the teachers in the basic schools were the State Government or government officers depending upon the nature of the posts. Almost the entire financial needs of the Board were met by the Government. After considering the provisions of the Act and the rules made thereunder, the Supreme Court concluded that the Government had direct control over the board and that it was not truly independent of the Government; the board had no separate personality of its own and that every employee of the Board was in fact holding his office under the Government. The subordination of the Board and its employees to the Government was writ large on the face of the Act and the Rules made thereunder. The Act discharged an important responsibility of the Government to provide primary education in the State. The Act empowered the State Government to take over all basic schools being run by the local bodies in the State and to manage them under the Act; as also to administer all matters pertaining to the entire basic education in the State through the Board. The teachers and other employees were to be appointed in accordance with Rules by government appointed officials. The disciplinary proceedings in respect of the employees were subject to the final decision of the State Government. In these circumstances, the post of a teacher under the U.P.

---

60. See, *infra*, Ch. III, Sec. A.
61. See, *supra*, p. 42. *See also Shrikant v. Vasantrao*, AIR 2006 SC 918 : (2006) 2 SCC 682. Also see, *infra*, Ch. VI.
62. *Abdul Shakur v. Rikhab Chand*, AIR 1958 SC 52 : 1958 SCR 387.
63. *Govinda Kurup v. S.A. Paul*, AIR 1961 Ker 242.

Basic Education Act was held to be an office of profit under the Government. In the words of the Court:

> "The Board for all practical purposes is a department of the Government and its autonomy is negligible".

Accordingly, the Court ruled that considering the high purposes underlying Art, 191(1)(a), the respondent assistant teacher was holding an office of profit under the State Government and so was disqualified for being chosen as a member of the State Legislative Assembly.[64]

In the case noted below,[65] the facts were as follows: the appellant was appointed as a single teacher in a primary school run by the Integrated Tribal Development Agency (ITDA) by its project officer who was the district collector. The ITDA was a society registered under the Societies Registration Act. The government had some control over the composition of its governing body and the sanctioning of posts. Funds for the activities of the society came from the government and some government officers were *ex officio* members of ITDA. Its object was to provide compulsory education in tribal areas. The appellant was suspended by the tribal welfare officer for some irregularities. The appellant was thereafter elected to the State Legislative Assembly. In an election petition filed against him, the High Court ruled that he was holding an office of profit under the government and so he was disqualified under Art. 191(1)(a) to be elected as a member of the State Legislature. The High Court took the view that although the society appeared to be independent of the state government, in substance, and for all practical purposes, its activities were controlled by government officials—the society's chairman and the project officer were government officials; a majority of the members of its governing body were government officials, society's funds came from government grants. The society was providing free and compulsory primary education to children which was the responsibility of the State Government and the society's teachers were subjected to the Civil Service (Classification, Control and Appeal) Rules of the State Government. But, on appeal, the Supreme Court reversed the High Court. The Supreme Court ruled that the government may have some control over the society which is the appointing authority, but government has no direct control over the teachers themselves. The whole scheme has been set up for the welfare of the tribals. In such a situation, felt the Supreme Court, the question of any conflict between the duties and interests of an elected member of a legislature does not arise since "it cannot be said that he, as a teacher, can be subjected to any kind of pressure by the government which has neither the power to appoint him nor to remove him from service. The Court said, "The right to appoint and right to remove the holder of the office in many cases becomes an important and decisive test."

Distinguishing *Biharilal Dobray*, the Supreme Court has held that the emphasis ought to be "on the nature of the post held and the possibility of conflict between duty and interest of an elected member and to appreciate the same the test is whether the government has power to appoint or dismiss the employee who is being chosen as a legislator".

---

64. *Biharilal Dobray v. Roshanlal Dobrary*, AIR 1984 SC 385 : (1984) 1 SCC 551. Also see, *supra*, footnote 45.

65. *Satrucharla Chandrasekhar Raju v. Vyricherla Pradeep Kumar Dev.*, AIR 1992 SC 1959 : (1992) 4 SCC 404.

To apply a "strict and narrow" construction will amount to shutting off many prominent and other eligible persons to contest the elections which forms the fundamental basis for the democratic set-up.

In *Satrucharla,* the Supreme Court has summarised as follows the tests or principles which emerge from the previous case-law to determine whether or not a person holds an office of profit under the government:

(i) The power of the government to appoint a person in office or to revoke his appointment at its discretion.

The mere control of the government over the *authority* having the power to appoint, dismiss or control the working of the officer employed by *such authority* does not disqualify the concerned officer from being a candidate for election as a member of Parliament/State Legislature.

(ii) The payment from out of the government revenue.

Payment from a source other than the government revenue is not always a decisive factor.

(iii) The incorporation of a body corporate and entrusting the functions to it by the government may suggest that the statute intended it to be a statutory corporation independent of the government.

But it is not conclusive on the question whether it is really so independent. Sometimes, the form may be that of a body corporate independent of the government, but, in substance, it may be the just after ego of the Government itself.

(iv) The true test of the determination of the said question depends upon the degree of control, the government has over it, the extent of control exercised by very other bodies or committees, and its composition, the degree of its dependence on the government for its financial needs and the functional aspect, namely, whether the body is discharging any important governmental function or just some function which is merely optional from the time of view of the government.

A company has its own separate identity. In modern times, many corporations and government companies are created to carry on multifarious activities, like the Life Insurance Corporation, State Trading Corporation, *etc*.[66] Usually, the government contributes most of its share, capital and appoints its directors. The government also enjoys power to issue directions relating to the company's working and has over-all control over it. Still, such a body is not a government department and has a distinct personality of its own and has a good deal of autonomy in its day to day working. Therefore, a servant in such a body does not hold an office 'under' the government because the power to appoint and dismiss him and control over his work vest in the company or the corporation itself and not in the government, and the government control is not direct but only indirect.[67] Even the power to determine the question of remuneration payable to the employee was not vested in the government.

---

66. For a fuller discussion on Public Sector Undertakings, see, JAIN, *A TREATISE ON ADMINISTRATIVE LAW,* II; *Jain & Jain, PRINCIPLES OF ADM. LAW,* Ch. XXXV (Reprint 1993).

67. *D.R. Gurushantappa v. Abdul Khuddus,* AIR 1969 SC 744 : (1969) 1 SCC 466.

The indirect control of the government arising out of its power to appoint the managing director of the company and to issue directions to the company in its general working does not bring the employees of the company directly under government control.

A person was appointed as part-time chairman by the transport corporation of the State. The government had no power to appoint or remove him from office. He was given a compensatory allowance by the corporation from out of its own funds and not out of government funds. It was held that he did not hold an office of profit.[68]

But the auditor of a government company (in which the government held 100 per cent shares) was held to hold an office of profit under the government. Although the company was a separate entity from the government, yet it was government company in which the government held 100% shares. The auditor was appointed, and was removable, by the government; he performed his functions under the control of the Comptroller and Auditor-General who himself is appointed, and whose administrative powers are controlled by the rules made by the President.

An office of profit *under* the government does not necessarily mean service of government. For holding an 'office of profit' *under* the government, a person need not be in the service of the government and there need not be any relationship of master and servant between him and the government. The fact that the auditor's remuneration was paid not out of the public revenues but by the company which had an entity apart from the government, was held to be not decisive of the question.[69] As the Court emphasized, what needs to be considered is the substance and not the form of the matter.

The Supreme Court has emphasized in *Biharilal Dobray v. Roshanlal Dobray,*[70] that merely because a body is incorporated, it is not conclusive of the question whether the body is really independent of the government. Sometimes, the form may be of a body corporate independent of the government but in substance it may just be the 'alter ego' of the government itself. "The true test for determination of the said question depends upon the degree of control the government has over it, the extent of control exercised by the several other bodies or committees over it and their composition, the degree of its dependence on government for its financial needs and the functional aspect, namely, whether the body is discharging any important governmental function or just some function which is merely optional from the point of view of government".

The Bokaro Steel Plant is under the management and control of the Steel Authority of India Ltd.—a company incorporated under the Companies Act and its shares are owed by the Central Government. Its Chairman and the Board of Directors are appointed by the President of India. The power of appointment and removal of workers vest in the Steel Authority of India Ltd. which also determined their remuneration. The Steel Authority as well as the Bokaro Plant perform non-governmental functions such as manufacturing steel. In this context, the Supreme Court has ruled that the *Khalashis* or meter readers employed by the Bokaro Plant are not subject to the control of the government which neither exer-

68. *K. Prabhakara Rao v. M. Seshagiri Rao,* AIR 1981 SC 658 : (1982) 2 SCC 78.
69. *Gurugovinda Basu v. Sankari Prasad,* AIR 1964 SC 254 : (1964) 4 SCR 311.
70. AIR 1984 SC 385 at 395 : (1984) 1 SCC 551; *supra,* footnotes 45 and 64.

cised the power of appointment nor of removal of these persons. Control over the work of these employees is exercised by the Steel Authority and not by the Central Government. Accordingly, these employees could not be regarded as holding an office of profit under the Central Government.[71]

A clerk employed in Coal India Ltd. has been held to be not disqualified under Art. 102/193 from contesting an election. Coal India is a private limited company incorporated under the Companies Act with 100% share capital owned by the Central Government. It is thus a government company. The President can issue directions to the company as may be considered necessary. The day to day management of the company however vests in a Board of Directors. The company has power to appoint, remove or dismiss its employees who are paid their salaries from the company's funds. The Government exercises no control on appointment, removal, service conditions and functioning of the employee concerned.[72]

A disqualification may arise under a statute outside the Constitution. Thus, the Representation of the People Act debars a person, who holds the office of a managing agent, manager or secretary of a company or corporation in the capital of which a government holds not less than 25% share, from being chosen as a member of the Legislature to which that Government is responsible. Further, a corporation may itself frame a regulation under statutory authority debarring its employees from standing at an election of a legislative body and this constitutes a disqualification.

(b) THE PARLIAMENT (PREVENTION OF DISQUALIFICATION) ACT, 1959

Parliament has power to declare the offices of profit the holders of which would not be disqualified for its membership [Art. 102(1)(a)]. Accordingly, Parliament has enacted the Parliament (Prevention of Disqualification) Act, 1959, which lists the various categories of offices the holders of which would not be disqualified for membership of Parliament.

The Act does not define the term 'office of profit' for the obvious reason that the term occurs in the Constitution and its final interpretation rests with the courts and not with Parliament. In case of an office other than those exempted under the Act, the final word on whether it is an 'office of profit' or not rests with the courts.

In Britain, there is no general theory that a disqualification arises from holding an office of profit under the Crown. There disqualifications are specific and disqualification arises only when a person holds a disqualifying office so declared under a parliamentary legislation.[73] The House of Commons Disqualification Act, 1975, lists the offices the holders of which are disqualified from membership of the House. The position is, however, different in India as there prevails a general disqualification under the Constitution, but specific exemptions may be granted from it under a law of Parliament.[74]

The power of Parliament to grant exemptions has on occasions been exercised to operate with retrospective effect. The Parliamentary (Prevention of Disquali-

---

71. *Aklu Ram Mahto v. Rajendra Mahto,* AIR 1999 SC 1259 : (1999) 3 SCC 541.
72. *Pradyut Bordoloi v. Swapan Roy,* AIR 2001 SC 296 : (2001) 2 SCC 19.
73. J.A.G. GRIFFITH'S comments in 20 *Modern L.R.,* 52, 492 (1957); WADE AND PHILLIPS, *op. cit,*. 154.
74. See *infra* p. 53.

fication) Amendment Act, 2006 excludes 45 posts held by Members of Parliament from the operation of Article 102 with retrospective effect from 1959. Now by virtue of the amendment, earlier judicial decisions to the extent that particular offices of profit (now excluded) would disqualify a member of the House, are no longer good law. But judicial pronouncements on the characteristics of an office of profit for the purposes of Article 102 will continue to operate.

Challenge to the constitutionality of the amendment by way of a petition under Article 32 has been repelled. The petitioners contended that a legislation retrospectively removing the disqualification will help a person to continue to be a Member, only if he/she had continued as a Member and his/her seat had not fallen vacant on the reasoning that in instances where the seat had already become vacant on account of incurring a constitutional disqualification, any legislative attempt to revive the membership of the Member whose seat had become vacant, would violate Article 102(1) read with Article 101(3)(a) of the Constitution was rejected.[75] The court held that when the amending Act "retrospectively removed the disqualification with regard to certain enumerated offices, any Member who was holding such office of profit, was freed from the disqualification retrospectively. As of the date of the passage of the Amendment Act, none of the Members who were holding such offices had been declared to be disqualified by the President. Section 4(2) was not attracted and consequently they continued as Members."

In 2004, an Election Petition was filed challenging the election of a candidate who was elected to the Delhi Legislative Assembly in 2003 on the ground that the elected candidate was the Chairman of the Delhi Wakf Board when he was elected. While the challenge was pending decision by the High Court, in 2006, the Wakf Act 1995 was amended by inserting a provision which effectively exempted the office of the Chairperson from being a disqualification for election as a member of the Legislative Assembly. The dismissal of the petition by the High Court was affirmed in appeal.[76]

(c) JOINT COMMITTEE ON OFFICES OF PROFIT

Every day government appoints committees and sets up statutory or non-statutory bodies. The membership of such bodies does not entail a disqualification if the member does not get any remuneration but only a compensatory allowance. As new and new bodies are created daily, the question as to the membership of which of these bodies would or would not be a disqualification for parliamentary membership is a matter demanding constant review. To meet this need, a Joint Committee on Offices of Profit has been constituted.

The Committee consists of ten members from the Lok Sabha and five members from the Rajya Sabha. The function of the Committee *inter alia* is to undertake a continuous scrutiny of composition and character of various government appointed bodies and report to both Houses as to the membership of which of these bodies ought or ought not to disqualify a person for membership of Parliament. The Committee generally applies two tests in deciding whether a member of a body ought to be exempted from disqualification—

---

75. *Consumer Education and Research Society v. U.O.I.*, (2009) 9 SCC 648.
76. *Mohd. Akram Ansari v. Chief Election Commissioner*, (2008) 2 SCC 95 : (2007) 14 Scale 30.

(*i*) what are the emoluments or allowances attached to the membership;

(*ii*) what is the nature of the functions of the body?

If a member of a body gets only a compensatory allowance and the body exercises merely an advisory function, then no disqualification would arise. But if the allowance given is more than compensatory allowance, and/or the body exercises executive and financial powers and is in a position to wield influence and patronage, then its membership would not be exempted from disqualification.

From time to time, the Joint Committee has submitted reports to both Houses giving its recommendations on proposals to nominate a member of the House to a particular office namely whether a nomination would fall foul of Article 102. The role of the Committee is only advisory and the recommendations do not give protection from disqualification under the law until the recommendations are given statutory effect by amending the Parliament (Prevention of Disqualification) Act, 1959. However, the Joint Committee was not consulted before the Act was amended by the Parliamentary (Prevention of Disqualification) Amendment Act, 2006.

Recently, a Joint Committee of both Houses has been set up to examine the constitutional and legal provisions relating to an office of profit.[77]

(d) DECISION ON DISQUALIFICATION

A disqualification for parliamentary membership may either exist when a person seeks to become a member of a House, or may arise after he has become a member. He is not entitled to be chosen as a member of a House in the former case and will cease to be a member in the latter case. If a disqualified person is elected, the Constitution lays down no procedure to declare the election void. That is a matter which can be dealt with by a law of Parliament. Section 100(1)(a) of the Representation of People Act, 1951, enables the High Court to declare an election void if a disqualified candidate is elected.

The constitutional scheme is that a person shall be disqualified from continuing as a Member of Parliament if he/she holds any disqualifying office of profit. Such a disqualification can result in the vacation of his/her seat when the Member admits or declares that he/she is holding the disqualifying office of profit. However, if he/she does not make a voluntary declaration about the same, the question of whether he/she is disqualified or not, if raised, shall have to be referred for a decision by the President of India and the same will be made after obtaining the opinion of the Election Commission of India. The question as to whether a particular Member has incurred a disqualification can be referred for the decision of the President by any citizen by means of making an application to the President. It is only after the President decides that the Member has incurred an alleged disqualification that the particular Member's seat would become vacant.[78]

The words "if any question arises as to whether a Member of either House of Parliament has become subject to any disqualifications" conclusively show that the question of whether a Member has become subject to any disqualification

---

77. See *Raja Ram Pal v. Speaker, Lok Sabha*, (2007) 3 SCC 184, 462 : (2007) 2 JT 1.
78. *Consumer Education and Research Society v. UOI*, (2009) 9 SCC 648.

under clause (1) of Article 102 has to be decided only by the President. Such a question would of course be a mixed question of fact and law. The Constitution provides the manner in which that question is to be decided. The Court was of the view that it is only after such a decision is rendered by the President, that the seat occupied by an incumbent member becomes vacant. The question of a person being disqualified under Article 102(1) and the question of his seat becoming vacant under Article 102(3)(a) though closely interlinked, are distinct and separate issues.[79]

Article 103 [Art. 192 in case of a State Legislature][80] lays down a procedure for dealing with the situation when a sitting member of a House becomes subject to a disqualification mentioned in Art. 102(1) [Art. 191(1) in case of a State Legislature]. When such a question arises, it is referred to the President [or the Governor in case of a State Legislature] and his decision is final.

However, in deciding the matter, the President [or the Governor] neither consults his Council of Ministers, nor decides the matter himself. He has to forward the question to the Election Commission for its opinion and act according to the opinion received.[81] In effect, therefore, the matter is decided by the Election Commission though the decision is announced in the name of the President [or the Governor]. The Commission holds a proper enquiry before giving its opinion.[82]

A member found to have become disqualified, *ipso facto* ceases to be a member of the House and his seat becomes vacant [Art. 101(3)(a)]. Art. 103 applies to a case of a sitting member becoming subject to a disqualification after his election, and under it the President [or the Governor] and the Election Commission have no jurisdiction to enquire into a member's disqualification existing prior to his election.

When a person who has incurred a disqualification offers himself/herself as a candidate and is subsequently elected and if no one objects and if the Returning Officer accepts the nomination and if no election petition is filed challenging the election, then he/she would continue as a Member in spite of the disqualification.[83]

In respect of the disqualification on the ground of holding an office of profit, the vacancy of the seat would become operative only when the President decides the issue on the subject of the alleged disqualification and declares that a particular Member has incurred the same. Such a decision may be made either on the basis of an adjudication where the question is disputed, or on the basis of an admission by the Member concerned.[84]

Upon a proper construction of the provisions of Articles 101 to 103, it is evident that a declaration by the President under Article 103(1) in the case of a disqualification under Article 102(1) and a declaration by the Speaker or the Chairman under Para 6 of the Tenth Schedule in the case of a disqualification under Article 102(2) is a condition precedent for the vacancy of the seat. If Article

---

79. *Consumer Education and Research Society v. U.O.I.,* (2009) 9 SCC 648.
80. *Infra,* Ch. VI.
81. For discussion on "Election Commission", see, *infra*, Ch. XIX.
82. *Brundaban v. Election Commission,* AIR 1965 SC 1892 : (1965) 3 SCR 53; *Election Commission v. N.G. Ranga,* AIR 1978 SC 1609 : (1978) 4 SCC 181.
83. *Consumer Education and Research Society v. U.O.I.*, (2009) 9 SCC 648.
84. *Consumer Education and Research Society v. U.O.I.*, (2009) 9 SCC 648.

101(3)(a) is interpreted otherwise, it will lead to absurd results thereby making it impossible to implement or enforce the relevant provisions of the Constitution or the RP Act.[85]

In *Saka Venkata Rao*,[86] the respondent was convicted and sentenced to a term of seven years rigorous imprisonment in the year 1942. He was released on the occasion of celebration of the Independence Day on August 15, 1947. He contested election for the State Assembly in 1952. Being disqualified for five years, he appealed to the Election Commission for waiver of his disqualification.

Pending the decision of the Election Commission, he was elected. Thereafter the Election Commission rejected his appeal. The Speaker then referred to the Governor the question of his disqualification. The Supreme Court decided that Arts. 190(3) and 192(1) [Arts. 101(3) and 103(1)] go together and provide a remedy when a member incurs a disqualification after he is elected as a member. Art. 192(1) contemplates only a sitting member incurring the disability while so sitting. Art. 190(3) does not apply to the pre-existing disqualification. The Supreme Court thus rejected the contention that Arts. 190(3) and 192(1) include within their scope the pre-existing disqualification as well. In the instant case, as Venkata Rao was already disqualified prior to his nomination for election, no action could be taken against him under Art. 192.

The Supreme Court has clarified the legal position obtaining under Arts. 103(1) and (2) as well as under Arts. 192(1) and (2). The language of both these provisions is verbatim except that in Art. 102, the decision is to be made by the President in relation to a member of a House of Parliament, and in case of a member of a State Legislature, it is the Governor who has to make the decision.

In *Brundaban Nayak*, the question was regarding the interpretation of Art. 192 which applies *ipso facto* to Art. 103. The appellant was elected to the Orissa Assembly and was appointed as a Minister. The respondent (No. 2) applied to the Governor alleging that the appellant had incurred a disqualification subsequent to his election. The Governor forwarded the complaint to the Election Commission for opinion.

The appellant sought quashing of the inquiry by the Election Commission on the ground that it was incompetent and without jurisdiction. The Supreme Court ruled that under Art. 192(1) what was required was that a question should arise and how it arises or by whom it is raised or in what circumstances it is raised, are not relevant for the purpose of the application of the clause. All that is relevant is that a question of this type mentioned by the clause should arise. It is not necessary that the question be raised on the floor of the House. Such a question as is contemplated by Art. 192(1) "shall be decided by the Governor and Governor alone; no other authority can decide it nor can the decision of the said question as such fall within the jurisdiction of the courts.

The stipulation in Art. 103(2) and Art. 192(2) that the President/Governor "shall act" according to such opinion leaves no room for doubt that the President/Governor has no discretion in the matter but to act according to the opinion

---

85. *Consumer Education and Research Society v. U.O.I.*, (2009) 9 SCC 648.
86. *Election Commission v. Saka Venkata Rao*, AIR 1953 SC 210 : 1953 SCR 1144.

of the Election Commission.[87] The decision on the question raised under Art. 192(1) or 103(1) has no doubt to be pronounced by the Governor/President, but that decision has to be in accordance with the advice of the Election Commission. The opinion of the Election Commission is a *sine que non* for the President/Governor to give a decision on the question whether a member of a House has incurred a disqualification. On this point, the Supreme Court has recently observed:[88]

> "It is thus clear on a conjoint reading of the two clauses of Art. 192 that once a question of the type mentioned in the first clause is referred to the Governor, meaning thereby is raised before the Governor, the Governor and the Governor alone must decide it but this decision must be taken after obtaining the opinion of the Election Commission and the decision which is made final is that decision which the Governor has taken in accordance with the opinion of the Election Commission. In effect and substance the decision of the Governor must depend on the opinion of the Election Commission and none else, not even the Council of Ministers. Thus, the opinion of the Election Commission is decisive since the final order would be based solely on that opinion".

In an earlier case,[89] the Supreme Court had observed in the context of Art. 103(2) that the President was bound to seek and obtain the opinion of the Election Commission and only thereafter decide the issue in accordance therewith. In other words, it is the Election Commission's opinion which is decisive. The opinion of the Election Commission is a *sine qua non* for the Governor or the President, as the case may be, to give a decision on the question whether or not the concerned member of the House of the Legislature of the State or either House of Parliament has incurred a disqualification.

It was argued in *Ramakrishna Hegde v. State*,[90] that since the order in question was made by the Governor acting without the aid and advice of the Council of Ministers, the order could not be questioned because of Art. 361.[91] The Governor could not be impleaded as a party to the writ petition as his action could not be challenged because of the immunity enjoyed by him and the opinion of the Election Commission became merged with the Governor's opinion. Rejecting the argument, the High Court ruled that in effect the decision was made by the Election Commission although the formal order was made by the Governor. The decision of the Election Commission is a *sine qua non* for the Governor to give a decision on the question of disqualification of a member of the State Legislature. The Election Commission was the second respondent to the writ petition.

The High Court referred to *Brundaban Nayak v. Election Commission*,[92] where the Supreme Court had said that the decision of the Election Commission was "in substance decisive" in such a matter. Under Art. 192, though the decision on the question raised is to be pronounced by the Governor, he actually acts according to the opinion of the Election Commission. The decision of the Governor de-

---

87. *Brundaban Nayak v. Election Commission of India,* AIR 1965 SC 1892 : (1965) 3 SCR 53; *Election Commission of India v. N.G. Ranga,* AIR 1978 SC 1609 : (1978) 4 SCC 181.

88. *Election Commission of India v. Dr. Subramaniam Swamy,* AIR 1996 SC 1810 : (1996) 4 SCC 104.

89. *Election Commission of India v. N.G. Ranga, supra,* footnote 87.

90. *Supra,* footnote 41.

91. See, *infra,* Ch. III and Ch. VII.

92. *Supra,* footnote 87.
Also see, *Election Commission v. Ranga,* AIR 1978 SC 1609 : (1978) 4 SCC 181.

pends on the opinion of the Election Commission and none else, not even that of the Chief Minister. Thus, it is the Election Commission which decides the matter though the decision is announced formally in the Governor's name.[93] The Governor has no choice but to pass the order in accordance with the opinion of the Election Commission. The Court, therefore, ruled that the writ petition could be maintained even in the absence of the Governor being a party to the proceedings when the Election Commission was itself before the court.

Further, the Supreme Court has ruled in *Election Commission v. Subramanian Swamy*,[94] that the Election Commission acts in a *quasi*-judicial capacity while adjudicating upon the disqualification of a sitting member of a House of State Legislature or Parliament. This means that the Election Commission has to follow the principles of natural justice. One of these principles is the rule against bias.[95] Therefore, if one of the members is disqualified because of the rule against bias, he should not participate in the decision.

In *Swamy*, a complaint of disqualification filed by Subramaniam Swamy against Jayalalitha, a member of the Tamil Nadu Assembly, was referred to the Election Commission by the Governor. The Chief Election Commissioner, Seshan, was held to be disqualified to participate in the decision because Swamy's wife, a lawyer, was engaged as counsel in a case filed by Seshan. The Supreme Court therefore ruled that the Chief Election Commissioner should call a meeting of the Commission and then recuse himself from participating in the decision, leaving the two other members, to decide the case. If the two Commissioners reach a unanimous verdict, that will be the decision of the Commission to be communicated to the State Governor. If, however, the two members fail to reach such a decision, then the Chief Election Commissioner will have to give his opinion on the basis of the ground of necessity. The majority decision would then be conveyed to the Governor.[96]

A significant question which remains unanswered so far as regards Art. 192 [as well as Art. 103] is that when the Governor [or the President, as the case may be] receives a representation against a member of the State Legislature [or Parliament] that he has become subject to a disqualification, is the Governor [or the President] obliged to refer the same to the Election Commission for its opinion, or the Governor [or the President] can exercise some discretion in the matter and can scrutinize for himself whether there is a *prima facie* case against the member or not?

This question arose in Tamil Nadu.[97] Subramaniam Swamy submitted a representation to the Governor to the effect that the Chief Minister had become subject to a disqualification as a member of the State Legislature. The Governor kept the representation pending for nearly four months without taking any action thereon.

Swamy then filed a writ petition in the Supreme Court to issue a writ directing the Governor to refer the representation to the Election Commission. Before the Court could hear the matter and decide one way or the other, the Governor *suo*

---

93. Also see, *K. Haja Shareff v. Governor of Tamil Nadu,* AIR 1985 Mad 55.
94. AIR 1996 SC 1810 : (1996) 4 SCC 104.
95. For a detailed discussion on this Rule, see, JAIN, *A TREATISE ON ADM. LAW, I,* 405-447 (1996); JAIN, *CASES* Ch. X.
96. AIR 1996 SC 1810 at 1817 : (1996) 4 SCC 104.
97. *Election Commission v. Subramaniam Swamy,* AIR 1996 SC 1810 : (1996) 4 SCC 104.

motu referred the representation to the Election Commission for inquiry and report. Had the Governor waited for some time more, the Court would have had occasion to decide the question about the Governor's actual role in the matter.

It seems that under Art. 192 [or Art. 103], the effective decision-making power has been given to the Election Commission, and, therefore, it should be for the Election Commission itself to decide whether the representation is frivolous or not, or whether any inquiry is called for or not. The Governor's role is confined only to seeking the advice of, and acting on, the advice of the Election Commission. His role is, therefore, merely formal. He has a discretion coupled with a duty. This is as it should be. Otherwise, if decision-making power is left to the Governor, the decision will be subject to political pressures.

From the observations made by the Supreme Court in the above mentioned cases, it becomes rather clear that the Court regards it as obligatory on the part of the Governor/President to seek the advice of the Election Commission whenever a question is raised, and brought to his notice, about the disqualification of a sitting member of the Legislature/Parliament. The use of the words "shall obtain" in Arts. 103(2) and Art. 192(2) means that it is obligatory for the President/Governor to obtain the opinion of the Election Commission. "Obtaining the opinion of the Election Commission is, therefore imperative. It is equally imperative for the Governor to act according to such opinion."[1]

The Supreme Court has clarified that the power conferred on the President under Art. 103 (as well as of the Governor under Art. 192)[2] is not to be regarded as the power to remove a member of Parliament (State Legislature in case of the Governor) The function of the President (Governor) under Art. 103 is adjudicatory in nature. If the President (Governor) holds, onthe advice of the Election Commission, that a member has become subject to a disqualification, the member is treated as having ceased to be a member of the House on the date when he became subject to such disqualification.[3]

It is evident from the decision in *P.V. Narasimha Rao*,[4] that when the President adjudicates on the subject of whether a Member was disqualified or not and gives a finding that he/she is disqualified, he/she is merely deemed to have ceased being a Member from the date that he/she had incurred the disqualification. It follows that a Member continues to be one until the decision of the President and when the outcome of the decision is that he/she is disqualified, it relates back to the date when the said disqualification was incurred. If the President holds that the Member has not incurred the disqualification, the person continues as a Member.[5]

It has been stated above that Art. 103 or 192 does not apply when a disqualified person gets elected to a House of Parliament or the State Legislature. The remedy in such a case, as discussed later,[6] is filing an election petition against the person concerned. But what happens if his election is not questioned through an

---

1. *Ibid*, at 1815.
2. See, *infra*, Ch. VI.
3. *P.V. Narasimha Rao v. State (CBI/SPE)*, (1998) 4 SCC 626 : 1998 SCC (Cri) 1108. Also see, *infra*, Sec. L.
4. *P.V. Narasimha Rao v. State*, (1998) 4 SCC 626 : 1998 SCC (Cri) 1108.
5. *Consumer Education and Research Society v. U.O.I.*, (2009) 9 SCC 648.
6. *Infra*, Ch. XIX under Elections.

election petition within the statutory limitation period. Such a situation arose in *K. Venkatachalam v. A. Swamickan.*[7]

A person who was disqualified was elected to the Tamil Nadu Assembly. No election petition was filed against him and the limitation period for the purpose expired. Thereafter, a writ petition was filed in the High Court under Art. 226 for declaration of his election as invalid. The Supreme Court ruled that the High Court could declare his election void as he had no basic constitutional and statutory qualification. There was no other mechanism available for the purpose. Action could not be taken against him under Art. 192 [Art. 103] as he incurred the disqualification prior to his election. Art. 226 is couched in the widest possible terms.[8] The Court also directed the State Government to recover from him penalty under Art. 193 [Art. 104] according to which he is liable to pay a penalty of Rs. 500 a day on which he sits and votes.[9]

(e) CRIMINALISATION OF POLITICS

The increasing nexus between criminals and politics threatens the survival of any true democracy. In India, the Election Committee's official publication 'Electoral Reforms (Views and Proposals)' highlighted the need to amend the Representation of the People Act, 1951 to debar antisocial and criminal elements making inroads into the electoral and political fields. It said that the criminalization of politics had reached a stage where the law breakers had become law makers.

The view was reiterated by the Law Commission in its 179th Report which also recommended an amendment of the Representation of the People Act, 1951 by providing that framing of charges for offences punishable with death or life imprisonment, should disqualify a candidate for five years or until acquittal, whichever event happens earlier. It also recommended that a candidate seeking to contest an election must furnish details regarding any pending criminal case, including a copy of the FIR/Complaint and also furnish details of all assets possessed whether by the candidate, spouse or dependent relations. No action was taken on the recommendation by the Government because of a lack of consensus amongst the political parties.

It is in this environment of inaction of the government, Parliament and political parties, the matter was first brought before the Delhi High Court through a PIL writ petition. Basing itself on the thesis that under Art. 19(1)(a) of the Constitution,[10] guaranteeing freedom of speech and expression, the right to get information is also guaranteed. The right to information is an integral part of the freedom of speech and expression. Accordingly, the High Court ruled that a candidate while filing his nomination for election to Lok Sabha or a State Legislature should give full information in an affidavit about his past criminal record, financial status etc.[11]

The Central Government appealed to the Supreme Court against the High Court verdict. On appeal, the Supreme Court has more or less reiterated what the

---

7. AIR 1999 SC 1723 : (1999) 4 SCC 526.
8. See, *infra*, Ch. VIII, Secs. D and E for discussion on Art. 226.
Also see, *infra*, Ch. XIX, under "Elections".
9. *Infra*, p. 61.
10. See, *infra*, Ch. XXIV.
11. AIR 2001 Del 126.

Delhi High Court has said. The Supreme Court has ruled that the Election Commission should call for information from each candidate on affidavit regarding his past criminal record, his financial assets (including those of his spouse or dependants), his liabilities to public sector bodies and educational qualifications.[12] It may be noted that these are not in any disqualifications of the candidate. The idea underlying the direction is that if the electors have full information about the antecedents of a candidate, they will be in a better position to decide as to whom to give vote. Subsequent to the decision of the Supreme Court in Association of Democratic Reform [*supra*], the Representation of the People Act, 1951 was amended[13] by inserting Section 33-A which requires a candidate to furnish information whether he is accused of any offence punishable with imprisonment of two years or more in a pending case in which charges have been framed by a Court of competent jurisdiction and whether he has been convicted and sentenced to imprisonment for one year or more. Failure to file an affidavit, filing a false affidavit or concealing information is punishable under Section 125-A. As far as the declaration of assets is concerned, Parliament chose to partially implement the decision of the Supreme Court by requiring an elected and not a candidate standing for election, to declare his assets.[14] Section 33-B provided that a candidate was not liable to disclose or furnish any such information, in respect of his election, which was not required to be disclosed or furnished under the Act or the rules made thereunder notwithstanding anything contained in any judgment, decree or order of any court or any direction, order or any other instruction issued by the Election Commission. In other words, a candidate is not required to disclose (a) the cases in which he is acquitted or discharged of criminal offence(s); (b) his assets and liabilities; and (c) his educational qualification. The section was held to be unconstitutional in *People's Union for Civil Liberties (PUCL) v. Union of India,*[15] on the ground that the voter had a fundamental right under Art. 19(1)(a) to be aware of the antecedents of his candidate.

E. OTHER PROVISIONS REGARDING PARLIAMENTARY MEMBERSHIP

(a) SIMULTANEOUS MEMBERSHIP

No person can be a member of both Houses of Parliament at one and the same time. Parliament is authorised to provide by law for vacation by a person, who is chosen a member of both the Houses, of his seat in one House [Art. 101(1)].[16]

---

12. *Union of India v. Association of Democratic Reforms*, (2002) 5 SCC 294 : AIR 2002 SC 2112.

13. The Representation of the People (Third Amendment) Act, 2002 (Act 72 of 2002).

14. Sec. 75A of The Representation of the People Act, 1951.

15. (2003) 4 SCC 399, at page 433 : AIR 2003 SC 2363.

16. The Representation of the People Act, 1951, provides that a person so chosen who has not taken his seat in either House may intimate the Election Commission within ten days from the publication of the later of the results as to the House he desires to serve in, and thereupon his seat in the other House falls vacant. In default of such an intimation, his seat in the Rajya Sabha becomes vacant. A sitting member of the Lok Sabha or Rajya Sabha vacates his seat when he is chosen a member of the Rajya Sabha or Lok Sabha respectively.

No person can be a member of Parliament and a State Legislature simultaneously. If a person is so elected, then at the expiry of such period as the President may by rules specify, his seat in Parliament becomes vacant, unless he has previously resigned his seat in the State Legislature [Art. 101(2)].[17]

Parliament has also provided that if a person is elected to more than one seat in a House then unless he resigns within the prescribed period all but one of the seats, all the seats become vacant.[18]

(b) TERMINATION OF MEMBERSHIP

A member of the Rajya Sabha may resign his seat by writing to the Chairman, and that of the Lok Sabha, by writing to the Speaker. The seat falls vacant when the resignation is accepted by the Chairman/Speaker who is not to accept the resignation if he is satisfied that it is not voluntary or genuine [Art. 101(3)(b)].

A House of Parliament may declare a seat vacant if a member absents himself from all its meetings for a period of sixty days without its permission, no account being taken of any period during which the House is prorogued or adjourned for more than four consecutive days [Art. 101(4)].

(c) COMMITTEE ON ABSENCE OF MEMBERS

Lok Sabha has a Committee on Absence of Members to consider all applications from members for leave of absence from sittings of the House, to examine every case when a member has been absent for sixty or more days from the sittings of the House and to report whether the absence should be condoned, or the seat of the member declared vacant by the House. Rajya Sabha has no such committee, but the seat of a member becomes vacant because of his absence when the House passes a motion for the purpose.

The seat of a member in a House does not become vacant automatically by his absence, but the House has power to declare it vacant. This is different from the case of a member becoming subject to a disqualification when his seat becomes vacant automatically.

(d) TAKING OF OATH

A member of a House of Parliament, before taking his seat in the House, has to make and subscribe an oath or affirmation before the President, or a person appointed by him for this purpose. Until a duly elected candidate takes the oath, he cannot participate in the proceedings of the House as he is not regarded a member thereof [Art. 99].[19]

(e) PENALTY

A person is liable to a penalty of Rs. 500 for each day he sits or votes as a member in a House :

(*i*) before taking the prescribed oath; or

(*ii*) when he knows that he is not qualified to be a member of the House, or is disqualified for being its member; or

---

17. Also see, The Prohibition of Simultaneous Membership Rules, 1950.
18. Sec. 70 of the R.P. Act, 1951.
19. Also see, Third Schedule to the Constitution.

(*iii*) when he knows that he is prohibited from sitting or voting in the House by virtue of any law made by Parliament [Art. 104].

(f) SALARY

Members of a House of Parliament are entitled to receive such salaries and allowances as may be determined by Parliament by law [Art. 106][20]

F. ANTI-DEFECTION LAW

The politics of defection has been the bane of the parliamentary system in India. The vice of defection has been rampant in India for quite some time, especially at the state level. Defection means floor-crossing by a member of one political party to another party.

Defection causes government instability, for a government may be toppled over due to the defection of some of its supporters to the opposition party converting it from a minority into a majority party. Defection is undemocratic as it negates the electoral verdict. A party which fails to get majority in the House through election may yet be able to manoeuvre a majority in the House and form the government by inducing defections from other parties. Thus, the party which may have won a majority through election, and got the mandate from the people to form the government, may yet fail to do so because a few of its members defect from the party.

It is one thing for a member to change his political affiliation out of conviction because he may conscientiously disagree with the policies of the party to which he belongs. In such a case, if he leaves the party with whose support he has been elected to the House, he ought to resign his membership of, and seek fresh election to, the House. But such principled defections are rare. Most of the defections take place out of selfish motives as the defectors hope to be appointed ministers in the Council of Ministers to be formed with their support. This is very well illustrated by the jumbo size Kalyan Singh government installed in 1997 in Uttar Pradesh formed by the BJP with the support of defectors from the Congress Party and the Bahujan Samaj Party. Almost all the defectors were appointed as ministers and, thus, the Council of Ministers had 94 Ministers, which was an unprecedented event in itself. Such unprincipled defections are morally wrong, opportunist and indicative of lust for power. It involves breach of faith of the electorate.

It was realized that if the evil of political defection was not contained, it would undermine the very foundations of democracy in India and the principles which sustain it. It was therefore thought necessary to enact a law to suppress the vice of defection.

The Constitution (Fifty-second Amendment) Act[21] changed four Articles of the Constitution, *viz.* 101(3)(a), 102(2), 190(3)(a) and 191(2), and added the Tenth Schedule thereto. This Amendment is often referred to as the anti-defection law.

Under Art. 102(2),[22] a person is disqualified to be a member of either House of Parliament if he is so disqualified under the Tenth Schedule.

---

20. Also see, The Salaries and Allowances of Members of Parliament Act, 1954.
21. For provisions of the Constitution Amendment Act, see, *infra*, Ch. XLII.
22. *Supra*, Sec. D.

Under Para 2 of the X Schedule, if a member voluntarily gives up his membership of, or votes or abstains from voting, in the House against the direction[23] issued by, the party on whose symbol he or she was elected, then he or she would be liable to be disqualified from membership.

In view of Explanation (a) to para 2(1) of Schedule X, the member concerned would be deemed to belong to the Indian National Congress Party by which he was set up as a candidate for contesting the election of MLC in the year 1998. On facts the Supreme Court held that it could not be said that the finding arrived at by the Chairman of the Legislative Council that he gave up the membership of the Indian National Congress Party to which he belonged is one which could not reasonably and possibly have been arrived at.[24]

The nature and degree of inquiry required to be conducted for various contingencies contemplated by para 2 of Schedule X may be different. Under para 2(1)(a) the inquiry would be a limited one. But the inquiry required for the purpose of para 2(1)(b) may, at times, be more elaborate involving several factual aspects.[25]

On the plain language of para 2 of Schedule X, the disqualification comes into force or becomes effective on the happening of the event. Under para 6, the final authority to take a decision on the question of disqualification of a member of the House vests with the Chairman or the Speaker of the House. Their role is only in the domain of ascertaining the relevant facts. Once the facts gathered or placed show that a member of the House has done any such act which comes within the purview of para 2(1) (2) or (3) of the Schedule, the disqualification will apply and the Chairman or the Speaker of the House will have to make a decision to that effect. Para 7 of Schedule X excludes the jurisdiction of the court in respect of any matter connected with disqualification of a member of a House under the Schedule. That provision being in the Constitution itself, unlike a statutory provision, affects the power of judicial review conferred on the High Courts and the Supreme Court under Article 226, respectively.[26]

Since the Speaker is involved in an adjudicating process, fairness demands that generally the member in fault should be given some opportunity of explaining his position. However, the complaint of violation of natural justice will not succeed if the member concerned has not suffered any prejudice. For example, in *Mahachandra Prasad Singh*,[27] the Chairman, Legislative Council who belonged to Indian National Congress was alleged to have incurred disqualification under para 2(1)(a) of the Tenth Schedule by contesting a parliamentary election as an

---

23. In *Kihota Hollohan*, see below, the Supreme Court has adopted a restrictive view of the 'direction' issued by a party "the violation of which may entail disqualification". Such a direction should pertain to two matters, *viz.*, (1) a vote on motion of confidence or no confidence in the government; (2) where the motion under consideration relates to a matter which is an integral policy and programme of the political party on the basis of which it approached the electorate. This has been done with a view to maintain freedom of speech of the members in the House guaranteed by Arts. 105(1) and 194(1).
See, *infra*, Sec. L, under "Parliamentary Privileges".

24. *Mahachandra Prasad Singh v. Chairman, Bihar Legislative Council*, (2004) 8 SCC 747 : AIR 2005 SC 69.

25. *Mahachandra Prasad Singh v. Chairman, Bihar Legislative Council*, (2004) 8 SCC 747: AIR 2005 SC 69.

26. *Mahachandra Prasad Singh v. Chairman, Bihar Legislative Council*, (2004) 8 SCC 747: AIR 2005 SC 69.

27. *Mahachandra Prasad Singh v. Chairman, Bihar Legislative Council*, (2004) 8 SCC 747: AIR 2005 SC 69.

independent candidate. The Chairman took into consideration a letter from the leader of Indian National Congress in the Legislative Council to the effect that the said MLC had ceased to be a member of the said party for violating party discipline by contesting the parliamentary election as an independent candidate. The petitioner did not dispute the facts but rather admitted them in his writ petition. In such circumstances, non supply of copy of the said letter to the MLC held caused no prejudice to the Member of Legislative Council and hence, was not violative of any principles of natural justice.

Under Para 3, no disqualification is incurred in cases where a split from, or merger of a party in, another party is claimed. In the event of a split, at least one-third of its members must decide to quit or break away. In the case of a merger, the decision should have the support of not less than two-thirds of the party members.

Paragraph 3 of the Tenth Schedule clearly states that from the time of the split, the breakaway faction will be deemed to be a separate political party for purposes of the anti-defection law. All that the Speaker is required to do is to ascertain whether the group consists of not less than one-third of the members of the legislature party. If this requirement is fulfilled, the Speaker is bound to hold that the members concerned cannot be disqualified.[28]

Paragraph 3 of the Tenth Schedule as it originally stood provided that no disqualification would be incurred in cases where there is a split of at least one third of the members of the original party. The entire paragraph has been omitted from the Tenth Schedule by The Constitution (Ninety-first Amendment) Act, 2003.[29] Paragraph 4 protects mergers of parties provided that the decision to merge is supported by not less than two thirds of a merging party.

The question of disqualification under Sch. X is to be determined by the Speaker of the Lok Sabha, or the Chairman of the Rajya Sabha, as the case may be, but he is to take notice of an alleged defection not *suo motu*, but only when a petition in writing is received from a member. Para 6 of the Xth Schedule renders the decision of the Speaker as final.

In terms of para 2 of the Tenth Schedule the act of disqualification occurs on a member voluntarily giving up his membership of a political party or at the point of defiance of the whip issued to him.The date of disqualification is the date on which the act takes place and not the date on which the Speaker takes a decision in that regard.[30]

Under para 7 of the Schedule, no Court has jurisdiction to decide the question of disqualification of a member of a House under Sch. X.

Para 8 authorises the Chairman/Speaker of a House to make rules for "giving effect to the provisions of Schedule X. Rule 7(7) provides that the procedure to

---

28. In *Rajendra Singh Rana v. Swami Prasad Maurya (supra)*, the Supreme Court construing para 3 held that the scheme of Articles 102 and 191 and the Tenth Schedule, does not permit the determination of the question of split or merger separately from a motion before the Speaker seeking a disqualification of a member or members concerned nor does the Speaker have an independent power to decide that there has been a split or merger of a political party as contemplated by paragraphs 3 and 4 of the Tenth Schedule to the Constitution.

29. See *infra*.

30. *Rajendra Singh Rana v. Swami Prasad Maurya*, (2007) 4 SCC 270 : AIR 2007 SC 1305.

be followed by the Speaker shall be the same as adopted in privilege cases by the Committee of Privileges.[31] A reasonable opportunity must be allowed to the member against whom a complaint has been made to represent his case, and to be heard in person. At times, the Speaker may refer a case of defection to the Committee of Privileges for inquiry. This process takes quite some time and, therefore, defection does not have any immediate effect. The jurisdiction of the courts is barred in matters connected with the disqualification of members.

(a) KIHOTA HOLLOHON

Explaining the rationale underlying the X Schedule, the Supreme Court has stated that the provisions of the X Schedule give recognition to the role of the political parties in the political process. A political party goes before the electorate with a particular programme; it sets up candidates at the election on the basis of such programme; a candidate is therefore elected on the basis of the party programme. The underlying premise of the X Schedule is that political propriety and morality demand that if a member of a legislature, after the election, changes his political affiliation and leaves the political party which had set him up as a candidate at the election, then he should give up his seat in the legislature and contest election again under the banner of the new party adopted by him.

The constitutionality of the Anti-Defection law has been upheld by the Supreme Court in a 3 : 2 decision in *Kihota Hollohon v. Zachilhu*[32]. But, at the same time, the Court has ruled that the Speaker's order under the law disqualifying a member of the legislature on the ground of defection is subject to judicial review.

The majority view is that the main provisions of the X Schedule are intended to provide a "remedy for the evil of unprincipled and unethical political defections." Para 7 of the X Schedule barring judicial review affects Articles 136, 226 and 227 of the Constitution[33] and, thus, is required to be ratified by half the State Legislatures in accordance with Art. 368(2) of the Constitution.[34] As it has not been so ratified, it would be constitutionally invalid. But, para 7 contains a provision which is independent of, and stands apart from, the X Schedule's main provisions. The remaining provisions of the X Schedule are severable from para 7 as they could stand independently of para 7 and are complete in themselves, workable and not truncated, by excision of para 7.[35]

The majority has upheld the validity of para 2 of the 52nd Amendment. This provides for disqualification on defection of a member from one political party to another. These provisions, the majority has ruled, do not violate any rights or freedoms guaranteed to the legislators under Arts. 105 and 194 of the Constitution.[36] In the words of the majority Judges:[37]

---

31. See, *infra*, Sec. L(ii)(h).
32. AIR 1993 SC 412 : 1992 Supp (2) SCC 651. The majority consisted of M.N. VENKATACHALIAH, K.J. REDDY, and S.C. AGRAWAL, JJ. The minority was constituted by L.M. SHARMA and J.S. VERMA, JJ.
33. For discussion on these Articles, see, Chs. IV and VIII, *infra.* These constitutional provisions deal with judicial review.
34. For Art. 368(2), see, *Infra*, Ch. XLI, under "Amendment of the Constitution".
35. For the doctrine of severability, see, Chs. XX and XL.
36. For Art. 105, see, Sec. L, *infra;* for Art. 194, see, *infra*, Ch. VI.
37. AIR 1993 SC at 436 : 1992 Supp (2) SCC 651.

> "The provisions are salutary and are intended to strengthen the fabric of Indian parliamentary democracy by curbing unprincipled and unethical political defections."

While rejecting the contention that the entire Xth Schedule, even after the exclusion of para 7, would be violative of the basic structure of the Constitution[38] in so far as the provisions in the Schedule affect the democratic rights of the elected members of the legislatures and, therefore, of the principles of parliamentary democracy, the majority Judges have ruled that the Speaker/Chairman acts as a 'tribunal' adjudicating upon rights and obligations and his decision in a defection case would thus be open to judicial review under Arts. 136, 226 and 227, and that the finality clause in para 6 of the Schedule does not exclude the jurisdiction of the courts under these Articles of the Constitution. However, judicial review would not cover any stage prior to the making of a decision by the Speaker/ Chairman. "The only exception for any interlocutory interference being cases of interlocutory disqualifications or suspensions which may have grave, immediate and irreversible repercussions and consequences."

The majority has affirmed that the Speaker's order would be open to judicial review on the grounds of jurisdictional errors based on violation of constitutional mandate, *mala fides*, non-compliance with rules of natural justice and perversity. The Judges have also rejected the contention that the investiture of adjudicatory functions in the Speaker/Chairman is by itself invalid on the ground of political bias and lack of impartiality. The majority view on this point is:[39]

> "The Chairmen or Speakers hold a pivotal position in the scheme of parliamentary democracy and are guardians of the rights and privileges of the House. They are expected to and do take far reaching decisions in the functioning of parliamentary democracy. Vesture of power to adjudicate questions under the Xth Schedule in such constitutional functionaries should not be considered exceptionable".

VENKATACHALIAH, J., observed in this connection :

> "It would, indeed be unfair to the high traditions of that great office to say that the investiture in it of this jurisdiction would be vitiated for violation of a basic feature of democracy. It is inappropriate to express distrust in the high office of the Speaker, merely because of the Speakers are alleged, or even found, to have discharged their functions not in keeping with the great traditions of the high office..."

The minority view, on the other hand, was that the assent of the President to the 52nd Amendment was *non est*, null and void as the Bill needed to be ratified by half the States and that has not been done. The Bill ought to have been presented to the President only after such ratification. As the Constitution has not been amended in accordance with Art. 368(2), the doctrine of severability could not apply to the 52nd Amendment.[40] Further, the Speaker cannot be given the role of the 'sole' arbiter in the defection cases as it would be against the basic structure of the Constitution. The Speaker depends continuously on the support

---

38. For discussion on the doctrine of 'Basic Features' or 'Basic Structure' of the Constitution, *see*, *infra*, Ch. XLI.
39. AIR 1993 SC at 453.
40. On this question, see, *infra*, Ch. XLI.

of the majority party in the House, and so he cannot be regarded as an independent adjudicatory authority. On this aspect, the minority Judges have observed:[41]

> "Democracy is a part of the basic structure of the Constitution and free and fair elections with provision for resolution of disputes relating to the same as also for adjudication of those relating to subsequent disqualification by an independent body outside the House are essential features of the democratic system in our Constitution. Accordingly, an independent adjudicatory machinery for resolving disputes relating to the competence of members of the House is envisaged as an attribute of this basic feature."

Therefore, according to the minority judgment, all the decisions rendered by the several Speakers hitherto must also be declared a nullity and liable to be ignored.

An outstanding feature of the majority decision is to introduce judicial review of a Speaker's decision in a defection matter under Schedule X. The Supreme Court has stated on this point as follows:[42]

> "This Court has held that the Speaker while deciding the question of disqualification of a Member of the State Legislative Assembly [or of Parliament] under the Tenth Schedule to the Constitution acts as a statutory authority, in which capacity the Speaker's decision is subject to judicial review by the High Court and this Court."

But this also opens the way for Legislature-Court confrontation which breaks out from time to time between the Courts and State Legislatures on the question of legislative privileges.[43]

(b) SUBSEQUENT DEVELOPMENTS

The purpose underlying the Anti-Defection law is to curb defections, but, at the same time, not to come in the way of democratic realignment of parties in the House by way of merger of two or more parties, or a split in an existing party. The Anti-Defection Law has been hailed as a bold step to clean public life in India, but, in course of time, certain defects therein have become apparent which have very much compromised the effectiveness of the law to achieve its objectives.

The law as it stood originally was not able to prevent defections in toto. Bulk defections and splits which were permitted and in a sense encouraged by paragraph 3 of the Tenth Schedule, destabilised governments. The decision whether there was a split or not was left to the Chairman or the Speaker of the House whose view in the matter was final under paragraph 6. Apart from the very real possibility of the Chairman or Speaker being politically biased, defections and splits took place not because of a change of ideology but because of a lust for power and to serve selfish interests. In almost all cases defectors were rewarded with ministerships.

In October 1997, 22 members of the Congress party and 12 members of the Bahujan Samaj Party defected from their Parties and supported the confidence

---

41. AIR 1993 SC at 457 : 1992 Supp (2) SCC 651.

42. *I. Manilal Singh v. H. Borobabu Singh,* AIR 1994 SC 505, 506 : 1994 Supp (1) SCC 718, *Mahachandra Prasad Singh v. Chairman, Bihar Legislative Council,* 2004 (8) SCC 747, 757.

43. See, *infra,* Sec. L. Also, Ch. VI, *infra.*

motion in the BJP (Bhartiya Janta Party) Government to give it a majority in the U.P. Legislative Assembly. Later, all the defectors were made Ministers and the Council of Ministers came to have 94 members. The leader of BSP complained to the Speaker that the 12 MLAs who had defected from the Party ought to be disqualified from membership of the House. The Speaker procrastinated and ultimately decided that there was a split in BSP and that 1/3rd members of the Party (numbering 23 MLAs) had split and hence the defecting MLAs (12 in number) had not incurred the disqualification. The fact is that the claim that 23 and not 12 MLAs had split from BSP was never substantiated but the Speaker took recourse to some technical procedural arguments and came to his conclusion. It may be noted that the Speaker belonged to BJP. The Speaker's decision was appealed from before the Supreme Court.[44] The appeal was heard by a Bench of three Judges. Of the three Judges, THOMAS, J. held that the decision of the Speaker was perverse and that there was in fact no split within the meaning of paragraph 3 of the Tenth Schedule. Consequently the defecting members stood disqualified without any scope for the Speaker being asked to take a fresh decision. SRINIVASAN, J. on the other hand upheld the decision of the Speaker saying that all relevant material had been considered and that at best it could be said that two conclusions were possible and the Speaker had chosen one of them. Although it was not necessary for SRINIVASAN, J. to decide the issue of remand for fresh disposal by the Speaker, he held that if the decision of the Speaker is set aside as a result of judicial review, the matter must be left to the Speaker to redecide the issue. Punchhi, CJ did not voice any final view but opined that the matter should be referred to the Constitution Bench for decision. The difference of opinion was left unresolved by the Constitution Bench which disposed of the appeal finally as infructuous in November, 2004. Following the Mayawati decision, in 1999 the Law Commission of India in its 170th Report on "Reform of Electoral Laws" recommended omission of paragraph 3 of the Tenth Schedule. The same view was expressed by the National Commission to Review the Working of the Constitution (NCRWC) which additionally recommended that a defector should be penalized by debarring him/her from holding any public office as a Minister or any other remunerative political post for at least the duration of the remaining term of the existing legislature or until the next election whichever is earlier. Both recommendations were accepted by Parliament. By the Constitution (Ninety-first Amendment) Act, 2003 paragraph 3 of the Tenth Schedule was omitted. Article 164 was amended by the introduction of clause (1B) disqualifying defectors from being appointed as Ministers for the period recommended by NCRWC. Art. 361B was also introduced by the 2003 Amendment Act, disqualifying defectors from holding any remunerative political post for the same period**.**

In 2007, another Constitution Bench in *Rajendra Singh Rana v. Swami Prasad Maurya,*[45] in effect upheld THOMAS J.'s view. In that case the Speaker had decided that certain members were not disqualified on the ground of defection. The Supreme Court set aside the decision as unconstitutional, *inter alia,* because it was based on no evidence. The Court did not remand the matter for a fresh decision by the Speaker but itself decided the issue and because the term of the As-

44. *Mayawati v. Markendeya Chand,* AIR 1998 SC 3340 : (1998) 7 SCC 517.
45. (2007) 4 SCC 270 : AIR 2007 SC 1305.

sembly was yet to expire, issued a declaration that the concerned members stood disqualified with effect from 27 August, 2003.[46]

In this context, the Supreme Court has considered an important question.[47] A person set up by a political party as a candidate gets elected to a House of legislature and is thereafter expelled by the party for any reason. He thus becomes an "unattached" member. If thereafter he joins another political party, will he incur disqualification under the X Schedule. The Supreme Court has answered the question in the affirmative. The Court has ruled that there is nothing like an "unattached" member under the X Schedule. "Such an arrangement and labelling has no legal bearing so far as the X Schedule is concerned". If such a member were to escape the rigour of the law, it will defeat the very purpose underlying the X Schedule, viz. to curb the evil of defection which has polluted the Indian democratic system.

Whether a disqualification event has occurred has to be determined by the Speaker on the basis of material placed before him. A mere claim that there has been a split would not be enough.[48]

The same yardstick is applied to a person who is elected as an independent candidate, *i.e.* a member elected without being set up as a candidate by any political party, and who wishes to join a political party after the election.[49]

When an independent Member is alleged to have joined a political party, the test to be applied is whether the member has given up his independent character on which he was elected by the electorate. This has to be determined on appreciation of material on record and conduct of the member by the Speaker. No hard and fast rule can be laid down when the answer is dependent on facts of each case. The substance and spirit of anti-defection provisions are the guiding factors.[50]

It seems that the Anti-Defection Law has stirred up more controversies than it has been able to solve. For example, the Meghalaya Speaker suspended the voting rights of five independent members before the House was due to take up no confidence motion against the government. Later the Speaker disqualified five members of the opposition and even ignored the stay order which these members had obtained from the Supreme Court. The Supreme Court asked the State Governor to include the disqualified members in the trial of strength in the House. The stage was thus set for a confrontation between the Court and the Legislature. The situation was however saved by the imposition of the President's rule in the State and the dissolution of the State Legislature.[51]

A sorry state of affairs in Goa is disclosed by the factual situation in *Dr. Kashinath G. Jalmi v. The Speaker*.[52] Naik assumed office of the Chief Minister of

---

46. *Ibid* page 305.
47. *G. Viswanathan v. Speaker, T.N. Legislative Assembly*, AIR 1996 SC 1060 : (1996) 2 SCC 353. See also *Mahachandra Prasad Singh v. Chairman (Supra)*.
48. *Jagjit Singh v. State of Haryana*, (2006) 11 SCC 1 : AIR 2007 SC 590.
49. *Jagjit Singh v. State of Haryana*, 2006 (13) Scale 335, 369 : AIR 2007 SC 590 : (2006) 11 SCC 1.
50. *Jagjit Singh v. State of Haryana*, (2006) 11 SCC 1 : AIR 2007 SC 590.
51. On this point see, *infra*, Ch. XIII.
52. AIR 1993 SC 1873 : (1993) 2 SCC 703. See, JAIN, *CASES AND MATERIALS ON INDIAN ADM. LAW*, II, 1410-1412.

Goa on 25-1-91. On 15-2-91, Speaker Sirsat disqualified Naik from the membership of the House on the ground of defection. On 4-3-91, Sirsat was removed from Speakership and the Deputy Speaker functioning as Speaker reviewing the order earlier made by Sirsat set aside the order. In the instant case, the Supreme Court quashed the order made by the Deputy Speaker on the ground that there was no inherent power of review vested in the Speaker.

There arose a very bad case of confrontation between the Supreme Court and the Speaker of the Manipur Assembly. The Speaker disqualified several MLAs' under the Anti-Defection Law. On the application of one of the aggrieved MLAs', the Supreme Court invalidated the Speaker's order. The Speaker refused to obey the Court order arguing that he was immune from the Court process being the Speaker. Ultimately, contempt of Court proceedings were initiated against him. The Court sent him notice to appear before it, but he refused to appear before the Court. After several adjournments, at last, on February 5, 1993, the Court directed the Central Government to produce the Speaker before it even by using minimum force against him, if necessary. The Court held as "totally misconceived" the contention of the Speaker that he was immune from the Court process. The Court observed in this connection:

> "It is unfortunate that a person who holds the constitutional office of a Speaker of Legislative Assembly has chosen to ignore the constitutional mandate that this country is governed by the rule of law and what the law is, is for this Court to declare in discharge of its constitutional obligation which binds all in accordance with Art. 141 of the Constitution[53] and Art. 144 then says that all authorities are to act in aid of the orders made by this Court[54]…..the contemner has chosen to ignore the obvious corollary of rule of law."

Ultimately, the Speaker was made to appear before the Court and, thereafter, the Court dropped the matter against him.

These unsavoury incidents which have occurred in the wake of the Anti-Defection Law show that there is need to review the law as there are several lacunae therein. It is necessary to review the law so that the lacunae therein may be removed and the malady of defection may be effectively rooted out from the body polity. It is high time that the law is revised suitably so as to take care of the many questions which need clarification.

While there is need to have a law to root out the malady of defection from the body polity, there is also need to ensure that the question of disqualification arising as a result of defection be decided objectively, on merits, without any political considerations, and expeditiously. It should also be clearly laid down that the decision-maker would be subject to the ultimate control of the Supreme Court so as to rule out any argument that the Speaker is subject to no one in this matter and that he can decide the question as he likes according to his whims and fancies. Law must be made certain on the several questions which have been thrown up during the several years of the working of the law.

The difficulty in implementing the law has been that the Speakers have not always exercised their power to decide whether or not a member has earned disqualification or not as a result of 'defection' objectively and impartially. The reason for this malady was rightly diagnosed by the minority Judges in *Kihota* as the

---

53. See, *infra,* Ch. IV.
54. *Ibid.*

Speakers' depend continuously on the majority support in the House. Therefore, if a member defects from a smaller party to a bigger party, and the Speaker belongs to the bigger party, an impartial adjudication on the defecting member's disqualification becomes extremely improbable. There has been suspicion in the public mind that the power is at times exercised by the concerned Speaker keeping in view political expediency. The majority judges placed the Speaker on a high pedestal but generally and subject to certain notable exemption[55] this does not accord with the real facts of political life in India.

A very serious question to think about is whether the power to disqualify a member on the ground of defection should continue to vest in the Speaker, or should it be vested in some independent body outside the House. It appears from the tenor of the Supreme Court's decisions that it may not accept vesting of such decision-making power solely in the Speaker. Some sort of judicial review is called for of the Speaker's decision because it has been proved again and again that a Speaker is a political creature and may not always be able to deal with the situation in an objective manner.[56]

In *Jagjit Singh* a challenge to the decision of the Speaker to disqualify a member for defection without complying with the principles of natural justice in as much as the member was not granted sufficient time to file a reply to meet the case against him was repealed. This was a case specific decision. But it appears that the Supreme Court proceeded on the basis that the principles of natural justice would apply as otherwise the Court ought to have rejected the argument and not explore whether on facts sufficient time had been given to the member or not.[57]

The Speaker of the Legislature is a political creature and therefore, generally he is not impartial. Most of the times he takes a view which is in the interest of the party to which he belongs. Suggestions have, therefore, been made that the Act should be amended to bar all defections—individual or group—and that the function to decide upon the question of disqualification arising out of defection should be taken away from the Speakers and be vested in the Election Commission which is an autonomous, non-political, non-partisan body.

As mentioned above, the minority view in *Kihota Hollohon* was that as the Speaker depends for his tenure on the majority in the Legislature, he does not satisfy the requirement of an "independent adjudicatory authority". Subsequent events in various legislatures have proved this assertion of the minority Judges right. The high ethical standard which was set up by the majority Judges in *Kihota Hollohon* is seldom reached by the Speakers in India. The confidence placed by the majority Judges in the "high traditions" of the "high office of the Speaker" have, in practice, been found to be misplaced.

This situation can be rectified, and the Anti-Defection Law made more effective, if the adjudicatory function is vested in the Election Commission. On the lines of Arts. 102 and 192,[58] the President in case of Parliament, and the Governor in case of a State Legislature, may refer the matter to the Election Commis-

---

55. See below under section H(a).
56. *Jagjit Singh v. State of Haryana,* 2006 (13) SCALE 335, 370-371.
57. *Jagjit Singh v. State of Haryana,* (2006) 11 SCC 1 : AIR 2007 SC 590.
58. See, *supra,* Sec. D. for Art. 102; for Art. 192, see, *infra,* Ch. VI, Sec. B.

sion. This seems to be the only way to avoid politically motivated decisions by the Speakers when members defect from one party to another.

A number of other related issues also need clarification as they have a bearing on the question of defection. Some of these questions are: whether defiance of the party whip may be regarded as 'dissent' or 'defection' in a parliamentary democracy? It has been argued that in case of conflict between the interests of the nation or loyalty to the electorate or the party principles and the legislature party boss's directive, the member's duty is the former.

The Anti-Defection Law and the rules framed thereunder do not provide for the expulsion of a member from his party for his activities outside the House. A practice has, however, grown to declare such a member which is expelled from a party as 'unattached', but he continues to be a member of the House notwithstanding the Anti-Defection Law.

Proceedings in respect of disqualification of a Member are comparable neither to a trial in a court of law nor departmental proceedings for disciplinary action.[59]

Defection is not only anti-democratic but even a form of corruption for underlying motivation is personal gain and not any conscientious change of heart on the part of the defecting legislator. At the election, people vote for a particular candidate on the basis of the party he belongs to at the time of his election. It is reasonable to contend that if the legislator seeks to change his political affiliation after election, he must resign his membership of the legislature and seek fresh endorsement by the voters on the basis of his newly chosen platform.

One aspect of the Anti-Defection Law needs to be noted. Until 1985, there was no explicit reference in the Constitution to political parties although they have always been existence in the country. The X Schedule introduced in 1985 acknowledges the existence of the political parties and seeks to protect their integrity by banning defection from one party to the other.

There is no provision in the Tenth Schedule to the effect that until a petition which is signed and verified in the manner laid down in CPC for verification of pleadings is made to the Chairman or the Speaker of the House, he will not get the jurisdiction to give a decision as to whether a member of the House has become subject to disqualification under the Schedule. There is no lis between the person moving the petition and the member of the House who is alleged to have incurred a disqualification. It is not an adversarial kind of litigation where he may be required to lead evidence. Even if he withdraws the petition it will make no difference as a duty is cast upon the Chairman or the Speaker to carry out the mandate of the constitutional provision viz. the Tenth Schedule.[60]

G. MEETING OF PARLIAMENT

(a) SUMMONING

The power to summon a House of Parliament to meet is formally vested in the President [Art. 85(1)]. In actual practice, however, the decision to convene a

---

59. *Jagjit Singh v. State of Haryana,* (2006) 11 SCC 1 : AIR 2007 SC 590.
60. *Mahachandra Prasad Singh v. Chairman, Bihar Legislative Council,* (2004) 8 SCC 747.

House is taken by its Leader in consultation with his Cabinet colleagues, the Speaker, and probably the leaders of the opposition groups.[61]

A notification convening a House is issued under the President's signature in the Official Gazette and summons to individual members are issued by its Secretary.

Each House is to meet in such a way that six months do not intervene between its last sitting in one session and its first sitting in the next session [Art. 85(1)]. This means that Parliament must meet at least twice a year. However, the period of six months does not apply in the event of premature dissolution of the Lok Sabha.[62]

(b) PRESIDENT'S ADDRESS

At the commencement of the first session of Parliament, whether after the general election to the Lok Sabha, or every year, the President addresses both Houses of Parliament assembled together and informs Parliament of the causes of its summons [Art. 87(1)].

The President's address fulfils two functions. First, it underlines responsibility of the Government to Parliament for it consists of the Government's review of the international and internal situation and a statement of its general policy together with an indication of its legislative programme for the ensuing session. Secondly, it provides a solemn yet simple ceremony with which the session of a House begins.

The practice of the President addressing Parliament has been adopted in India from Britain where the Monarch addresses a new session of Parliament.[63]

The President's speech is prepared by the Cabinet and announces in outline Government's plans for the principal business of the ensuing session. The President's address is thus in reality the Government's address delivered through the President.[64]

Each House has to make provision by its rules of procedure for allotment of time for discussing the matters referred to in the Presidential address [Art. 87(2)]. In this discussion, members may raise any question of general policy, public administration and political situation. This discussion provides an opportunity for a general discussion of national affairs. The great merit of the debate on the Address from the point of view of the private members is that the field of argument

---

61. For details of Parliamentary Procedure, see, KAUL AND SHAKDHAR, *PRACTICE AND PROCEDURE OF PARLIAMENT*, (ed. G.C. Malhotra, V Ed.); SUBHASH KASHYAP, *PARLIAMENTARY PROCEDURE*, (2000).

62. In re Special Reference No.1 of 2002 : (2002) 8 SCC 237, 284 : AIR 2003 SC 87.

63. MORRISON, *GOVERNMENT AND PARLIAMENT*, 75

64. Shri R. VENKATARAMAN (former President of India) in his memoires criticises the practice of Presidential address in the following words :

"I had always held the view that the address by the President and Governors (see, *infra*, Ch. VI) at the commencement of the first session of the legislature every year was a British anachronism. First, the address was prepared by the government and contained only its views and the President and the Governors were mere mouth pieces. While this is a fact, very often the President or Governors were criticized on the contents of the address, creating a wrong public impression about these dignitaries. Further, disorderly behaviour during these addresses marred the dignity of the high offices...During Rajiv Gandhi's time, I had written to him to amend the Constitution deleting this meaningless formality."

R VENKATARAMAN, *MY PRESIDENTIAL YEARS*, 476.

is virtually unlimited, and one can talk about anything under the sun and yet be in order.

According to the rules of the two Houses, the debate on the President's speech is held in the House on a motion of thanks to the President for his speech. Amendments can be moved to this motion. The motion of thanks is regarded as a motion of confidence in the Government. If the motion is defeated, or amended, in spite of the Government's opposition, it may be regarded as a vote of no-confidence in the Council of Ministers resulting in its resignation.

The constitutional provision requiring the President's address at the first session of Parliament is mandatory and Parliament cannot be said to have met, and it cannot transact any business, until this preliminary formality has been gone through.[65] Apart from his obligation to address the first session of Parliament, the President may address either House or both Houses assembled together any time and to require the attendance of the members for that purpose [Art. 86(1)].

(c) POWER TO SEND MESSAGES

The President can send messages to a House whether with respect to a Bill pending in Parliament or otherwise [Art. 86(2)]. The House to which any such message is sent is obligated to consider with all convenient despatch any matter required by the message to be taken into consideration.

The above provision appears to have been taken from America where the President may send messages to Congress. The provision has a utility in that country because of the separation between the Executive and the Congress; President's advisers are not members of the Congress and, therefore, Presidential messages constitute a means of communication between the Executive and the Legislative wings.[66]

But the purpose of the provision enabling the President to send messages to Parliament in India is not clear because the President acts on the advice of the Ministers who are always present in the House and can, therefore, say whatever is necessary for the Government to say.

A view has, however, been expressed that the founding fathers intended this power to be an instrument whereby the President could carry out his constitutional duty to see that the Constitution is obeyed and that the kind of Government it contemplates is continued; that he should be able, when given advice that he cannot in conscience accept, to appeal to Parliament and, incidentally, to the nation. The possibility and the threat of such action by the President is calculated to deter Ministers from tendering improper advice.[67]

This view is not tenable as the action of the President to approach Parliament over the head of the Prime Minister is bound to create a constitutional crisis. It would also be extremely embarrassing for the President if the Lok Sabha sides with the Council of Ministers and does not accept what he suggests in his message. On the whole, therefore, barring an extreme situation, President's power of sending messages to the Houses is not going to be of much use and, in practice, would lie dormant.

---

65. *Syed Abdul Mansur v. Speaker, W.B. Leg. Ass.*, AIR 1966 Cal 363.
66. *See*, Ch. III, Sec. E, *infra.*
67. GLEDHILL, *op. cit.*, 117-8.

(d) QUORUM

The quorum of each House has been fixed at one-tenth of its total membership. Parliament may, however, vary this rule by enacting a law [Art. 100(3)]. If at any time during the course of a meeting of a House there is no quorum, the presiding officer is obliged either to adjourn the House or to suspend the meeting until there is a quorum [Art. 100(4)].

The British Parliamentary practice is somewhat different in this respect. No notice of lack of quorum is taken there till the lack of quorum is challenged by a member and only then a meeting of the House may be adjourned. In India, on the other hand, it is the constitutional duty of the occupant of the chair to suspend or adjourn the sitting if there is no quorum. The British practice has this advantage over the Indian practice that formal business can be transacted there without quorum.

It may, however, be noted that if some business is transacted in a House without quorum, its validity may not be open to attack in the courts because of the principle of internal autonomy of the House [Art. 122(1)].[68] The rule regarding quorum is regarded as procedural and so directory and not mandatory.[69]

(e) DECISIONS

Matters are decided in a House by an ordinary majority of votes of the members present and voting at a sitting excluding the Speaker or the Chairman or the person acting as such, who does not vote in the first instance, but has a casting vote in case of an equality of votes [Art. 100(1)].

The Constitution lays down a rule of special, instead of ordinary, majority for certain matters, *viz*.:

Amendment of the Constitution (Art. 368);[70]

Impeachment of the President (Art. 61);[71]

Passing of an address for the removal of a Judge of the Supreme Court [Art. 124(4)];[72]

Removal of a Judge of the High Court [Art. 217(1)(b)];[73]

Removal of the Comptroller and Auditor-General of India [Art. 148(1)],[74]

Removal of the Chief Election Commissioner, [Proviso to Art. 324(5)];[75]

Removal of the Chairman or the Deputy Chairman of the Rajya Sabha [Arts. 67(b) and 90(c)][76];

Removal of the Speaker and the Deputy Speaker of the Lok Sabha [Art. 94(c)];[77]

---

68. **S**ee under 'Privileges of Parliament', *infra*., Sec. L.
69. Ruling of the Speaker on April 11, 1955.
70. *Infra.,* Ch. XLI.
71. *Infra.* Ch. III.
72. *Infra,* Ch. IV.
73. *Infra*. Ch. VIII.
74. *Infra*, Sec. J(ii).
75. *Infra,* Ch. XIX.
76. *Infra*, Sec. H.
77. *Infra*, Sec. H.

Passing of a resolution in the Rajya Sabha to create All-India Services (Art. 312)[78]

For authorising Parliament to legislate on matters in the State List (Art. 249).[79]

(f) VACANCY IN A HOUSE

A vacancy in the membership of a House does not render it incapable of acting and discharging its functions. A House has power to act notwithstanding any vacancy in its membership. Proceedings of a House remain valid even though it is discovered later that some person, not qualified or entitled to do so, sat or voted or otherwise participated in the proceedings [Art. 100(2)].

(g) LANGUAGE

The business of Parliament is to be transacted in Hindi or English. This provision is subject to Art. 348 [Art. 120(1)].[80] With the permission of the presiding officer, a member who cannot adequately express himself in either of these languages may address the House in his mother tongue [Proviso to Art. 120(1)].[81]

Art. 120(2) Provides:

> "Unless Parliament by law otherwise provides, this article shall, after the expiration of a period of fifteen years from the commencement of this Constitution, have effect as if the words 'or in English' were omitted therefrom".

Thus, it is up to Parliament to continue use of English in Parliament as long as it likes.

(h) WHO CAN PARTICIPATE IN THE PROCEEDINGS OF A HOUSE?

Only a member of the House can participate in its proceedings. However, every Minister or the Attorney-General has a right to speak and otherwise take part, in the proceedings of either House, a joint sitting of the two Houses, and any parliamentary committee of which he is appointed a member, without being entitled to vote [Art. 88].

A right to vote in a House accrues only to its members. The idea underlying the above provision is that a Minister, though member of one House, can participate in the work of the other House without enjoying a right to vote. Further, in India, a person can remain a Minister for six months without being a member of any House [Art. 75(5)].[82] Such a Minister can participate without voting in the proceedings of both the Houses of Parliament.

H. OFFICERS OF PARLIAMENT

(a) SPEAKER/DEPUTY SPEAKER

The Speaker is the chief officer of the Lok Sabha. He presides at its sittings. His authority and power arise from the fact that his powers are the powers of the House which the House has committed to him for convenience and practical purposes.

---

78. *Infra,* Ch. XXXVI.
79. *Infra,* Ch. X.
80. *See, infra,* Ch. XVI.
81. Also see, *infra,* Ch. XVI, Official Language.
82. *See,* Ch. III, Sec. A(iii), *infra.*

The Speaker and the Deputy Speaker are chosen by the House itself from amongst its members [Art. 93]. The Deputy Speaker performs the duties of the Speaker's office when it is vacant. In case the Deputy Speaker's office is also vacant, the Speaker's duties are to be performed by such member of the House as the President may appoint for the purpose till any of the offices is filled by election by the House [Art. 95(1)].

The Deputy Speaker acts as the Speaker when the latter is absent from the House. When both the Speaker and the Deputy Speaker are absent from the House, such person as may be determined by the rules of procedure of the House, and if no such person is present, such other person as may be determined by the House, acts as the Speaker [Art. 95(2)].

The Speaker and the Deputy Speaker remain in office so long as they are members of the House and they vacate their offices as soon as they cease to be its members [Art. 94(a)]. When Lok Sabha is dissolved, the Speaker does not vacate his office until immediately before the first meeting of the House after dissolution [Proviso II to Art. 94]. The Speaker or Deputy Speaker may resign his office by writing to each other [Art. 94(b)].

Any one of them may be removed from his office by a resolution passed by a majority of all the then members of the House [Art. 94(c)]. Such a resolution can be moved only after at least a fourteen days' notice has been given of the intention to move it [Proviso I to Art. 94]. When such resolution is under consideration against the Speaker, he does not preside at the sittings of the House though he may be present. He can, however, participate in the proceedings of the House at such a time and even vote in the first instance though not when there is an equality of votes [Arts. 96(1) and (2)]. Similar is the position of the Deputy Speaker when a resolution against him is under consideration of the House.

The Speaker and the Deputy Speaker are paid such salaries and allowances as are fixed by Parliament by law, and until such a provision is made, as specified in the Second Schedule to the Constitution [Art. 97].

The office of the Speaker enjoys great prestige, position and authority within the House. He has extensive powers to regulate the proceedings of the House under its rules of procedure. The ordinary interpretation of the procedural laws, rules and customs of the House is his function and he allows no debate or criticism of his rulings except on a formal resolution. He is responsible for the orderly conduct of its proceedings and maintains discipline and order in the House.

The Speaker has power to decide finally whether a Bill before the House is a Money Bill or not [Art. 110(3)][83]. The Speaker is not expected to give his rulings on questions of constitutionality of laws as such questions are to be decided finally by the courts.

The Speaker is much more than merely a presiding officer of the House. He is the representative and spokesman of the House in its collective capacity and is the chief custodian of its powers and privileges. According to the majority opinion in *Kihota*:[84]

---

83. *Infra*, Sec. J(ii)(c).
84. AIR 1993 SC at 452 : 1992 Supp (2) SCC 651. Also see, *supra*, Sec. F.

> "The office of the Speaker is held in the highest esteem and respect in Parliamentary traditions. The evolution of the institution of Parliamentary democracy has as its pivot the institution of the Speaker. The Speaker holds a high, important and ceremonial office... The Speaker is said to be the very embodiment of propriety and impartiality".

A few constitutional provisions ensure the impartiality and independence of the Speaker and the Deputy Speaker. Their salaries and allowances are to be fixed by Parliament by law [Art. 97], are not subject to the annual vote of Parliament, and are *charged* on the Consolidated Fund of India [Art. 112(3)(b)].[85] There is thus no special opportunity to criticise their work and conduct in Parliament. Further, none of them can be removed from office except by a resolution passed by the House itself.

In Britain, at one time, it was a practice that the re-election of the former Speaker at a general election was not opposed, but in recent years this practice has weakened and the Labour and Liberal candidates have stood against the Speaker. It is customary for the previous Speaker to be re-elected even though his party may no longer be in power.[86] Such a practice is not followed in India.[87]

Owing to the great importance of his office, the Speaker is expected to maintain his impartiality. So, it is a convention in Britain that the Speaker divests himself of his party character by resigning from the party to which he belonged before his election.[88] This convention is not followed strictly in India where the Speaker remains a member of the party though he does not attend or participate in any party meeting except on ceremonial or social occasions.[89]

The position of the Speaker was brought into sharp focus in 2008. Somnath Chatterjee, a member of the Communist Party of India (Marxist)(CPM) was appointed as the Speaker of the Lok Sabha after the Congress led coalition, which was supported by the Left parties, formed the Government at the Centre in 2004. The Left withdrew their support to the Government in 2008 and called upon the Speaker to resign his post. When he did not, the CPM expelled the Speaker from the party. Constitutionally, the Speaker is chosen by the House and does not represent any party. Additionally had the Speaker resigned on the say so of his party, the impartiality of his decisions as Speaker would have been rendered suspect. By not resigning from the Speaker's post even though Left parties had withdrawn support to the government, it was demonstrated that the Speaker's post is above party politics, a position reflecting the British Convention referred to in the preceding paragraph.

(b) CHAIRMAN OF RAJYA SABHA

The presiding officer of Rajya Sabha is known as the Chairman. The Vice-President of India is the *ex officio* Chairman of the House [Art. 89(1)]. The House also elects a Deputy Chairman from amongst its members [Art. 89(2)] who vacates his office as soon as he ceases to be a member of the House [Art.

---

85. See, *infra*, Sec. J(ii)(h).
86. WADE & PHILLIPS, 165 (IX Ed.).
87. The Speakers' Conf., Oct. 5, 68, suggested that the political parties accept a convention that the Assembly seat of the Speaker would not be contested by any party.
88. LORD CAMPION, *PARLIAMENT—A SURVEY*, 17 (1955); JENNINGS, *op. cit.*, 65
89. MUKHERJEA, PARL. *PROCEDURE IN INDIA*, 48 (1967). The Speakers' Conf., Oct. 5, 68, suggested that the Speaker should sever his connections with his party.

90(a)]. He may resign his office by writing to the Chairman [Art. 90(b)]. He may be removed from his office by a resolution passed by a majority of all the then members of the House. Such a resolution, however, cannot be moved unless at least a fourteen days' notice has been given of the intention to move it.[90]

The Deputy Chairman performs the duties of the Chairman when that office is vacant, or when the Vice-President is acting as the President of India [Art. 91(1)]. If the office of the Deputy Chairman is also vacant, then the duties of the Chairman are performed by such member of the Rajya Sabha as the President may appoint for the purpose till any of these offices is filled. In the absence of the Chairman from a sitting of the House, the Deputy Chairman, and if he is also absent, such person as may be determined by the rules of procedure of the House, or, if no such person is present, such other person as may be determined by the House, acts as the Chairman [Art. 91(2)].

The Vice-President of India cannot preside over a sitting of Rajya Sabha as its Chairman when a resolution for his removal is under consideration. He has, however, a right to speak and otherwise participate in the proceedings of the House, but cannot vote at such a time [Art. 92].[91] Similarly, the Deputy Chairman cannot preside over a sitting of the House when a resolution for his removal is under consideration [Art. 92], though he has a right to vote and participate in the proceedings.[92]

The salaries and allowances payable to the Chairman and Deputy Chairman are fixed by Parliament by law and, until so fixed, are to be as specified in the Second Schedule to the Constitution [Art. 97]. Under the Rules of Procedure of the House, the Chairman enjoys powers to regulate the proceedings of the House similar to those enjoyed by the Speaker in relation to the Lok Sabha.

(c) PARLIAMENTARY SECRETARIAT

Each House has separate secretarial staff of its own though there may be some posts common to both the Houses. The terms of recruitment and conditions of service of persons appointed to the secretarial staff of a House may be regulated by law by Parliament. Until so regulated, the President of India may, after consultation with the Speaker of the Lok Sabha, or the Chairman of the Rajya Sabha, as the case may be, make rules for the purpose. The rules so made have effect subject to the provisions of any law which Parliament may make [Art. 98].

I. TERMINATION OF PARLIAMENT

(a) PROROGATION

Prorogation puts an end to a session of the House but not to its existence and the same House meets again after prorogation. Prorogation only means that the House ceases to function for a particular period of time.

The power to prorogue a House is vested formally in the President [Art. 85(2)(a)], but he acts in this matter on the advice of the Prime Minister. A Bill or any other business, whether pending in the House or pending the assent of the

---

90. Art. 90(c) and proviso.
91. For procedure to remove the Vice-President, see Ch. III, Sec. A, *infra*.
92. Art. 92.

President, does not lapse by the prorogation of the House [Art. 107(3)].[1] Contempt of the House committed in one session can be punished by it in another session.[2]

Several questions have arisen regarding the exercise of power of prorogation of the House by the State Governors[3] and the principles emerging therefrom may be relevant to the prorogation of the House of Parliament by the President.

(b) ADJOURNMENT

An adjournment terminates a sitting of the House. Unlike dissolution or prorogation, it is the act of the House itself.

A House may adjourn for such time as it pleases, and it is in exercise of this power that a House adjourns its sitting from day to day and sometimes over the holidays intervening in the course of the session. A House may also be adjourned *sine die,* that is without naming a day for reassembly. An Adjournment does not affect the incomplete work before the House which may be resumed when the House meets again after adjournment.[4]

(c) DISSOLUTION

Dissolution puts an end to the life of the House. It leads to the election of a new House.

Rajya Sabha is a continuing chamber; it never comes to an end; it is not subject to dissolution and one-third of its members rotate every two years [Art. 83(1)].[5]

Lok Sabha, on the other hand, is not a continuing chamber. Its normal life is five years from the date of its first meeting after the general elections, and the expiry of this period *ipso facto* operates to dissolve the House [Art. 83(2)].[6]

During an emergency, Parliament can make a law to extend the life of Lok Sabha for a year at a time. Such a law may be passed repeatedly each time extending the life of the House for a year, subject to the overall condition that the life of Lok Sabha cannot be extended beyond a period of six months after the emergency comes to an end [Proviso to Art. 83(2) and Art. 352][7]. The idea is that the House may continue for the entire duration of the emergency as it may not be expedient to distract the attention of the nation by parliamentary elections at such a time. But, then, within six months of the emergency coming to an end the House is to be re-elected.

Elections may be held to constitute a new Lok Sabha before the existing Lok Sabha completes its term or is dissolved. The newly elected House would not, of course, start functioning till the existing House comes to an end. Elections for the

---

1. *Purushottam Nambudri v. State of Kerala*, AIR 1962 SC 694 : 1962 Supp (1) SCR 753. In the matter of Special Reference No 1 of 2002 (Gujarat Assembly Election matter) : AIR 2003 SC 87, (2002) 8 SCC 237, 278-279. However, all pending notices other than those for introducing Bills, lapse on prorogation.

2. *M.S.M. Sharma v. S.K. Sinha*, AIR 1960 SC 1186 : (1961) 1 SCR 96, *infra*,.

3. Ch. VI, *infra*, for details.

4. See, *infra*, Ch. VI. Also see, *H. Siddaveerapa v. State of Mysore* , AIR 1971 Mys 200.

5. *Supra*, pp. 35-36.

6. *Supra*, pp. 39-40.

7. *See, infra*, Ch. XIII, for Emergency.

new House are held so that it may start functioning as soon as the existing House comes to an end. The life of the new House will start running from the date of its first meeting which will naturally be fixed after termination of the old House.[8]

The power to dissolve Lok Sabha is vested formally in the President [Arts. 83(2) and 85(2)(b)]. This is a significant power, for, by virtue of this power, a new House can be brought into being which may even result in a change of government. When, on what considerations, and under what circumstances can the power to dissolve Lok Sabha be exercised? These questions are of great importance, but, on these points, the Constitution is silent and lays down no norms. The framers of the Constitution thought it better to leave the matter open and lay down no rigid rules so that, as and when the question of dissolution arises, it might be decided in accordance with the circumstances prevailing at the time, and the constitutional conventions operative in the countries with the parliamentary form of government.

Guidance on this question may be sought from Britain where also the Crown has the formal power to dissolve the House of Commons. The position in Britain in this respect, though not entirely free from doubt, appears to be somewhat as follows. It is a well-settled convention that the Crown would not dissolve the House *suo motu*, on his own initiative, without the advice of the Prime Minister. This is in accordance with the principle of responsible government according to which the Crown functions on ministerial advice. The responsibility for dissolution rests with the Prime Minister though he may consult some of his colleagues if he so likes.[9]

When the Council of Ministers enjoys the confidence of the House of Commons, a dissolution is usually asked for before the House runs out its full term. Usually, the House is dissolved sometime in the fifth year and general elections held. The Prime Minister thus has a right to go to the polls at a time most favourable to his party politically, when its stock with the electorate is high, without his having to wait for the efflux of the full term of the House. The Prime Minister thus has it within his power to select the most favourable and opportune moment for dissolving the House and holding a fresh poll.

If the Prime Minister's overall majority in the House is very slender, and he finds it difficult to push his programme through the House, he may ask for dissolution of the House in the hope that his party position would improve after fresh elections. Dissolution may also be resorted to if the Prime Minister feels that he should seek a mandate from the electors on some important matter of policy on which he wishes to embark, but such dissolutions are now rare.

If a Ministry enjoying majority support in the House is defeated on any major issue of policy, it can either resign or seek an endorsement of its policies from the electorate by suggesting dissolution of the House and holding fresh elections. It

---

8. *Bholanath Srivastava v. Union of India*, AIR 1963 All 363.

9. JENNINGS, *CABINET GOVERNMENT*, 412-28 (III ed. 1969).

Till, 1918, the practice appears to have been that the advice to dissolve the House of Commons was submitted by the Prime Minister on the decision of the Cabinet. Since 1918, however, the view has come to be held that the responsibility for dissolution must rest with the Prime Minister though he may consult a few of his colleagues, if he so likes, but he is not bound to do so. No dissolution since 1918 has been brought before the Cabinet and each Prime Minister since Lloyd George has assumed a right to give the advice himself : *Ibid.*, 417-19.

appears to be a settled convention that the Crown will grant a dissolution in such a situation even if it were possible to find an alternative Ministry. The justification for this convention is that in modern times a Ministry is the direct result of general elections and that its defeat in the House automatically entitles it to appeal once again to the people.

There have been a number of constitutional precedents to this effect. The nineteenth century in Britain was a period of parliamentary instability when only on one occasion (1868-1873) Parliament ran for its full course. Between 1832 to 1868, defeat of the government in the House led to its dissolution five times and to resignation of the Ministry eight times. In 1859 and 1868, dissolutions were granted even when Parliament was only two to three years old and alternative Cabinets were ready to take office.[10] Lord Melbourne got a dissolution of the House earlier and led a minority ministry. Lord Palmerstone got a dissolution of the House in 1857; Lord Derby in 1859; Disraeli in 1868, and all these Prime Ministers headed minority governments. In 1910, the House of Commons was dissolved just within a year of its electionafter its dissolution earlier in 1909. Thus, there was a double dissolution of the House within a year. In 1923, 1924, 1931, 1951 and 1979, Parliament was dissolved, for political reasons, long before the normal period expired.

Is the Crown bound to grant a dissolution of the House on the request of a Ministry which never had a clear majority, and which is defeated in the House on a major policy matter? The answer to this question is somewhat debatable and is not free from doubt. In 1924, King George V granted dissolution to the Labour Prime Minister, Ramsay Macdonald. There were three parties in the House, Labour, Liberal and Conservative. Their strength was as follows ; Conservatives 261; Labour, 191; Liberal, 155; Others, 8. Although the Conservative Party was numerically the largest party, the King invited Ramsay Macdonald to lead a minority Labour Government. Thus, Labour took office without a majority but with the support of Liberals who subsequently withdrew their support. Liberals and Conservatives were not willing to combine to form government and hence the House was dissolved.[11]

Similarly, Prime Minister James Callaghan's request for dissolution of Parliament was granted by the Queen, despite the fact that he headed a minority government.[12] The type of embarrassment which might be caused to the Crown, if dissolution is refused in such a situation, may be represented by the typical case of Lord Byng, the Governor-General of Canada. At the general election of 1925 in Canada, the Conservative Party secured a small lead over the Liberal Party, but the Liberal Government in office at the time thought that it could carry on with the aid of smaller groups in the House. Threatened by a vote of censure nine months later, the Liberal Prime Minister asked for a dissolution, but Byng refused to oblige on the ground that the Conservative Party could form the government. The Prime Minister thereupon resigned. The Conservatives took office,

---

10. KEITH, *CONSTITUTIONAL LAW*, 51-52 (1939).

11. In such a state of parties, according to FINER, the question arose what is the rule for dissolution? "When there is no certainty that a majority government is attainable, ought the minority in office to advise the Crown to dissolve in order to escape from parliamentary difficulties and perhaps improve its electoral position?"

FINER, THE THEORY AND PRACTICE OF MODERN GOVERNMENT, 393 (1965).

12. HILAIRE BARNETT : CONSTITUTIONAL & ADMINISTRATIVE LAW, (5th Edn.) (2004).

but they were defeated in the House within a week and they themselves asked for a dissolution which Byng granted. At the general elections, the Liberal Party obtained a majority and again assumed office and Byng came in for a lot of criticism at his handling of the situation.[13]

If the Prime Minister requests for dissolution and the King refuses it, the Prime Minister may decline to remain in office. The King then must find a new Prime Minister. It is then for the House to decide the question, because if the House refuses to support the new Prime Minister, the King would then be compelled to agree to dissolve the House and this may cause damage to the institution of monarchy in the process.

The question of dissolution has been widely discussed by many scholars in Britain, but, as De Smith says there is no consensus of opinion on the conventional power of the Monarch to require a dissolution of Parliament, or to refuse a request for dissolution.[14] While the general view is that it may be politically expedient for the Crown to accept the advice whenever tendered by the Prime Minister to dissolve the House, yet not a single constitutional lawyer appears to assert unequivocally that the Crown's discretion or prerogative to grant or refuse dissolution has been atrophied by disuse, or been lost irrevocably.[15] Although, for over a hundred years, the Sovereign has never rejected, but has consistently acceded to, the Prime Minister's request to dissolve the House, nevertheless, there has been a persistent tradition, and the view is still propounded, that the Crown may refuse if the circumstances so demand.[16]

The idea is expressed in various ways *e.g.*, that no Constitution can stand a diet of dissolutions which means that successive dissolutions may be refused and, thus, a Ministry which having been defeated in the House asks for and gets a dissolution, and then is defeated at the polls, should not again ask for another dissolution. It has been asserted that the convention that the Monarch would not refuse to grant dissolution is dependent on another convention that there would not be an unreasonable demand for dissolution, implying thereby that the Crown can refuse to grant dissolution if it regards the request unreasonable. Similarly, it is maintained that there is no convention which prevents the Crown from refusing dissolution in exceptional circumstances.[17]

Mackintosh asserts that a request for dissolution will never be refused if the Prime Minister can claim that an election will reveal a definite change of temper among the electorate, or that the government is likely to be strengthened, but dissolution can be refused when an election would neither change party representation in the House of Commons to any appreciable extent nor aid the government in any way. He goes on to illustrate his point by taking an example of there being

---

13. EDWARD MCWHINNEY, The Head of State in the Commonwealth Countries, 4 *Vyavahara Nirnaya*, 120 (1955). HOGG: Constitutional Law of Canada (2003) 9.6(d).

14. S.A. DE SMITH, *CONST. AND ADM. LAW*, 51, 102-5, (1977).

15. It is interesting to note that Queen Victoria claimed an unlimited power in this respect. She wrote in a letter, "There was no doubt of the power and prerogative of the sovereign to refuse a dissolution. It was one of the very few acts which the Queen of England could do without responsible advice". *LETTERS OF THE QUEEN VICTORIA*, first series, ed. Benson & Esher, III 364-5 (1907); Keir, *THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN*, 489.

16. E.A. FORSEY, *THE ROYAL POWER OF DISSOLUTION IN THE BRITISH COMMONWEALTH*; B.S. MARKESINIS, *THE THEORY AND PRACTICE OF DISSOLUTION OF PARLIAMENT*; WADE & PHILLIPS, *op. cit*. 226-8; JENNINGS, *op. etc.*, 427.

17. LAWSON & BENTLEY, *CONSTITUTIONAL AND ADMINISTRATIVE LAW*, 107 (1961).

in the House three well-balanced parties, A, B, C, out of which A forms the government relying on the support of B. If later the stock of the government declines and it has no chance of winning an absolute majority in a division in the House, and if the two other parties B and C are not eager to go to the country but are prepared to combine in support of an agreed Cabinet, the Crown would be entitled to refuse dissolution on the request of A, and to commission a new Prime Minister having the support of B and C.[18] Similarly, a doubt has been raised whether the convention as to the right of a Prime Minister defeated in the House on a major issue to get a dissolution would survive the presence of three parties, each with a fair proportion of seats.[19]

JENNINGS takes the view that while the royal prerogative is maintained in theory, and that the Monarch can refuse to accept the Prime Minister's advice in the matter of dissolution, such a royal power can hardly be exercised in practice,[20] and he also fails to see what those circumstances can be when the Monarch may refuse to dissolve except that if the major political parties break up, the whole balance of the Constitution would be altered, and then possibly, the royal prerogative may become important.

O. Hood Phillips also maintains that the opinion which allows a "limited personal prerogative' to the Sovereign, appears to be the better one. He says : "It is more in consonance with the traditions of British parliamentary government".[21]

The underlying idea in this cautious approach of the scholars is that while the Crown, speaking generally, should act on the advice of his Prime Minister, the political situation being extremely varied and diversified, no one can foresee all the situations and be sure that a moment may never arise when the Crown may have to refuse dissolution in the interest of saving the democratic constitutional fabric. However, there are enormous difficulties in the way of the Crown to refuse dissolution when so advised by the Prime Minister. As JENNINGS says: "Thus while the Queen's personal prerogative is maintained in theory, it can hardly be exercised in practice." If the advice is refused, the Prime Minister would have no option but to resign, and the Crown would have no option but to turn to the opposition to form the government. This may involve the Crown in partisan party politics which may injure the Crown as an impartial institution, free from the current political controversies and manoeuvres. In sum, the position appears to be that in Britain the Crown would accept ministerial advice to dissolve the House except, perhaps, in a very exceptional situation.

---

18. MACKINTOSH, *THE BRITISH CABINET*, 18 (1977). See also HILAIRE BARNETT, CONSTITUTIONAL AND ADMINISTRATIVE LAW (5th Edn.) p. 136.

19. *Also see*, *infra*, Chs. VI and VII.
For discussion on Lok Sabha, *see*, V JI., *of Inst. of Constitutional & Parliamentary Studies*, 295-376 (1971).

20. *JENNINGS, CABINET GOVERNMENT*, 412-28.

21. O. HOOD PHILLIPS, *CONST. AND ADM. LAW*, 155 (1987).
For a fuller discussion on the Sovereign's power to dismiss, see, *ibid.*, 152-155. He mentions the following factors that would have to be taken into account before the Sovereign could properly refuse a dissolution : (i) the time that had elapsed since the last dissolution; (ii) whether the last dissolution took place at the instance of the present Opposition; (iii) whether the question in issue is of great political importance; (iv) the supply position; (v) whether Parliament is nearing the end of its maximum term; (vi) whether the Prime Minister is in a minority in the Cabinet; (viii) whether there is a minority government; (viii) and perhaps, whether there is a war on.

Dissolution is in effect an appeal to the supreme constitutional authority, namely, the people, and is, thus, the most democratic procedure to determine as to which government will be in office. Dissolution has been characterised as a 'big stick' which the government wields to keep its majority in the House intact. The power can also be used to discipline the opposition. In a multi-party system when parliamentary government is unstable, successive dissolutions of the popular chamber may help in consolidation of parties and ultimate evolution of fewer parties by eliminating the lesser ones.

When the House is dissolved, the Government continues in office; it vacates office when, after the election, it loses its majority in the House. In such an eventuality; it must resign.[22]

On the basis of the above, it may perhaps be safe to say that, normally speaking, the President will grant a request for dissolution of Lok Sabha as and when made by the Prime Minister enjoying majority support in the House.

In theory, it may be asserted that a Prime Minister defeated in the Lok Sabha ought to be granted dissolution irrespective of his party position and be permitted to seek the verdict and mandate from the people to whom ultimately the government is responsible and who in the last resort decides as to which government should rule. Refusal to dissolve the House at a time when no government is stable, leads to all kinds of combinations and permutations amongst the various political parties. It is quite possible that several dissolutions of the Lok Sabha may help in consolidation of parties and evolution of two or three national parties. Multiple political parties make parliamentary form of government unstable.

But, in India, from a practical point of view, it remains a moot question whether a Prime Minister defeated in the House would be granted dissolution irrespective of his party position. On the whole, there prevails a feeling in India that frequent elections ought not to be held because of the expense involved. There is inherent resistance to mid-term dissolution of the Lok Sabha. Not only the people do not want to go to the polls often, but even the members of the Legislature do not want to lose their privileges before the full five-year term is over.

During the last thirty years, Lok Sabha has witnessed several premature dissolutions, the reason being that no political party has been able to secure a stable majority in the House. In November, 1969, the ruling Congress Party broke up. Consequently, the Government lost its majority. On the advice of the Prime Minister, on December 27, 1970, the President dissolved the Lok Sabha elected in February, 1967. The Lok Sabha was thus dissolved fourteen months before its full term would have run out.

Several interesting features of this dissolution may be noted. First, the request to dissolve the Lok Sabha was made by the Cabinet, of course, on the initiative of the Prime Minister and not by the Prime Minister alone. Secondly, the Prime Minister was heading at the time a minority government, but it had not been defeated in the Lok Sabha on any question. The Government, to start with, had a small majority but because of a split in the party it lost that majority. The Prime Minister asserted that the sole consideration to make the request was government's desire to seek a fresh mandate from the people to enable the Government to effectively implement its programme. Lastly, the opposition parties had con-

22. For further discussion on this point, see, *infra*, Ch. III.

tended that the head of a minority government had no right to recommend dissolution of the Lok Sabha but the President rejected this contention.

In 1975, emergency was imposed in India under Art. 352. The emergency was revoked in 1977 and elections were held to the Lok Sabha. The Congress Party which was responsible for imposing the emergency was routed. Morarjee Desai, leader of the United Front, a coalition of several parties, which secured a majority in the House became the Prime Minister. He resigned in July, 1979, when the United Front broke away and Charan Singh, leader of the breakaway group, became the Prime Minister in 1979.

In 1979, Lok Sabha was dissolved after only two years of its existence on the advice of a Prime Minister [Chaudhury Charan Singh][23] who headed a minority government from the very beginning and who never faced the House.[24] He was installed in office with the outside support of the Congress Party. When the Congress Party withdrew its support, Lok Sabha was dissolved. When elections were held to Lok Sabha in 1980, a stable government did emerge at the Centre.[25]

In 1990, the V.P. Singh Government was defeated on the floor of Lok Sabha on a confidence motion. In anticipation of the impending defeat of the government on the floor of Lok Sabha, a question was hotly debated in public, *viz.*, would the President be bound to accept the advice of the defeated Prime Minister to dissolve the House? However, no conclusive answer emerged to this question as the Prime Minister resigned, without seeking dissolution of the House, as the public mood in the country at the time was against such a step.[26]

Thereafter, the Chandra Shekhar Ministry was installed in office in November, 1990. Chandra Shekhar headed a minority party but managed a majority in Lok Sabha with the help of the Congress Party. After four months, in March, 1991, the Congress withdraw its support and, consequently, Prime Minister Chandra Shekhar resigned his office, and the House was dissolved on the advice of the Prime Minister. There was the added circumstance at the time that no viable alternative government could possibly be installed.[27]

---

23. *See,* next Chapter, for discussion on the appointment of Chaudhary Charan Singh as the Prime Minister.

24. *Also see*, *infra*, Chs. VI and VII. For discussion on the dissolution of Lok Sabha, see, *V JI. of Inst. of Constitutional & Parliamentary Studies*, 295-376 (1971).

25. For full facts, *see*, *infra*, Ch. III, Sec. I(c).

26. Shri R. VENKATARAMAN, who was the President at the time, refers to this episode in his memories entitled *MY PRESIDENTIAL YEARS*, at 431. He observes: "It was becoming increasingly clear that V.P. Singh would lose the vote of confidence. I therefore started consulting legal experts regarding the courses open to me after the vote. One immediate possibility was a recommendation for the dissolution of the House by the Prime Minister. Whether the advice of a defeated Prime Minister is binding on the Crown in England, is not free from doubt."

He mentions that in England for nearly a hundred years, the Crown has never refused to accept the advice of the Prime Minister before or after his defeat in the House if he wanted to appeal to the people. VENKATARAMAN then refers to the scholastic opinion in Britain according to which the Crown may refuse to accept the advice for dissolution under certain circumstances. Finally he says : "It appeared to me that it was safer to go with the British precedent of accepting the Prime Minister's recommendation rather than rely on erudite and eminent textbook writers."

27. *See*, R. VENKATARAMAN, *op. cit.*, 491.

He observes : "I did not base the dissolution of the Lok Sabha solely on recommendation of the outgoing Prime Minister but on the other factor also, namely, that no political party had come forward to form a government..."

Then, again, as a result of the general election held in May, 1996, no party emerged in majority in the Lok Sabha. The House was badly fractured and split three ways as follows : United Front, 177 seats; Congress, 140 seats and Bhartiya Janta Party, 162 seats. With the help of the Congress support, the leader of the United Front took office in 1996.

On 4th December, 1997, the House was dissolved within two years of its election, as Prime Minister Gujaral lost his majority support in *Lok Sabha*. Gujaral headed a minority government but it stayed in office with the support of the Congress Party from outside. The Prime Minister resigned and the Government fell when the Congress Party withdrew its support to the Government. The outgoing Cabinet recommended that Lok Sabha be dissolved and a fresh mandate be obtained from the people. Again, there was the added circumstance that there was no prospect of installing an alternative government at the time.

President Narayanan did not accept the advice of the Prime Minister straightaway but explored the possibility of installing an alternative government, and dissolved the House only when he realised that there was no such possibility.[28]

In the communique issued by the President dissolving Lok Sabha, it was stated that the President had gone through the arduous exercise of consulting the leaders and representatives of major political parties including the ruling party with a view to explore the possibility of forming a government which was "lawful, viable and enjoy a reasonable prospect of stability." But it became clear that "no political combination in the Lok Sabha" was in a position to form such a government. The communique also stated that the recommendation made by the Council of Ministers "converged with the President's own process of deduction."

The communique thus makes it amply clear that the decision to dissolve Lok Sabha was based not merely on the advice of Council of Ministers but also on the President's own appraisal of the situation as well. The President considered the matter from all angles. It thus becomes amply clear that in the matter of dissolution of Lok Sabha, the advice of the outgoing Ministry to dissolve the House is not binding on the President. He will try to explore the possibility of having an alternative stable government.[29]

Again, in 1997, the elections resulted in a hung Parliament as no party secured a clear majority in Lok Sabha. A coalition government of several parties, of which BJP was the major component, was installed in office in March, 1998. This government being a coalition of several parties could not be characterised as a stable government because of the internal pulls and pressures of its component units. This government fell in April, 1999, as it was defeated in Lok Sabha on a vote of no confidence by one vote. The President sought to explore the possibility of an alternative government but when he failed in this enterprise, Lok Sabha was dissolved and fresh elections held. Thereafter, a new coalition government took office in October, 1999, under Shri Atal Behari Vajpayee as the Prime Minister. That government remained in power till the next general elections five years later. The government which was formed in 2004 was also a coalition under the

---

28. The Presidential Order dissolving the House was challenged through a writ petition in the Andhra Pradesh High Court, but it was dismissed : *D.S.N.V. Prasad Babu v. Union of India*, AIR 1998 AP 140.

29. *A writ petition* challenging the dissolution of Lok Sabha was dismissed by the Andhra High Court in *D.S.N.V. Prasad Babu v. Union of India*, AIR 1998 AP 140.

Prime Ministership of Manmohan Singh. The 2009 General Elections has also resulted in a coalition Government at the Centre, albeit with different political partners.

Thus, in India, it remains doubtful at present whether frequent elections to Lok Sabha may result in one single political party securing a majority in the House in the forseeable future. Perhaps, for some time to come, India is destined to have coalition government rather than a single party government. It remains a moot point whether the clause that the President 'shall act" on the advice of the Council of Ministers binds the President to dissolve the House as and when the Prime Minister requests for it. On the whole, on the basis of the practice followed so far, it may be said that, dissolution will not be granted automatically on the advice of the Prime Minister who has lost confidence of the House. The President will first explore if there is a possibility of formation of an alternative government. The public mood is against frequent elections in the country. Only when no alternative government is possible, Lok Sabha will be dissolved.

(d) EFFECT OF DISSOLUTION ON BUSINESS PENDING IN THE HOUSE

When the Lok Sabha is dissolved :

(1) a Bill pending in Rajya Sabha which has not been passed by the Lok Sabha does not lapse [Art. 107(4)];

(2) a Bill pending in the Lok Sabha lapses [Art. 107(5)];

(3) a Bill passed by the Lok Sabha but pending in the Rajya Sabha lapses [Art. 107(5)], but it would not lapse if in respect of it a joint session of the two Houses has already been called by the President [Art. 108].[30]

A joint sitting of the two Houses may still be held in spite of the dissolution of Lok Sabha, if it has been convened already before Lok Sabha stands dissolved.[31]

(4) A Bill passed by both Houses but pending assent of the President does not lapse with the dissolution of the Lok Sabha.[32]

(5) Dissolution of the House does not wipe out contempt proceedings in the House. The new House constituted after election can punish for contempt of the House dissolved.[33]

J. FUNCTIONS OF PARLIAMENT

Parliament is a deliberative and a legislative body. Its functions are multifarious which are divisible under the following heads :

(*i*) Legislation;

(*ii*) Control of Public Finance;

(*iii*) Deliberation and Discussion;

(*iv*) Control of the Executive;

---

30. For a joint session see, *infra*, Secs. J(i)(b) and K(i).

31. *Ibid.*

32. *Purushottam Nambudri v. State of Kerala*, AIR 1962 SC 694 : (1962) Supp (1) SCR 753; In re Special Reference No. 1 of 2002 : (2002) 8 SCC 237; AIR 2003 SC 87.

33. *A.M. Paulraj v. Speaker, T.N. Legislative Assembly, infra*, Ch. VI.

(*v*) Removal of certain high Officials; and

(*vi*) the Constituent function.

Heads (*i*), (*ii*) and (*iii*) are discussed below. As to head (*iv*), in a parliamentary form of government, the Executive being responsible to Parliament, an important function of Parliament is to control the Executive, criticise, supervise administration, and influence governmental policies. Practically, every activity of Parliament, whether legislative or deliberative, is oriented towards this end. This aspect is discussed in the next Chapter.

As to head (*v*), Parliament has power to impeach the President [Art. 61][34] and remove from office the Vice-President of India [Art. 67, proviso (b)],[35] Judges of the Supreme Court[36] and the High Courts,[37] the Chief Election Commissioner [Art. 324(5)][38] and Comptroller and Auditor-General of India [Art. 148(1)].[39] All these matters are discussed at the proper places.

The Constituent function of Parliament is discussed later in this book.[40]

(i) LEGISLATION

Making laws is Parliament's major pre-occupation. Changing and complex socio-economic problems constantly demand new laws and, thus, Parliament spends a good deal of its time on legislative activity.

(a) PROCEDURE

An ordinary Bill, *i.e.*, a Bill other than a Money or a Financial Bill, may originate in either House of Parliament [Art. 107(1)]. It becomes an Act when it is passed by both Houses and is assented to by the President [Arts. 111(1) and 107(2)].

The procedure for passage of a Bill in a House is contained in the rules of procedure of each House. Usually, a Bill passes through three stages, popularly known as readings, in a House.

The first is the introduction stage. By convention no discussion takes place at this stage unless the Bill is very controversial, *e.g.*, this convention has been broken when the Preventive Detention Bill has been introduced. Then comes the consideration stage which has two parts—one, a general discussion of the principles and provisions of the Bill (details of the Bill are not discussed at this stage); two, its clause by clause consideration. The general discussion takes place on a motion either that the Bill be taken into consideration; or, that it may be referred to a select committee; or, that it be circulated for eliciting public opinion.

An important Bill is usually referred to a select committee of the House or to a joint select committee of both Houses. After the report of the committee is presented to the House, the Bill is discussed clause by clause. Amendments to

---

34. Ch. III, Sec. A(i)(h), *infra.*
35. Ch. III, Sec. A(ii), *infra.*
36. Art. 124(2), Proviso (*b*); Ch. IV, *infra.*
37. Art. 217(1), Proviso (*b*); Ch. VIII, *infra.*
38. Ch. XIX, *infra.*
39. *See, infra,* p. 108 *et seq*.
40. *See,* Ch. XLI, *infra,* under "Amendment of the Constitution".

clauses may be moved at this stage. At the final or the third reading stage, after a brief general discussion, the Bill is finally passed.

After its passage in one House, the Bill is transmitted to the other House where it undergoes more or less a similar procedure.

(b) JOINT SESSION

In the area of ordinary legislation, the two Houses of Parliament enjoy co-ordinate power. A Bill has to be passed by the two Houses in an identical form before it can be submitted to the President for his assent [Art. 107(2)].

If a Bill passed by one House is amended by the other House, the amended Bill is sent back to the originating House for its concurrence with the amendments so made. Usually, the two Houses agree and finally pass the Bill in the same form.

It may, however, happen at times that the two Houses do not agree on a Bill and a deadlock may ensue between them. Such a deadlock is resolved through a joint session of the two Houses. Thus, when a Bill passed by one House and transmitted to the other House:

(*i*) is rejected there; or

(*ii*) the two Houses disagree as to the amendments to be made to the Bill; or

(*iii*) if the other House does not pass it for more than six months,

the President may summon a joint session of both the Houses [Art. 108(1)]. While reckoning the period of six months, no account is to be taken of any period during which the House to which the Bill has been sent is prorogued or adjourned for more than four consecutive days [Art. 108(2)].

After the President notifies his intention to summon a joint session of the two Houses, none of the Houses can proceed further with the Bill [Art. 108(3)]. No joint session can be called if the Bill has already lapsed by the dissolution of the Lok Sabha as discussed above [Arts. 108(1) and 107(5)][41]; but the joint session may be held if the Lok Sabha is dissolved after the President has notified his intention to summon such a session [Art. 108(5)].

If the Bill passed by one House is not passed by the other House with amendments and returned to the originating House, no amendments can be proposed to the Bill at a joint session other than those which might have become necessary by the delay in the passage of the Bill [Art. 108(4), proviso (a)]. If, on the other hand, the Bill has been passed by the other House with amendments and returned to the originating House, then only such amendments, and in addition, such other amendments as are relevant to the matters with respect to which the Houses have not agreed, may be proposed at the joint sitting [Art. 108(4), proviso (b)]. In all cases, the decision of the presiding officer as to what amendments are admissible at the joint sitting is final [Art. 108(4)].

At the joint sitting, the Speaker of the Lok Sabha, or in his absence, such person as may be determined by rules of procedure, is to preside [Art. 118(4)]. The rules of procedure with respect to joint sittings of the two Houses are to be made

41. *Supra*, Sec. I(c).

by the President after consulting the Chairman of the Rajya Sabha and the Speaker of the Lok Sabha [Art. 118(3)][42]. A Bill passed with or without amendments, by a majority of all the members present and voting in the joint session, is deemed to have been passed by both the Houses [Art. 108(4)].

Since the commencement of the Constitution, the provision regarding the joint session of the two Houses has been invoked only a few times. The first joint session of the two Houses was held on May 6 and 9, 1961, to pass the Dowry Prohibition Bill regarding certain provisions of which there was disagreement between the two Houses. The Congress Party was in majority at the time in both the Houses. Being a social measure, the Government did not take a definitive stand on the points in controversy and left the matter to the judgment of the members, hence the deadlock. Had the Government given guidance on the Bill, no deadlock would have ensued as the members do usually accept Government leadership. It is for this reason that the provision for joint session has been so rarely invoked so far.

Another joint session of the two Houses of Parliament was held on May 16, 1978 to enact the Banking Service Commission (Repeal) Bill. The political complexion of the two Houses differed very sharply at the time. In the general election held for Lok Sabha in 1977, the Congress Party was routed and the Janata Party enjoyed a majority in Lok Sabha . But the Congress Party still dominated the Rajya Sabha. The Bill had earlier been passed by the Lok Sabha but was later rejected by the Rajya Sabha and so a joint session had to be called to override the inter-House difference of opinion as regards the Bill. The Bill was approved in joint session. The third joint session was held on March 26, 2002. The Prevention of Terrorism Bill, 2002 was approved by Lok Sabha by a margin of more than 100 votes but it was defeated in Rajya Sabha by 15 votes. The joint session was held to break the inter-House deadlock on the Bill and it was passed in the joint session.

(c) PRESIDENT'S ASSENT

Parliament cannot legislate without the concurrence of all its parts, and, therefore, in addition to the two Houses, assent of the President is also required for a Bill to become law, for the President is a part of Parliament [Art. 79]. When a Bill passed by both Houses is sent to the President for assent—

(i) he may either give or withhold his assent therefrom [Art. 111], or,

(ii) may send it back to the Houses for reconsideration and for considering the desirability of introducing such amendments as he may suggest [Proviso to Art. 111].

When a Bill is so returned, it is the duty of each House to reconsider it accordingly, and if it is passed again by the Houses with or without amendments, and presented to the President for assent, the President 'shall not withhold assent therefrom' [Proviso to Art. 111].

Thus, if the President refuses to give his assent to a Bill in the first instance, there is no way to override his veto and the Bill will be dead. If, however, he does not veto the Bill but refers it to the Houses for reconsideration, his power of veto is gone.

---

42. Also see, *Appendix* I to the Rules of Procedure and Conduct of Business in Lok Sabha (1957).

These are formal powers of the President which he exercises on ministerial advice.[43] The President may veto a Bill on ministerial advice but it is inconceivable that a government would wish to veto a Bill for the passage of which it has been responsible and, therefore, the President rarely exercises his veto power. In a parliamentary democracy, consent of the Head of the State to a Bill passed by Houses of Parliament is deemed to be a mere formality. A similar power held by the British Crown has not been used for a very long time and is now regarded as having fallen into disuse.

The Presidential power to refer a Bill back to the Houses for reconsideration is meant to be used in a situation where, after the passage of a Bill by the two Houses, some important developments take place necessitating amendments in the Bill as passed, or where the Ministry finds later that some unwanted provisions have crept into the Bill, or if the government finds that due to haste or oversight, a Bill passed by the two Houses contains some provision which goes contrary to the intention of Parliament. In such a situation, President's power to refer a Bill back to the Houses enables the Houses to reconsider the Bill and effect necessary modifications therein according as the situation demands.

Constitutional history was made in India when the President returned a Bill to the government unsigned with the suggestion that its flaws be rectified. This was the first time after the Constitution came into force that a Bill was received back by the government without the President's assent. The Bill to amend the Post Office Act was passed by both Houses of Parliament in 1986. The Bill contained a provision authorising the Central or State Government, or any authorised officer, if satisfied that it was necessary to do so in the interests of public safety or tranquility, the sovereignty or integrity of India, the security of the state, friendly relations with foreign states or public order or for preventing incitement to the commission of any offence, or on the occurrence of any public emergency, to intercept or detain any mail. Objection to this clause was widespread in the country. The clause was too sweeping in nature as it undermined the Fundamental Rights of the people. The clause sought to vest the government with wide and sweeping powers in the matter of interception of the mail. Fears had been expressed that the power could be used for political purposes. Even the Law Commission had expressed its views against such a broad power of interception of mail.[44] The clause in question appeared to come in conflict with Art. 19(2).[45] The clause was too broad, too vague, and too drastic. There was strong public reaction against this clause which was characterised as draconian. The President under the Constitution had two options; (1) to give assent to the Bill; (2) to send it back to Parliament with a message to reconsider the Bill. Parliament would have then reconsidered the Bill. In adopting either of these options the President would have acted against the advice of the Council of Ministers which was a party to the passage of the Bill in the two Houses. Instead of following these constitutional options, the President sent the Bill to the Law Ministry seeking certain clarifications. In a formal sense, the action of the President, though unique, did not amount to the withholding of the assent as envisaged in Art. 111. In that case, he would have sent the Bill back to Parliament with a message to reconsider it. Instead, the President sent the Bill back to the Government so that the Government might reconsider

43. *Infra*, Ch. III.
44. LAW COMMISSION, *REPORT*, (1986).
45. *Infra*, Ch. XXIV.

the matter and move to suitably amend the Bill. The President acted in this matter on his own initiative and not on the advice of the Council of Ministers as envisaged by Art. 74(1).[46] In course of time, taking into consideration the public protests against the Bill, the Government allowed the Bill to lapse without bringing it before the Houses for reconsideration.[47]

A different outcome took place with regard to the Parliament (Prevention of Disqualification) Amendment Bill, 2006. The Bill was passed in the background of a challenge to the appointment of Jaya Bachchan, a cinema artist and Member of the Rajya Sabha on the ground that she held an office of profit as she had been appointed Chairperson of the Uttar Pradesh Film Development Council by the government of that State. The Challenge was upheld and Ms.Bachchan was disqualified by the President on the basis of the opinion of the Election Commission under Art. 103(2). Her plea to the Supreme Court challenging the disqualification was rejected.[48]

This led to a spate of complaints against other members of the Houses of Parliament including persons who belonged to the ruling coalition. While the complaints were pending the opinion of the Election Commission, the Parliament (Prevention of Disqualification) Amendment Bill, 2006, which in effect sought to render the complaints before the Election Commission substantially infructuous, was passed by both Houses and sent to the President, Abdul J. Kalam, for his assent. The President returned the Bill to Parliament under Article 111 raising various points and requesting that the Bill be reconsidered. There was heated debate both publicly and within Parliament on the appropriateness of the Bill. Nevertheless, the Bill was passed again without any changes by the majority and re-sent to the President for his assent under the proviso to Art. 111. The President gave his assent to the Bill on 18th August, 2006.[49]

(d) PRIVATE MEMBERS' BILLS

An important characteristic of the parliamentary system is that the Cabinet is predominant and virtually monopolizes business in Parliament. So long as the Cabinet holds a majority in the Lok Sabha, the government is in control of the House. It is the government which determines what shall be discussed in each House, when shall it be discussed, how long the discussion shall take place and what the decision shall be. Practically, all Bills which ultimately pass through Parliament are sponsored by Ministers who are under the constant pressure of organised opinion of all kinds seeking redress or relief through legislation.

A private member, *i.e.*, a member who is not a Minister, though theoretically authorised to sponsor a private member's Bill in the House, in practice, there is little chance of its passage without government's support. The powers of private members are thus rigidly limited and not much scope is left for their individual enterprise and initiative. Most of the parliamentary time is occupied by government Bills. In the Lok Sabha, private members have only two and a half hours on each Friday at their disposal. In the Rajya Sabha, the whole of Friday is reserved for this business unless the Chairman directs otherwise.

---

46. *See, Infra,* Ch. III, Sec. B.
47. *See,* R. VENKATARAMAN, *MY PRESIDENTIAL YEARS,* 42, 84, 335.
Also, *MEMOIRS OF GIANI ZAIL SINGH,* (VII President) 276-279 (1997).
48. *Jaya Bachchan v. Union of India,* (2006) 5 SCC 266 : AIR 2006 SC 2119.
49. See *supra* pages 53, 54.

There is a practical reason for the passing of the initiative from the private member to the government in matters of legislation. The problem before a modern government is a problem of time. Therefore, the time of Parliament has to be used to the best advantage which needs planning of work. There are always a number of government Bills waiting for passage by Parliament. Consequently, the private members' Bills have been downgraded to afford priority to government business. It is felt that if a matter is important enough to be embodied in a Bill, then the responsibility for its passage should rest with government.

A private member's Bill can originate in any House and after its passage in both Houses it needs President's assent to become law. Under its rules of procedure, Lok Sabha has a Committee on Private Member's Bills and Resolutions consisting of 15 members nominated by the Speaker for a year. The function of the committee, generally speaking, is to examine the private members' Bills after they have been introduced in the House and classify them according to their nature, urgency and importance and allocate time for their discussion.

(ii) CONTROL OF PUBLIC FINANCE

(a) FOUR PRINCIPLES

A government cannot exist without raising and spending money. Parliament controls public finance which includes granting of money to the administration for expenses on public services, imposition of taxes and authorisation of loans. This is a very important function of Parliament. Through this means Parliament exercises control over the Executive because whenever Parliament discusses financial matters, government's broad policies are invariably brought into focus. The Indian Constitution devises an elaborate machinery for securing parliamentary control over finances which is based on the following four principles.

The first principle regulates the constitutional relation between the Government and Parliament in matters of finance. The Executive cannot raise money by taxation, borrowing or otherwise, or spend money, without the authority of Parliament.

The second principle regulates the relation between the two Houses of Parliament in financial matters. The power of raising money by tax or loan and authorizing expenditure belongs exclusively to the popular House, *viz.*, Lok Sabha. Rajya Sabha merely assents to it. It cannot revise, alter or initiate a grant. In financial matters, Rajya Sabha does not have co-ordinate authority with Lok Sabha which has the real control in this area. Thus, financial powers have been concentrated in Lok Sabha and Rajya Sabha plays only a subsidiary role in this respect.

The third principle imposes a restriction on the power of Parliament to authorize expenditure. Parliament cannot vote money for any purpose whatsoever except on demand by Ministers.

The fourth principle imposes a similar restriction on the power of Parliament to impose taxation. Parliament cannot impose any tax except upon the recommendation of the Executive.

Each of these principles is discussed below.[50]

---

50. See, *MAY, THE LAW, PRIVILEGES, PROCEEDINGS AND USAGES OF PARLIAMENT,* 700(1976); LLBERT, *PARLIAMENT,* 76, 77 (1953); MORRISON, *BRITISH PARLIAMENTARY DEMOCRACY,* 60-94(1961); KAUL AND SHAKDHER, *PRACTICE AND PROCEDURE IN PARLIAMENT,* Ch. XXIX (2000).

(b) NO TAX WITHOUT AUTHORITY OF LAW

The principle that the Executive has no power to impose any levy upon the people without the sanction of the Legislature is contained in Art. 265 which states: "No tax shall be levied or collected except by authority of law". This constitutional provision applies both to the Central as well as the State spheres.

Art. 265 forbids the state from making any unlawful levy. The bar imposed by Art. 265 is absolute. Art. 265 protects the citizen from any unlawful levy.

The word 'tax' has been used in Art. 265 in a comprehensive sense as including any impost—general, special or local.[51] A tax cannot be levied or collected merely by an executive fiat or action without there being a law to support the same.[52]

Art. 265 uses two words "levy" and "collect". "Levy" means the assessment or charging or imposing tax. "Collect" means physical realisation of the tax which is levied or imposed. The stage of collection of tax comes after the levy of the same.

There appears to be a difference of opinion among the High Courts regarding the exact significance of the word 'law' in this Article. One view is that 'law' means a statutory law, *i.e.*, an Act of Legislature and, therefore, a levy or collection of tax by usage is ruled out. The other view is that 'law' does not mean statute law alone and that a customary levy is not ruled out, *e.g.*, a levy on land imposed under a custom as an incident of the possession of any property or holding an office.[53] But a customary collection in respect of goods taken out of a village, or brought within, for purposes of sale, is not valid as it is not related to the holding of some land or office.[54] It will be seen that under the second view some customary levies may be held valid while these would not be valid under the first view.

A mere resolution of a House is not sufficient to impose a tax. For this purpose, the Legislature has to enact a law. A law for levying a tax may be made with retrospective effect.[55] Under Art. 265, not only the levy but also the collection of a tax must be sanctioned by law. A tax may have been validly levied, but it can be collected only in accordance with the law. The procedure to impose the liability to pay a tax has to be strictly complied with, otherwise the liability to pay tax cannot be said to be according to law.[56]

Article 265 also gives protection against executive arbitrariness in the matter of tax collection. Arbitrary assessment of a tax does not amount to collection of tax by authority of law.[57] The imposition cannot exceed what the statute authorises. The tax imposed must fall within the four corners of the law. Therefore, where the statute authorises levy of a tax on the basis of trade, assessment of the tax on the total income of the assessee is unjustified.[58]

---

51. Art. 366(28).
52. *State of Kerala v. Joseph*, AIR 1958 SC 296 : 1958 KLT 362.
53. *Wadhwani v. State of Rajasthan*, AIR 1958 Raj 138.
54. *Guruswami Nadar v. Ezhumalai Panchayat*, AIR 1968 Mad 271.
55. *Shri Prithvi Cotton Mills v. Broach Borough Municipality*, AIR 1970 SC 192 : (1969) 2 SCC 283.
56. *Khurai Municipality v. Kamal Kumar*, AIR 1965 S C 1321 : (1965) 2 SCR 653.
57. *M. Appukutty v. STO*, AIR 1966 Ker 55.
58. *Phani Bhushan v. Province of Bengal*, 54 CWN 177; *Union of India v. Bombay Tyre International Ltd.*, AIR 1984 SC 420; *State of Rajasthan vs. Rajasthan Chemist Association.* AIR 2006 SC 2699 : (2006) 6 SCC 773.

The Constitution imposes several limitations on the power of Parliament and the State Legislatures to levy taxes. A tax levied by a law infringing any of these restrictions will be a tax without the authority of law and hence invalid. The term 'law' in Art. 265 means a "valid law". Art. 265 thus gives protection against imposition and collection of a tax except by authority of a valid law.[59] A law imposing a tax should be within the legislative competence of the legislature concerned; it should not be prohibited by any provision of the Constitution or hit by a Fundamental Right.[60]

In India, the Executive is empowered to issue ordinances. An ordinance has the same effect as a law of the Legislature.[61] It is possible therefore to levy a tax through an ordinance, but it is very much deprecated and, in practice, use of an ordinance to levy tax is rare.[62]

The right conferred by Art. 265 can be enforced through proper court proceedings. Therefore, if a tax-payer is made to pay an unconstitutional tax, he can recover the amount paid by bringing a civil suit. The writ jurisdiction of the High Court can also be invoked if a tax is sought to be levied without a valid law or without following the mandatory provisions of law.[63]

When a tax is held to be void as being unconstitutional or illegal on any ground, ordinarily speaking, the tax collected by the state would become refundable.[64] The state cannot retain an unconstitutional tax as the levy would be without the authority of law and contrary to Art. 265 of the Constitution. But there are several Supreme Court cases[65], discussed later,[66] where the Court in exercise of its discretionary power to mould relief,[67] may hold the tax invalid prospectively and not retrospectively. This means that while the state can retain the proceeds of the tax already collected before the date of the judgment of the court, the state could not collect the tax thereafter. The court may also refuse refund of tax if the tax-payer has already reimbursed himself by passing the tax burden to a third party.[68] Acknowledging the complexities the court observed that where the re-

---

59. *Firm Ghulam Hussain Haji Yakoob v. State of Rajasthan,* AIR 1963 SC 379 : (1963) 2 SCR 255.

60. *Chhotabhai Jethabhai v. Union of India,* AIR 1962 SC 1006 : 1962 Supp (2) SCR 1.
For discussion on Fundamental Rights, see, *infra,* Chs. XX-XXXIII.

61. *Zila Parishad, Moradabad v. Kundan Sugar Mills,* (1968) I SCJ 641 : (1968) 1 SCR 1 : AIR 1968 SC 98.

62. *See, infra,* Chs. III and VII for discussion on the power of the government to issue ordinances.

63. *Poona City Municipal Corp. v. Dattatraya N. Deodhar,* AIR 1965 SC 555 : (1964) 8 SCR 178; *B.K. Bhandar v. Dhamangaon Municipality,* AIR 1966 SC 249 : (1965) 3 SCR 499; *U.P. Pollution Control Board v. Kanoria Industrial Ltd.,* AIR 2001 SC 787 : (2001) 2 SCC 549. On the power of the High Courts to issue writs, see, *infra,* Ch. VIII.

64. See, *U.P. Pollution Control Board, supra,* note 16.
Also see, *HHM Ltd. v. Administrator, Bangalore City Corp.,* AIR 1990 SC 47. *Salonah Tea Co. Ltd. v. Superintendent of Taxes, Nowgong,* AIR 1990 SC 772 : (1988) 1 SCC 401.

65. See, *Synthetics & Chemicals Ltd. v. State of Uttar Pradesh,* AIR 1990 SC 1927 : (1990) 1 SCC 109; *Belsund Sugar Col Ltd. v. State of Bihar,* AIR 1999 SC 3125 : (1999) 9 SCC 620; *Somaiya Organics (India) Ltd. v. State of Uttar Pradesh,* AIR 2001 SC 1723 : (2001) 5 SCC 519.

66. See, *infra,* Ch. XL, under "Prospective Overruling" and "Unconstitutionality of a Statute".
Also see, M.P. JAIN, *A TREATISE ON ADMINISTRATIVE LAW,* II, under "Restitution".

67. *Infra,* Chs. IV and XXXIII.
On "Moulding Relief", also see, Ch. VIII, *infra.*

68. *Mafatlal Industries Ltd. v. Union of India,* (1997) 5 SCC 536 : (1996) 11 JT 283.

cipient of the refund need not necessarily be the taxpayers the court is faced with the difficulty in refunding a huge amount to a large number of persons who suffered illegal taxation and are not identifiable or where there is a finding of unjust enrichment, the court may direct the body which has made such illegal collection to hand over equivalent amount to a voluntary or a charitable organization.[69]

(c) MONEY BILLS

From the point of view of parliamentary procedure, the Constitution distinguishes between (*i*) Money Bill, (*ii*) Financial Bill and (*iii*) an ordinary Bill involving expenditure.

A Money Bill is a Bill which contains *only* provisions dealing with the following matters : (*a*) the imposition, abolition, remission, alteration or regulation of any tax; (b) the regulation of the borrowing of money or the giving of any guarantee by the Government of India or the amendment of the law with respect to any financial obligations undertaken by that Government; (*c*) the custody of the Consolidated Fund or the Contingency Fund of India, the payment of moneys therein or withdrawal of moneys therefrom; (*d*) the appropriation of money out of the Consolidated Fund of India; (*e*) the declaring of any item of expenditure as being a charge on the Consolidated Fund of India, or increasing any such amount; (*f*) the receipt of money on account of the Consolidated Fund of India or the Public Account of India, or the custody or issue of such money or the audit of the accounts of India or of a State; or (*g*) any matter incidental to any of the matters specified above [Art. 110(1)]. A Bill is a Money Bill when it deals *only* with the matters specified above, and not with any other extraneous matter. Thus, a notification issued by the Ministry of Environment and Forests in exercise of the powers conferred by sub-section (3) of Section 3 of the Environment (Protection) Act, 1986 constituting an authority for the purpose of management of money received towards compensatory afforestation and other monies recoverable by the Central Government for non-forestry uses of forest land is not a Money Bill under either Art. 110 or Art. 199.[70]

A Bill which makes provisions for any of the above-mentioned matters, and *additionally* with any other matter, is called a Financial Bill [Art. 117(1)]. A Financial Bill is thus really a Money Bill to which some other matter has also been tacked on.

Further, a Bill is neither a Money Bill nor a Financial Bill if it deals only with—(*i*) the imposition of fines or other pecuniary penalties; or, (*ii*) the demand of payment of fees for licences or fees for services rendered, or (*iii*) imposition, abolition, remission, alteration, or regulation of any tax by any local authority or body for local purposes [Arts. 110(2) and 117(2)]. The last clause excludes all municipal taxation from the scope of a Money or Financial Bill.[71]

As regards the exclusion of 'licence fee' from the purview of a Money or a Financial Bill, it is necessary to interpret the term 'licence-fee', somewhat restrictively, for there are examples of taxes being collected through licences, *e.g.*, ex-

---

69. *State of Maharashtra v. Swanstone Multiplex Cinema Private Limited*, (2009) 8 SCC 235 : AIR 2009 SC 2750.

70. *T.N. Godavarman Thirumulpad (87) v. Union of India*, (2006) 1 SCC 1 at page 28 : AIR 2005 SC 4256.

71. *Corporation of Calcutta v. Liberty Cinema*, AIR 1965 SC 1107 : (1965) 2 SCR 477.

cise duties. It cannot be the purpose of the Constitution to exclude a tax-measure from the definition of a Money or a Financial Bill merely because the tax is sought to be collected or levied in the form of licence-fees. Therefore, the expression 'licence-fee' would mean only a 'fee' collected through a licensing system and not a 'tax'.[72]

(d) PARLIAMENTARY PROCEDURE IN MONEY BILLS

A Money Bill originates in Lok Sabha only; it cannot be introduced in Rajya Sabha [Art. 109(1)]. It cannot be introduced or moved except on the recommendation of the President [Art. 117(1)]. However, Presidential recommendation is not necessary for moving an amendment providing for reduction or abolition of any tax.

After its passage in Lok Sabha, the Money Bill is transmitted to Rajya Sabha for its consideration and recommendations. Rajya Sabha is allowed a period of 14 days for this purpose from the date it receives the Bill [Art. 109(2)]. If Rajya Sabha fails to return a Money Bill with its recommendations within 14 days allowed to it, the Bill is deemed to have been passed by both Houses at the expiry of that period [Art. 109(5)].

Lok Sabha is free to accept or reject any recommendation made by Rajya Sabha relating to the Money Bill. If Lok Sabha accepts any recommendation, the Bill is then deemed to have been passed by both the Houses in the modified form. If Lok Sabha rejects all recommendations of Rajya Sabha, the Bill is deemed to have been passed by both Houses in the form originally passed by Lok Sabha without any change [Arts. 100(3) and (4)]. In financial matters, therefore, the powers of Rajya Sabha are only recommendatory, and the final word rest with the Lok Sabha because it is elected by the people and so it represents the people.

The decision of the Speaker of Lok Sabha is final on the question whether a particular Bill is a Money Bill or not [Art. 110(3)]. While sending a Money Bill to Rajya Sabha for consideration, or presenting it to the President for assent, the Speaker endorses on it a certificate that it is a Money Bill [Art. 110(4)]. The certificate is conclusive of the question that a Bill is a Money Bill.

Two incidents are common between a Money and a Financial Bill. First, both originate only in Lok Sabha and not in Rajya Sabha. Secondly, neither can be introduced without the recommendation of the President [Art. 117(1)]. In all other respects, a Financial Bill is treated like any other ordinary Bill by both Houses; Rajya Sabha has full power to effect amendments in it and a deadlock between the two Houses will have to be resolved through the procedure of the joint session.[73] Thus, Lok Sabha has much greater control over a Money Bill than a Financial Bill.

The stipulation that a Financial Bill should not originate in Rajya Sabha is necessary to safeguard the position of Lok Sabha, for, otherwise, it would have been quite possible for Rajya Sabha to originate a Bill, in essence a Money Bill, by adding something else to it so as to save it from being labelled as a Money Bill; and Lok Sabha's control over finance would thus have been greatly weakened.

---

72. For a discussion on the difference between a 'tax' and a 'fee' *see*, *infra*, Ch. XI.
73. *Supra*, Sec. J(i)(b).

The distinction between a Money Bill and a Financial Bill is also necessary to protect the position of Rajya Sabha. Rajya Sabha does not possess co-ordinate power with Lok Sabha in case of a Money Bill. Lok Sabha could possibly bypass Rajya Sabha even in case of an ordinary Bill by adding some financial clauses to it and thereby characterising it as a Money Bill. It is, therefore, stipulated that a Money Bill ceases to be so if some other matter is added to it in which case it becomes necessary for both Houses to agree to it.

It will be seen that the procedure for passing a Money Bill differs substantially from that used to pass an ordinary Bill. Whereas an ordinary Bill can be introduced in any House, a Money Bill can be introduced only in Lok Sabha. Then, while consent of Rajya Sabha is not necessary for passage of a Money Bill, it is necessary for passing an ordinary Bill. Lastly, a Money Bill can be introduced only on the President's recommendation while this is not so in case of an ordinary Bill.

An ordinary Bill, though not a Money or a Financial Bill, may yet, if enacted and put into effect, involve expenditure from the Consolidated Fund of India. Such a Bill is to be passed by the two Houses as an ordinary Bill, the only difference being that it cannot be passed by a House unless the President recommends it to the House for consideration [Art. 117(3)]. Under the rules of the two Houses, a financial memorandum is to accompany a Bill involving expenditure drawing attention to the clauses involving expenditure.

(e) PRESIDENT'S ASSENT

Presidential assent is necessary to make a Money Bill or a Financial Bill legally effective after its passage in the two Houses. The position in this connection is much the same as in case of an ordinary Bill, except that the President has no power to refer a Money Bill back to the Houses for reconsideration [Art. 111].[74]

It has been contended that the President cannot withhold assent from a Money Bill.[75] But this opinion does not appear to be sound in view of the phraseology of Art. 111.

(f) EXECUTIVE'S RESPONSIBILITY IN FINANCIAL MATTERS

A leading tenet of parliamentary control of finances is that money is granted by Lok Sabha only on demand by the Executive, and that no proposal for imposing a tax, or for appropriating public revenue, can be made in the House without the recommendation of the Executive. Nor can amendments to government's proposals be in order if they have the effect of increasing a tax or imposing an additional charge on the revenue.

There are several reasons underlying this rule which places the responsibility for suggesting measure of taxation and expenditure on the government. If the privilege to suggest expenditure is given to private members, there is a danger that they may suggest expenditure so as to benefit the particular interests of the constituents they represent in Parliament, and the allocation of funds may take place on a sectional, rather than national, basis. Being both the collector and

74. *See, supra,* Sec. J(i)(c).
75. SEERVAI, *CONSTITUTIONAL LAW OF INDIA*, 834.

spender of money, the Executive is in a much better position to allocate the available resources among competing needs on an integrated and planned national basis.

This rule making the Executive responsible for proposing measures of taxation and spending is concretised through several constitutional provisions. Thus, no demand for a grant can be made except on the President's recommendation [Art. 113(3)]. Lok Sabha may refuse any demand or reduce its amount but cannot increase it [Art. 113(2)]. A Financial Bill or a Money Bill, or an amendment thereto, is not to be moved without the President's recommendation, but no such recommendation is necessary to move an amendment to reduce or abolish any tax [Proviso to Art. 117(1)]. Further, a Bill which when enacted and put into operation would involve expenditure from the Consolidated Fund of India[76] is not to be passed by a House unless the President has recommended its consideration to that House [Art. 117(3)].

(g) PARLIAMENTARY CONTROL ON APPROPRIATIONS

CONSOLIDATED FUND

No expenditure can be incurred by the Government without the sanction of Parliament.

The pivot, the foundation stone, of parliamentary control over appropriations is the Consolidated Fund of India out of which all government expenditure is met. Parliamentary control over appropriations is ensured by the rule that money cannot be withdrawn from the Consolidated Fund without an Appropriation Act [Art. 114(3)]. No moneys can be appropriated out of the Consolidated Fund except in accordance with law and for the purposes and in the manner provided in the Constitution [Art. 266(3)].

The idea of Consolidated Fund arose in Britain sometime around 1787. Originally Parliament voted taxes to the King leaving him free to collect and spend it on such purposes as he liked. Often money was spent for purposes other than those for which the King had asked it. Parliament retained no control after having voted the taxes. At a later stage, Parliament started to follow the procedure of levying a tax and appropriating its proceeds to a specific purpose. The result was that when it came to passing the Budget, practically no money was left for general purpose, as all taxes had been appropriated to specific purposes. To avoid this situation, it became necessary to collect into one fund all revenues raised by taxes or received in other ways, without being appropriated to any particular purpose, so that when Parliament came to decide upon the Budget, it had with it a fund which it could disburse.

A Consolidated Fund is thus necessary in order to prevent the proceeds of taxes from being frittered away by laws made by Parliament for specific purposes without regard to the general needs of the people. The Consolidated Fund is single unified account for all government departments. It is like a reservoir, a national till, into which all government receipts flow.

In India, the Fund is formed of all revenue receipts of the Central Government; all loans raised by it by issuing treasury bills, loans or ways and means

---

76. For explanation of Consolidated Fund, see, below.

advances : all moneys received by the Central Government in repayment of its loans [Art. 266(1)], and any fees or other moneys taken by the Supreme Court [Art. 146(3)]. Thus, practically, all moneys raised by the Central Government for its expenditure form part of the Fund. From the Fund are excluded the sums payable into the Contingency Fund,[77] and the receipts from taxes and duties which have been assigned wholly or partly to the States for their expenditure.[78]

Parliament is empowered to regulate by law such matters as the custody of the Consolidated Fund, payment of moneys therein and withdrawal of money therefrom. Till Parliament enacts a law for the purpose, these matters may be regulated by rules made by the President [Art. 283(1)].

PUBLIC ACCOUNT

Besides the Consolidated Fund of India, there is the Public Account of India in which are credited all public moneys, other than those put in the Consolidated Fund, received by or on behalf of the Government of India [Art. 266(2)]; all moneys received by or deposited with any officer employed in connection with the affairs of the Union, in his capacity as such, other than revenues or public moneys raised or received by the Government of India [Art. 284(a)], and all moneys received or deposited with the Supreme Court to the credit of any cause, matter, account or persons [Art. 284(b)].

Matters like the custody of public moneys, other than those credited to the Consolidated Fund and the Contingency Fund, received by or on behalf of the Government of India, their payment into the Public Account of India and the withdrawal of such moneys from that Account, may be regulated by Parliament by law, and until such a law is made, by rules made by the President [Art. 283(1)].

No Appropriation Act is needed to withdraw money from the Public Account. The reason being that none of the moneys placed in this Fund really belongs to the Central Government and the payments made into this Fund are largely in the nature of banking transactions.

(h) EXPENDITURE CHARGED ON THE CONSOLIDATED FUND

Public expenditure is divided into two distinct categories, namely,

(1) expenditure *charged* on the Consolidated Fund; and

(2) charges granted by Parliament on an annual basis.

The former category comprises charges of a permanent nature, or charges which it is desirable to keep above controversial party politics. Parliamentary control over these items is very limited as these can be discussed, but not voted upon, in Parliament. An estimate of the charged expenditure is presented to Parliament but no demands for grants are made for them. These items are incorporated in the Appropriation Act.

The following items of expenditure are *charged* on the Consolidated Fund of India [Art. 112(3)]:

---

77. For explanation of this term, see, *infra*, p. 106.
78. Ch. XI, *infra.*

(a) the emoluments and allowances of the President and other expenditure relating to his office;

(b) the salaries and allowances of the Chairman and the Deputy Chairman of the Rajya Sabha and the Speaker and the Deputy Speaker of the Lok Sabha;

(c) debt charges for which the Indian Government is responsible;

(d) the salaries allowances and pensions payable to or in respect of Judges of the Supreme Court;

(e) the pensions payable to the Judges of the Federal Court; and

(f) the Judges of the High Courts;

(g) any sum of money needed to satisfy any judgment, decree or award of any court or arbitral tribunal;

(h) the salary, allowances and pensions payable to the Comptroller and Auditor-General of India;

(i) any other expenditure declared by this Constitution or by Parliament by law to be so charged [Art. 112(3)(g)]. Thus Parliament may by law declare any other expenditure to be charged on the Consolidated Fund of India.

Several other constitutional provisions have charged several items of expenditure on the Consolidated Fund of India, viz.:

(a) the administrative expenses of the Supreme Court including all salaries, allowances and pensions payable to or in respect of officers and servants of the Court [Art. 112(3)(d)(i) and Art. 146(3)];

(b) the administrative expenses of the office of the Comptroller and Auditor-General, including all salaries, allowances and pensions payable to or in respect of persons serving in that office [Art. 112(3)(e) and Art. 148(6)][79]

(c) sums prescribed by law by Parliament as grants-in-aid for States in need of assistance [Art. 275(1)],[80]

(d) sums of money required for making loans to the States [Art. 293(2)]; and

(e) the expenses of the Union Public Service Commission including any salaries, allowances and pensions payable to its members or staff [Art. 322].[81]

In addition to the above, Parliament may by law declare any other expenditure to be *charged* on the Consolidated Fund of India [Art. 275(3)(g)].

(i) ANNUAL APPROPRIATIONS

An important mechanism for securing parliamentary control over appropriations is the principle of annuality. Most of the appropriations made by Parliament are on an annual basis. The Executive thus comes before Parliament every year to ask for grants for the ensuing year so that Parliament gets an opportunity of

79. *Infra*, p. 108.
80. *See, infra*, under Federalism, Ch. XI.
81. *Infra,* Ch. XXXVI.

reviewing, criticising and discussing the activities and policies pursued by the Government during the preceding year.

The parliamentary process to make annual appropriations passes through several stages. The first stage is the presentation of an annual financial statement, popularly known as the Budget.[82] The formal obligation to cause the annual financial statement to be laid before both Houses has been cast on the President [Art. 112(1)]. The Budget is presented by the Finance Minister on the last working day in February every year. It is the statement of the estimated receipts and expenditure of the Government of India for the following year (April 1 to March 31). The Expenditure charged on the Consolidated Fund of India is shown separately from other expenditure, and expenditure on revenue account is distinguished from all other expenditure [Art. 112(2)].

In Britain, the Budget is presented only to the House of Commons and not to the House of Lords. In India, it is presented to Lok Sabha and is laid before Rajya Sabha. A general discussion is held on the Budget in each House. Members may discuss the Budget as a whole or any question of principle involved therein. At this stage no motion is moved nor is the Budget submitted to the vote of the House.

Then comes the stage of submitting demands for grants to the Lok Sabha for approval. The estimates of expenditure charged on the Consolidated Fund of India are open to discussion but not to a vote in Parliament [Art. 113(1)].[83] All other items of expenditure contained in the Budget are submitted to the Lok Sabha in the form of demands for grants.

Lok Sabha has power to assent to, reject or reduce, but not to increase, the amount of any demand [Art. 113(2)]. Also, as already noted, no demand for grant can be made except on the recommendation of the President, which, in effect, means that only a Minister may move a demand in Lok Sabha. Thus, a member can neither suggest any new expenditure, nor propose an increase in a demand over and above what the government suggests [Art. 113(3)][84]. A member has, therefore, very limited opportunity to distort the Budget. He can only move cut motions to reduce the amount of a demand and through such motions he may criticise the Government, discuss policy questions, criticise the administration, discuss the conduct of the Executive and suggest economy in government expenditure.[85]

---

82. A separate Railway Budget is presented by the Minister of Railways a few days before the General Budget.

83. *Supra*, p. 101.

84. *Supra*, pp. 99-100.

85. There are three kinds of cut motions:

(*i*) Disapproval of Policy Cut—its form is 'That the amount of the demand be reduced to Re. 1-.' It represents disapproval of Policy underlying the demand under consideration. In this way, the whole policy of the Ministry to which the grant relates can be discussed and members may even advocate alternative policies.

(*ii*) Economy Cut—its form is 'That the amount of the demand be reduced by a specified amount', the amount being equivalent to the economy which the member moving the cut thinks may be effected. By moving such a cut, ways and means to effect economy in the expenses of a Ministry can be discussed.

(*iii*) Token Cut—its form is 'That the amount of the demand be reduced by Rs. 100.' This kind of cut motion is used to ventilate a specific grievance.

KAUL AND SHAKDHAR, *PRACTICE AND PROCEDURE OF PARLIAMENT*, 713 (2000).

Cut motions though freely moved by members when demands for grants are being considered in Lok Sabha, are seldom pressed to the point of voting, for the government would always use its majority to defeat such a motion, the reason being that acceptance of a cut motion would amount to expressing lack of confidence in the government and would almost inevitably involve the resignation of the government. Cut motions are used only as a device to raise discussion on the conduct and policies of the Executive and the demands moved by government are invariably accepted by the House after a discussion.

The demands for grants are discussed, but not voted upon, in Rajya Sabha and no 'cut motions' are moved there. It is the exclusive privilege of Lok Sabha to grant money demanded by government. The process of discussing the demands in the Houses is very useful as in this way the whole area of the government activities can be probed into by the members of Parliament and thus the concept of responsible government becomes a reality to some extent.

Since 1993, with a view to make parliamentary control over government expenditure more effective, a number of departmentally related standing committees are constituted. Each committee considers the demands for grants of the concerned ministry and makes a report to the House which then considers the demands for grants in the light of these reports.[86]

(j) APPROPRIATION ACT

No money can be withdrawn from the Consolidated Fund of India without an Appropriation Act being passed in accordance with the procedure laid down in the Constitution for the purpose [Arts. 114(1), (2) and (3)]. The sanction given by Lok Sabha to the demands for grants does not by itself authorise expenditure without the passage of an Appropriation Act. Therefore, after the demands have been discussed in both Houses of Parliament, and have been assented to in Lok Sabha, an Appropriation Bill is introduced in Lok Sabha.

The Appropriation Bill provides for appropriation out of the Consolidatd Fund of all moneys required to meet the grants assented to by Lok Sabha and the expenditure charged on the Consolidated Fund, and in no case the amount under each head can exceed what was shown previously in the Budget [Art. 114(1)(b)]. No amendment can be proposed to this Bill in any House of Parliament so as to vary the amount or alter the destination of any grant previously agreed to by Lok Sabha or to vary the amount of an expenditure charged on the Consolidated Fund. The decision of the presiding officer as to whether an amendment is admissible or not under this clause is final [Art. 114(2)]. The idea behind these restrictions is that the grants already voted upon in the Lok Sabha should not be disturbed later.

The Appropriation Bill goes before both Houses of Parliament for consideration, but being a Money Bill, the power of Rajya Sabha to deal with it is very restricted.[87] The passing of the Appropriation Bill completes the parliamentary process of authorisation of expenditure. The Appropriation Act plays an important role in the parliamentary control of public finance. It authorises the issue of money from the Consolidated Fund of India for the expenditure of the Central Government and limits the expenditure of each department to the sums set out

86. KAUL AND SHAKDHER, *op. cit.*, 706.
87. *Supra*, p. 98.

therein, thus ensuring not only that the expenditure does not exceed the sum voted but that it is incurred only for the purposes authorised.

(k) FINANCE ACT

The last stage in the chain of annual parliamentary financial procedure is reached when Parliament enacts the Finance Act to effectuate government's taxation proposals for the ensuing year.

The taxes imposed in India are partly permanent and partly temporary. Only a few taxes are levied on a permanent basis and their renewal every year is not necessary. In order to maintain parliamentary control over the Executive, some of the important taxes are imposed on a yearly basis, as for example, the income tax which is the most fruitful source of revenue is renewed every year. The Finance Act seeks to renew the annual taxes, impose new taxes and make necessary adjustments in the permanent taxes with a view to raise revenue necessary to meet the appropriations made out of the Consolidated Fund of India for the ensuing financial year.

The government's taxing proposals are first contained in the Budget. The Finance Bill embodying these proposals is introduced in the Lok Sabha immediately after the conclusion of the Finance Minister's Budget speech. The Bill is not proceeded with immediately but is kept pending till the passage of the Appropriation Act. A motion may then be made in the Lok Sabha for referring the Finance Bill to a select committee and the debate ensuing thereon generally covers a very wide ground. The Bill is taken up for consideration after the select committee has made its report.

The Finance Bill may be a Money Bill or a Financial Bill according as it deals with the matters of taxation exclusively or with some other matters also.[88] The passage of the Finance Act is essential to raise the necessary revenue because of Art. 265.[89] Ordinarily, the taxes sought to be levied by the Finance Act can be collected only after its enactment, but, in order to avoid leakage of revenue, the Government is empowered, under the Provisional Collection of Taxes Act, 1931, to start collection of duty of customs and excise at the new proposed rates immediately from the date the Finance Bill is introduced in the Lok Sabha.[90]

(l) VOTES ON ACCOUNT

No expenditure can be incurred out of the Consolidated Fund without parliamentary authorization expressed through an Appropriation Act. It usually becomes difficult to go through the various stages—from the presentation of the Budget to the passage of Appropriation Act—in Parliament before the new financial year starts on April 1.

Each financial year is a watertight compartment and, therefore, just after a financial year ends, and till the new Appropriation Act is passed for the ensuing year, funds are needed to carry on the administration. This situation is met by taking recourse to votes on account,[91] *i.e.*, Parliament allows a lump sum grant to the Executive to cover expenditure for a short period of two to three months, so

---

88. For distinction between a 'Money Bill' and a 'Financial Bill', see, *supra*, p. 97.
89. *Supra*, p. 95.
90. *Albert David Ltd. v. Union of India*, AIR 1966 Cal 101.
91. 4 *Jl. Parl. Inf.*, 125 (1958); Art. 116(1)(*a*).

that Parliament may discuss the Budget and pass the Appropriation Act without being unduly rushed.

(m) VOTES OF CREDIT

In addition, votes of credit may be used in times of emergency when Parliament may vote a lump sum without allocating it to any particular object. Lok Sabha has power to make a grant for meeting an unexpected demand upon the resources of India when on account of the magnitude or indefinite character of the service, the demand cannot be stated with usual details [Art. 116(1)(b)].

(n) EXCEPTIONAL GRANT

Lok Sabha is also authorised to make an exceptional grant which forms no part of the current service of any financial year [Art. 116(1)(c)]. After the Lok Sabha assents to any of these grants, Parliament has to enact a law to withdraw moneys from the Consolidated Fund. In making these grants and passing the law, the procedure prescribed for making annual appropriations is to be followed [Art. 116(2)].

(o) SUPPLEMENTARY GRANTS

It may be that during a financial year, the money sanctioned by the Annual Appropriation Act for a particular service may prove to be inadequate, or that supplementary or additional expenditure is needed on some new service not contemplated at the time when the Budget was presented, or, that money has been spent on a service in excess of the amount granted for the year. In such cases, supplementary grants are made by Parliament before the end of the financial year.

The Finance Minister places before Parliament a statement showing the estimated amount of that expenditure or a demand of such excess. The demands are discussed in both Houses and such of them as are not charged on the Consolidated Fund of India are then assented to in Lok Sabha. Thereafter, a supplementary Appropriation Act containing the demands sanctioned by Lok Sabha as well as the expenditure charged on the Consolidated Fund is passed. The procedure outlined above in relation to annual demands and appropriations applies to supplementary demands and appropriations as well [Art. 115].

(p) CONTINGENCY FUND

It may become necessary during a financial year to spend some money on a service which was not foreseen at the time of presentation of the Budget. There may not be enough time to convene Parliament to secure its sanction for incurring the expenditure. The Contingency Fund is meant to be used in such a contingency. This Fund is in the nature of an imprest and is used to defray expenditure pending, and in anticipation of, Parliamentary sanction. Money is spent from this Fund without prior parliamentary approval; later, *ex post facto* parliamentary sanction is secured for the expenditure incurred, and an equal amount of money is transferred to this Fund from out of the Consolidated Fund.

It is for Parliament to establish the Contingency Fund and to determine the sums which may be paid into it from time to time. The Fund is placed at the disposal of the President so that advances may be made out of it for the purpose of meeting unforeseen expenditure pending parliamentary authorization of the

same. The Contingency Fund of India Act, 1950, has created the Fund with a sum of 50 crores of rupees, and has vested its custody in a Secretary of the Ministry of Finance on behalf of the President.

The existence of this Fund in no way exonerates the Executive from submitting all excess expenditure to Parliament for sanction, nor does it commit Parliament to approving the expenditure simply because it has been met out of the Contingency Fund. Parliamentary control over the expenditure is thus not diluted by the creation of the Fund.

(q) PARLIAMENT'S POWER TO REGULATE FINANCIAL PROCEDURE

Each House of Parliament has power to make rules for regulating its financial procedure and conduct of business subject to the provisions of the Constitution [Art. 118(1)]. In addition, Parliament may for the purpose of timely completion of financial business make a law to regulate the procedure of, and the conduct of business in, each House of Parliament in relation to any financial matter, or in relation to any Bill for the appropriation of moneys out of the Consolidated Fund of India [Art. 119]. Any such law will prevail over, in case of inconsistency with, any rule made by a House under its rule-making power.

(r) BORROWING

It is not always possible for the Government to find through taxation all the money needed for public expenditure. It may have to resort to borrowing from time to time. Art. 292 empowers the Central Government to borrow money upon the security of the Consolidated Fund of India within such limits, if any, as Parliament may fix from time to time by law and the Government may give guarantees for its loan within the limits so fixed.

This constitutional provision is of a permissive nature as it does not obligate the Executive to obtain statutory authorization from Parliament to borrow funds, but it gives the necessary power to Parliament, if it so desires, to control borrowing activities of the Central Government by fixing quantitative limit thereon. This power has not been exercised by Parliament so far. The position, therefore, is that the Central Government today borrows money entirely on its executive authority without seeking a mandate from Parliament for the purpose.

The practice in the U.K., however, differs from that in India. Whenever the British Government desires to borrow money, a resolution authorising the Treasury to issue the loan is passed by the House of Commons. No such specific resolution is needed in India.

The power to raise funds by borrowing is an important weapon in the hands of the Central Government and if parliamentary control over public finance is to be complete, it is essential for Parliament to take suitable action to define the limits and conditions subject to which loans can be raised by the Central Government. The Government does not, however, favour this course of action. Because of planning, Government has to resort to borrowing and deficit financing extensively. If a ceiling is placed on borrowing, it will make things rigid as the ceiling cannot be crossed without amending the law and this may delay matters.

All borrowings during the year are shown in the Budget and approval of the Budget by Parliament might be regarded as approval of the Government's borrowing programme as well. The money borrowed by the Government becomes

part of the Consolidated Fund of India out of which appropriations are made only by Parliament by law.

(s) COMPTROLLER AND AUDITOR-GENERAL

The Comptroller and Auditor-General (C.A.G.) is appointed by the President, *i.e.*, the Central Executive [Art. 148(1)]. He takes a prescribed oath before assuming his office [Art. 148(2)]. His salary and other conditions of service have now been prescribed in an Act of Parliament.[1]

Neither his salary nor his rights in respect of leave of absence, pension, or age of retirement can be varied to his disadvantage after his appointment [Art. 148(3)]. He can be removed from his office in the same way as a Judge of the Supreme Court [Art. 148(1)].[2] He is not eligible to hold any office under the Central or any State Government after he ceases to hold the office of the Comptroller and Auditor-General [Art. 148(4)]. The administrative expenses of his office, including all salaries, allowances and pensions payable to him or in respect of persons serving in his office, are charged on the Consolidated Fund of India.[3]

The President may make rules, after consultation with Comptroller and Auditor-General, regulating the conditions of service of persons serving in the Indian Audit and Account Department. This rule-making power is, however, subject to the "Constitution and any law made by Parliament [Art. 148(5)]." Interpreting the scope of the rule-making power, the Supreme Court has ruled that these rules cannot be made with retrospective effect.[4]

Adequate precautions have thus been taken to render the Comptroller and Auditor-General independent of, and immune from, the influence of the Executive. It was very necessary to do so in order to enable him to discharge his important functions without fear or favour.

The Constitution does not specifically prescribe his functions but leaves the matter to be dealt with by Parliament. He is to perform such duties and exercise such powers in relation to the accounts of the Union and the States and of any other authority or body as may be prescribed by law by Parliament [Art. 149].

Under the Act of 1971,[5] Parliament has prescribed two types of functions for him. As an accountant, he compiles the accounts of the Union and the States. These accounts are to be kept in such form as the President may prescribe on the advice of the Comptroller and Auditor-General [Art. 150]. As an auditor, he audits all the receipts and expenditure of the Union and State Governments and ascertains whether moneys disbursed were legally available for, and applicable to, the service or purpose to which they have been applied and whether the expenditure conforms to the authority which governs it.

Audit plays an important role in the scheme of parliamentary financial control. Parliament appropriates specific sums for specific purposes. Audit ensures that the Executive keeps within the sums allotted and the purposes authorised. It is

---

1. The Comptroller and Auditor-General (Duties, Powers and Conditions of Service) Act, 1971, fixes his salary equal to that of a Supreme Court Judge. The tenure of his office is fixed at six years.
2. For the procedure to remove a Judge of the Supreme Court, *see, infra,* Ch. IV, Sec. B.
3. Arts. 112(3)(*e*) and 148(6); *supra*, p. 102.
4. *Accountant-General v. S. Doraiswamy*, AIR 1981 SC 783 : (1981) 4 SCC 93.
5. *Supra*, footnote 1.

absolutely necessary that some independent person should scrutinise the government spending and check whether it has been in accordance with parliamentary intentions. In the absence of such a scrutiny parliamentary control over appropriations may be frustrated. He also satisfies himself on behalf of Parliament as to the wisdom, faithfulness and economy of the expenditure.

Audit is, therefore, directed towards discovering waste or extravagance. He can disallow any expenditure violating the Constitution or any law and he thus upholds the Constitution and the laws in the field of financial administration. It is his duty to challenge any improper exercise of discretion by authorities and comment on the propriety of the sanctions and expenditure.[6]

The Comptroller and Auditor-General performs a very useful function. He secures the accountability of the Executive to Parliament in the field of financial administration. He helps in making legislative control over the Executive more effective by a sort of retrospective, an *ex post facto*, examination of the expenses incurred. It is because of the great importance of his functions that the Comptroller and Auditor-General has been given a status comparable to that of a Judge of the Supreme Court. He submits his reports to the President or the Governor in case of the Central or State accounts respectively. These reports are placed before Parliament or the concerned State Legislature [Art. 151].

In Britain, this officer performs a dual function. As Auditor-General, he audits and examines the Government accounts to ensure that each payment has been applied to the purpose for which it was appropriated by Parliament and not to any other purpose. The audit reports prepared by him are presented direct to the House of Commons and not to the government and so he is regarded as an officer of the House. He is appointed by the Crown on an address by the House of Commons which is moved by the Prime Minister with the agreement of the chairman of the Public Accounts Committee.

As Comptroller, he controls issue of money out of the Consolidated Fund by ensuring that nothing is taken out of it without due parliamentary authority. He would not allow issue of money for an unauthorised purpose; any excesses over parliamentary grants are prevented, and parliamentary control is thus made more effective.[7]

In India, this aspect of the Comptroller's functions has not yet been developed. Here he acts mainly as an auditor and points out the irregularities after the expenses have been incurred. He does not have that preliminary control over the issue of public money as his British counterpart has. Audit only constitutes a post-expenditure check.

The Constitution has left it to Parliament to enact a law to strengthen the position of the Comptroller and Auditor-General and equate him with his British counterpart. But this has not been done so far. Another weakness of the Indian system is the combination of the dual functions of Audit and Accounts in the same hands. Such a combination lessens the responsibility of the Administration

---

6. MUKHERJEA, *PARLIAMENTARY PROCEDURE IN INDIA*, 326; A.K. CHANDA, *INDIAN ADMINISTRATION*, 239(1967).

7. WADE AND PHILLIPS, *op. cit*., 273; WHEARE, *GOVERNMENT BY COMMITTEE*, 129 (1955); SHAKDHER, COMPTROLLER AND AUDITOR-GENERAL OF INDIA AND THE U.K., 4. *JI. of Parl. Inf*., 102; O. Hood Phillips, *CONSTITUTIONAL & ADM. LAW*, 226 (VII Ed., 1887).

to render accounts. Accounting is essentially an executive function and must be under the control of the Executive head of the department. Auditing is a kind of *quasi*-judicial function, which involves a checking of the financial transactions of the executive authorities. A combination of these two essentially distinct functions involves a kind of contradiction, for the officer compiling the accounts has also to certify as to their correctness.

The prevalent system was introduced by the British in the pre-Independence days on grounds of economy and expediency. It is out of tune with the modern context and can be justified no longer. Although opinions have been expressed from time to time to dissociate the two functions,[8] nothing has been done in this direction and *status quo* has been maintained so far.

(t) PARLIAMENTARY FINANCIAL COMMITTEES

In addition to all the institutional and procedural apparatus which the Constitution creates for ensuring parliamentary control over the Executive in financial matters, the Lok Sabha further has created two committees under its rules.

PUBLIC ACCOUNTS COMMITTEE

The Public Accounts Committee in India is a close replica of the British model.[9] It consists of fifteen members elected by Lok Sabha every year from amongst its members. A Minister cannot be its member. Seven members of the Rajya Sabha are also associated with the committee. A member of the opposition acts as its chairman.

The committee examines the accounts showing the appropriations of the sums granted by Parliament for government's expenditure. The committee also examines the accounts of the government corporations and autonomous and semi-autonomous bodies. The committee has power to hear officials or take evidence connected with the accounts under examination. The reports made by the Auditor-General would not be of much use if the Houses were to have no organ to examine these reports. It is with this in view that the Public Accounts Committee has been instituted. The committee functions on the basis of the audit reports made by the Comptroller and Auditor-General.

The basic purpose of the committee is to see that the grants made to the various departments are used only for the purposes set out in the estimates. The committee thus reviews the transactions of the departments after the Budget has been executed with a view to ensure that money is spent as Parliament intended, that due economy is exercised and that no waste or extravagance or losses occur in expenditure.

The committee is not an executive body, and has no power to disallow any item or to issue an order. Its reports are technically made to Prliament. The reports have no force in themselves but they carry great weight and influence and the government usually accepts its recommendations. A beneficial result of the activities of the committee is that it reminds the officials that their actions are subject to scrutiny on behalf of Parliament and this is a great check on the slackness, negligence or absolutism of the Executive.

---

8. Third Report of the Public Accounts Committee, 1952-53.
9. MUKHERJEA, *op. cit.*, 312; O. HOOD PHILLIPS, *supra*, footnote 7, at 227.

ESTIMATES COMMITTEE

The Estimates Committee consists of 30 members elected by Lok Sabha for one year from amongst its members. A Minister cannot be its member. Unlike the Public Accounts Committee, members of Rajya Sabha are not associated with the Estimates Committee.

The committee is authorised to take evidence connected with the estimates under examination. The committee presents its reports to the House. The committee, like its counterpart in Britain, examines the details of the estimates presented to Lok Sabha in the Budget with a view to secure economy and efficiency in administration, but it does not go so much into the policy which is regarded as government's responsibility. However, it can suggest alternative policies with a view to ensure efficiency and economy in the administration.

GENERAL FEATURES OF THE TWO COMMITTEES

The two committees, mentioned above, make parliamentary control of public finance more effective. Because of its large membership, pressure of work and inexpert character, Lok Sabha is hardly in a position to go into minute details and exert effective financial control over government. The committees being smaller bodies can scrutinise the government expenditure and estimates more thorougly than the House could ever do. Another advantage of the committees is that they directly contact the executive officers who spend money. They can call for evidence and documents. Discussion in these committees cuts across party lines.

After submitting their recommendations, the committees insist on a statement from the government showing which of these have been implemented, and to give its reasons for those not implemented. On the basis of the government's statements, the committees issue a second report discussing whether the action taken on their recommendations is adequate or not. The reports of these committees are of great value in checking laxity of administration and irregularity in expenditure. Though these reports are not discussed or formally adopted by the House, nevertheless, these reports carry the same weight and authority as if they have been so adopted.[10]

(iii) DELIBERATION AND DISCUSSION

The Houses of Parliament are constantly engaged in discussion, deliberation, debating public issues, shaping and influencing government policy and ventilating public grievances. This is constantly done through legislation, control of public finance, and debate on the President's address.[11] Debates of real value take place during discussion on appropriations when every branch of government administration runs the gauntlet of parliamentary criticism.[12]

Members of Parliament put questions to Ministers to obtain information on matters of public importance. Parliamentary questions provide a check on the day

---

10. WADE & PHILLIPS, *op. cit*., 192; JENNINGS, *op. cit*., 303-316, 332-7; MAY, *op. cit*., 672, 675; WHEARE, *op. cit.* 205, *et seq*; MUKHERJEA, *op. cit*., 305, 312; SHAKDHER, Two Estimates Committees 6 *JI. of PARL. Inf*., 76 (1960); CHANDA, *op. cit*., 170, 180: R.N. AGGARWAL, *FINANCIAL COMMITTEES OF THE INDIAN PARLIAMENT* (1966); B.B. JENA, *PARLIAMENTARY COMMITTEES IN INDIA*, 125-198 (1966).

11. *Supra*, pp. 73, 89, 94.

12. *Supra*, pp. 103, 104.

to day administration and help in securing redress of individual grievances. Stressing the importance of this procedure, ILBERT observes: "There is no more valuable safeguard against maladministration, no more effective method of bringing the searchlight of criticism to bear on the action or inaction of responsible Ministers and their subordinates. A Minister has to be constantly asking himself not merely whether his proceedings and the proceedings of those for whom he is responsible are legally or technically defensible, but what kind of answer he can give if questioned about them in the House and how that answer will be received."[13]

In addition, the rules of each House provide for many other procedural techniques for raising discussion on public issues in the House. A discussion may be raised by a member moving in the House a resolution on a matter of general public interest; by raising half an hour discussion on a matter of sufficient public importance which has been the subject of a recent question in the House and the answer to which needs elucidation on a matter of fact; by raising a discussion on a matter of urgent public importance for short duration. From time to time, Ministers make statements of policy in the Houses. Specific aspects of government policy are debated from time to time.

An adjournment motion, *i.e*. a motion for adjournment of the business of the House, may be moved by a member in the Lok Sabha for discussing a definite matter of urgent public importance. If the Speaker holds the motion in order and 50 members of the House support it, theordinary time table of the day is suspended, and a full debate is held on the subject. Such a motion is very rarely admitted by the Speaker for it involves an element of censure of the government. The advantage of the procedure is that once the Speaker agrees that the matter raised is definite and urgent, a debate is almost assured for howsoever overwhelming the government majority in the House may be, it cannot prevent a discussion as even the weakest opposition may muster at least 50 votes.

In Rajya Sabha, the procedure by way of an adjournment motion is not available but a similar purpose is served through a motion for papers.[14]

Elaborate discussion may take place in Lok Sabha on a motion of no confidence in the Council of Ministers. Such a motion cannot be discussed in Rajya Sabha, for according to Art. 75(3), the Council of Ministers is collectively responsible only to Lok Sabha.[15]

Petitions may be submitted to a House on a Bill introduced there; and to, Lok Sabha, in addition, on any other matter connected with pending business or on a matter of general public importance. Each House has a Committee on Petitions to which petitions are forwarded for consideration and report.

(iv) PARLIAMENTARY COMMITTEES

Under its rules of procedure and conduct of business, each House has instituted an elaborate committee system with a view to better organize its work and discharge its functions effectively. The committee system helps in conserving the

---

13. ILBERT, *PARLIAMENT*, 98.
14. *KAUL AND SHAKDHER, PRACTICE AND PROCEDURE OF PARLIAMENT*, Ch. III (2000).
15. Ch. III, *infra.*

time of the House, increasing expertise and enables the House to exert some control over the government.

Parliament discusses policy, but it is in the committees that details can be discussed, administrators made to give evidence and matters examined thoroughly. On the floor of the House, discussions are on party lines. In a committee, the atmosphere is informal and business-like almost free of party politics.

Lok Sabha has the following committees:—

(*i*) Committee on Private Members' Bills and Resolutions;[16]

(*ii*) Committee on Petitions;[17]

(*iii*) Committee on Public Accounts;[18]

(*iv*) Committee on Estimates;[19]

(*v*) Committee on Leave of Absence from Sittings of the House;[20]

(*vi*) Committee of Privileges;[21]

(*vii*) Committee of Subordinate Legislation;[22]

(*viii*) Business Advisory Committee is nominated by the Speaker and has 15 members including the Speaker who is its chairman. Its main function is to recommend the allocation of time for discussion of various stages of such government Bills and other government business as may be referred to it by the Speaker in consultation with the Leader of the House.

The committee consists of members from all sections of the House. Its decisions are reported to the House which may accept them by passing a motion to that effect. The committee helps in better planning of work of the House. As it arrives at agreed decisions, wastage of the time of the House in unnecessary wrangling over allocation of time is avoided.

(*ix*) Committee on Government Assurances: Its function is to scrutinise the assurances given by the Ministers in the House from time to time and to report to what extent these assurances have been implemented and whether the implementation has taken place within the minimum time necessary for the purpose.

The committee consists of 15 members nominated by the Speaker. A Minister cannot become its member. Its report is presented to the House.

The committee has sprung up because of the desire of the members to keep a check on the promises which Ministers usually make on the floor of the House. The committee reports on the gap between prom-

---

16. *Supra*, pp. 93, 94.
17. See above.
18. *Supra*, p. 110.
19. *Supra*, p. 111.
20. *Supra*, p. 61.
21. *Infra*, Sec. L.
22. JAIN, *A TREATISE ON ADMINISTRATIVE LAW*, I, 142-52.

ise and fulfilment and is a manifestation of the parliamentary mood of watchfulness over the government, and thus plays an important role.

(*x*) Rules Committee considers matters of procedure in Lok Sabha, and recommends amendments to its Rules. It consists of 15 members nominated by the Speaker who is its *ex officio* Chairman.

(*xi*) General Purposes Committee: The Speaker is its *ex officio* Chairman. Its function is to advise on such matters concerning the affairs of the House as the Speaker may refer to it from time to time.

(*xii*) House Committee is nominated by the Speaker. Its function is advisory and it deals with all questions relating to residential accommodation for members of Lok Sabha.

(*xiii*) Committee on Public Undertakings examines the working of the public undertakings mentioned in a schedule to the Rules of the House.

Besides the above, select committees are appointed by the House on an *ad hoc* basis from time to time to scrutinise the provisions of important Bills. A select committee can hear expert evidence and representatives of various interests affected by the Bill and suggest amendments to it. Its report is placed before the House. A select committee performs a very useful function as it thoroughly scrutinises the Bill and discusses the underlying policy in an informal atmosphere away from the public gaze.

Lok Sabha may constitute a committee for any other specific purpose. A committee of Lok Sabha has power to send for persons, papers and records and to take evidence on any matter. The government, however, has the privilege to decline to produce a document before the committee on the ground that its disclosure will be prejudicial to the safety or interest of the state.

Rajya Sabha also has several committees, *viz*., Business Advisory Committee, Committee on Petitions,[23] Committee of Privileges,[24] Rules Committee, Committee on Subordinate Legislation,[25] all practically similar to their counterparts in Lok Sabha.

Besides, Rajya Sabha also appoints select committees on Bills and may appoint any other committee for any other purpose.

There are some Joint committees consisting of members of both the Houses, such as, Library Committee, Committee on the Welfare of the Scheduled Castes and Scheduled Tribes[26], Committee on Empowerment of Women[27]. From time to time, joint select committees for scrutinising Bills are appointed by the two Houses.

Besides, some parliamentary committees are appointed under statutory provisions, as for example, a joint committee functions under the Salaries and Allowances of Parliament Act, 1954, for the purpose of making rules under the Act.[28] Reference has already been made to the Joint Committee of the two Houses on Offices of Profit.[29]

---

23. *Supra*, p. 113.
24. *Infra*, Sec. L.
25. *Supra*, footnote 22.
26. *Infra*, Ch. XXXV.
27. *Ibid.*
28. *Supra*, p. 61.
29. *Supra*, pp. 52, 53.

K. INTERRELATION OF THE HOUSES

The fact that Parliament is bi-cameral gives rise to the problem of inter-relationship between the two Houses. This topic can be considered under the following several heads:

(i) LEGISLATIVE PROCESS (OTHER THAN MONEY BILLS)

The two Houses enjoy co-ordinate power in this area.[30] A deadlock between them in respect of a Bill is resolved through their joint session. This method recognises in theory the equality of the two Houses.

As a hypothesis, Lok Sabha with 545 members can always have its way in a joint session over Rajya Sabha with its 250 members but, in practice, this may not always be so. Lok Sabha can prevail over Rajya Sabha only if most of its members support its stand in the joint session. But, as both the Houses are divided into political parties, usually, members of one political party in both Houses may be expected to go by the party loyalty and vote in one way irrespective of their loyalty to the House to which they belong. It may so happen that the combined strength of the ruling party in the two Houses may be less than that of the Opposition parties, and in such an eventuality the result of a joint session may be quite embarrassing to the government.

The device of joint session to resolve the inter-House deadlock has been adopted in India, with some adaptation, from Australia. In Australia, an ordinary Bill needs the assent of both Houses to become a law. If a Bill is passed twice by the Lower House, and rejected twice by the Upper House, a deadlock ensues. Both Houses are then dissolved and if the deadlock persists even after fresh elections, a joint session of both Houses is summoned.

The position in India differs from that in Australia in two respects: (1) after deadlock, the Houses in India are not dissolved but are continued in operation; and (2) a Bill does not have to be passed by Lok Sabha and rejected by Rajya Sabha twice before a joint session is called.

In Britain, it needs the assent of both Houses to pass a Bill (other than a Money Bill). In case of difference of opinion between the two Houses, it is the House of Commons which ultimately prevails. The House of Lords has only a suspensory veto over public Bills for a maximum period of one year.

The procedure to resolve the inter-House deadlock in India differs from that in Britain. While India has the procedure of the joint session, in Britain the efflux of time resolves the differences between the two Houses.

In the United States, the two Houses enjoy co-equal legislative powers, and one House cannot override the other House. Legislation can originate in any House but the consent of both Houses is necessary before a Bill becomes law. The U.S. Constitution has no provision for breaking an inter-House deadlock. The practice is for each House to appoint a committee and the two committees then negotiate and reach a compromise which each House invariably accepts.

In Canada, there is a formal equality between two Houses in matters of legislation, and both Houses should agree before a Bill can become a law. In case of a deadlock, the Executive may appoint four or eight new Senators. But this pro-

---

30. *Supra*, Sec. J(i).

vision has never been utilised because of the compliant attitude of the Senate.[31] Being a nominated body, it is largely insignificant and a political non-entity. Rajya Sabha, however, is much more of a living organism.

(ii) FINANCIAL LEGISLATION

In financial matters, the effective power rests with the Lok Sabha. The reason for this inequality between the two Houses is that Lok Sabha being directly elected, it represents the people who provide the money through taxation, whereas Rajya Sabha is not such a representative body. Lok Sabha has full control over a Money Bill which can become law without Rajya Sabha's concurrence, and, therefore, no deadlock can arise between the two Houses in this case.[32]

Similar is the position in Britain. The House of Lords has no effective power to interfere with taxation or financial matters. The House of Commons has complete control over a Money Bill.

In the U.S.A., both Houses are co-equal in financial matters except that a bill to raise revenue originates in the House of Representatives and not in the Senate. The Senate, however, has power to amend such a Bill, while Rajya Sabha does not have any such power.

In Australia, assent of both Houses is needed to pass a Money Bill though it may originate only in the Lower House. The Senate has power to reject a Money Bill, but cannot amend it, though it may request the Lower House to amend it and the House may or may not accept any of the Senate's recommendations. In practice, however, Senate's power to reject Money Bills, and submit requests for amendments now seem almost equivalent to the power to amend since the Lower House, when faced with the alternative of rejection of a Money Bill by the Senate, or accepting its requests for amendments, would generally prefer the latter course. In case of a deadlock, the usual provision of double dissolution applies. In India, Rajya Sabha cannot reject a Money Bill and there cannot be a deadlock between the Houses in this regard.

In Canada, the Lower House has exclusive power to initiate tax and appropriation measures but the Senate has power to amend such bills. In case of a deadlock, the usual provision available in case of ordinary legislation applies.

(iii) OTHER AREAS

(a) IMPEACHMENT

In Britain, the Commons can impeach any person before the Lords for any crime or political misdemeanour, but this institution has now fallen into disuse with the emergence of the concept of ministerial responsibility.[33]

In the U.S.A., an impeachment is tried by the Senate on charges preferred by the House of Representatives; the President, Vice-President and civil officers including federal judges can be impeached for treason, bribery and other high crimes. Thus, in U.K. and U.S.A., the power to initiate proceedings for impeachment lies with the popular chamber, and impeachment is tried in the Upper Chamber.

---

31. DAWSON, *GOVERNMENT OF CANADA*, 282, 295 (1970).
32. *Supra,* Sec. J(ii).
33. WADE AND PHILLIPS, *op. cit*., 97-8.

There is no provision for impeachment in Canada and Australia.

In India, on the other hand, the resolution to impeach the President may be moved in either House and the impeachment will be tried in the other House and, thus, both Houses enjoy co-equal status in this respect.[34]

(b) REMOVAL OF A JUDGE OF THE SUPREME COURT OR A HIGH COURT

Both Houses enjoy co-equal power in this respect as a resolution to dismiss a Judge is to be passed by each House [Arts. 124 and 217][35].

(c) ELECTION OF THE PRESIDENT:

An elected member of each House of Parliament has the same number of votes for election of the President.[36]

(d) ELECTION OF VICE-PRESIDENT

He is elected by members of both Houses assembled in a joint meeting [Art. 66(1)].[37]

(e) REMOVAL OF THE VICE-PRESIDENT

The resolution to remove the Vice-President is to be passed by both Houses though there is a slight difference in their respective roles.

The resolution should first be passed by Rajya Sabha, whose Chairman the Vice-President is, by a majority of all its then members; it becomes effective when later Lok Sabha agrees to it by a simple majority [Art. 67].[38]

(f) CONTROL OF THE EXECUTIVE

While both Houses control the Executive through criticism and discussion, *etc*., it is the Lok Sabha which plays a predominant role in this respect.[39]

The same is the case in Britain, Australia and Canada. In America, the form of government being presidential, no question of its direct responsibility to any House arises.[40]

(g) AMENDMENT OF THE CONSTITUTION

Both Houses have co-equal power in the matter of passing a Bill to amend the Constitution. The Constitution has no provision to break an inter-House deadlock over a proposed constitutional amendment [Art. 368][41].

(h) DECLARING A STATE MATTER AS BEING OF NATIONAL IMPORTANCE

Lok Sabha has absolutely no power in this respect [Art. 246(1)]. Only Rajya Sabha can pass a resolution to this effect. Presumably, the power has been given to the Rajya Sabha in its character of a House representing the States.[42]

---

34. *Infra*, Ch. III, Sec. A(i).
35. Chs. IV and VIII, *infra*.
36. *Infra*, Ch. III, Sec. A(i).
37. *Infra*, Ch. III, Sec. A(ii).
38. *See*, *infra*, Ch. III, Sec. A(ii).
39. Ch. III, Sec. B, *Infra.*
40. Ch. III, Sec. E, *infra.*
41. *Infra*, Ch. XLI.
42. *Supra*, Sec. A, Ch. X, *infra.*

(i) PRESIDENTIAL ORDINANCE

President's ordinance is laid before both Houses and it lapses if both Houses pass a resolution disapproving it [Art. 123(2)].[43] The power of the two Houses is therefore co-ordinate in this matter.

(j) DECLARATION OF AN EMERGENCY

A declaration of emergency is laid before both Houses and it cannot remain in force for more than one month unless, before the expiry of that period, it is approved by both Houses [Art. 352(2)].[44]

(k) FAILURE OF CONSTITUTIONAL MACHINERY IN A STATE:

A proclamation of failure of constitutional machinery in a State is laid before both Houses and it ceases to operate after two months if in the meantime it is not approved by both Houses [Art. 356(3)].[45]

(iv) ASSESSMENT OF THE ROLE OF RAJYA SABHA

From the above, it is clear that Rajya Sabha is not a non-entity and is very much of a living organism. In some matters, its powers are inferior to, but in many other matters, it stands *pari passu* with, Lok Sabha. In the matter of declaring a State subject as being of national importance it has even an exclusive power. However, in the context of the totality of the government process in the country, Rajya Sabha is less powerful than Lok Sabha.[46]

Because of the fact that the Executive is responsible to Lok Sabha and not to Rajya Sabha, power seeks to gravitate to Lok Sabha. A majority of Ministers belong to Lok Sabha and government is more sensitive to the criticism made and views expressed in that House. Lok Sabha has the effective financial power. It is elected by the people directly on adult franchise and thus it reflects in a more representative manner the current public opinion. Rajya Sabha, on the other hand, being based on a very restricted franchise, does not command so much of public appeal and representative character as does the Lok Sabha.

However, the status of Rajya Sabha is comparatively superior to that enjoyed by the Upper Chamber in Britain and Canada. Because the Senate in Australia has substantial powers in financial matters, it may be said to occupy a more significant position than does Rajya Sabha.

The strongest Upper Chamber is the Senate in the U.S.A., because, in addition to its practically co-ordinate powers with the Lower House in financial and other legislation (without there being a method to break an inter-House deadlock except negotiation), it also has certain powers which the other House does not possess, *viz*., the power to approve treaties and high appointments made by the President.

The existence of two chambers having co-ordinate authority in several matters does create the possibility of complex constitutional situation arising at

---

43. Ch. III, Sec. D(ii)(d) *infra.*
44. *See, infra,* Ch. XIII.
45. *See, infra,* Ch. XIII.
46. Ch. III, Sec. B, *infra.*

times. In India, however, not many complications have arisen so far, and the relationship between the two Houses has been, on the whole, smooth. The Indian parliamentary system will work well if one political party has majority in both Houses.

So long as the Congress Party enjoyed majority in both Houses, the system worked without much difficulty. But, now, that the government has majority in Lok Sabha and not in Rajya Sabha, where the opposition enjoy majority support, stresses and strains between the two Houses arise from time to time. Such a situation arises because while all the members of Lok Sabha are elected at one and the same time, all the members of Rajya Sabha are not elected at one time. Nearly 1/3 members of Rajya Sabha retire every two years. This means that while Lok Sabha reflects the present day public mood, it taken six years for Rajya Sabha to fully adjust to the present public mood and political realities. In the meantime, the situation may cause political embarrassment to the government if on a specific measure, Lok Sabha supports it, but Rajya Sabha refuses to support it.

What will the government do if the two Houses do not agree on a matter in which both Houses enjoy co-ordinate power? Rajya Sabha is not subject to dissolution; the government cannot act till both Houses agree and it is responsible to the Lower House and not to the Upper House. Except legislation and money matters, the Constitution does not prescribe any machinery to break the deadlock between the Houses. The only practical way out for the government would be to seek to promote some sort of a compromise between the two Houses. This phase appeared for a while during the Janata Government regime when the government enjoyed majority in Lok Sabha but was in a minority in the Rajya Sabha.

The present-day coalition government has a majority in Lok Sabha but not in Rajya Sabha. This is a source of embarrassment to the government at times. For example on the 12th February, 99, the President issued a proclamation under Art. 356 [see head (XI) above] for the State of Bihar. The Government in the State was dismissed and presidential rule was imposed. This proclamation was approved by Lok Sabha but the Central Government did not place it in Rajya Sabha as the Government did not have majority in that House and it became clear that the House would not approve the proclamation. Consequently, the Central Government revoked the proclamation on March 8 resulting in the restoration of the former Government in office in the State.

L. PARLIAMENTARY PRIVILEGES

With a view to enabling Parliament to act and discharge its high functions effectively, without any interference or obstruction from any quarter, without fear or favour, certain privileges and immunities are attached to each House collectively, and to the members thereof individually.

Members of Parliament have been given somewhat wider personal liberty and freedom of speech than an ordinary citizen enjoys for the reason that a House cannot function effectively without the unimpeded and uninterrupted use of their services. Privileges are conferred on each House so that it may vindicate its authority, prestige and power and protect its members from any obstruction in the

performance of their parliamentary functions.[47] Legislative privileges are deemed to be essential in order to enable the House to fulfil its constitutional functions, to conduct its business and maintenance of its authority.

In India, parliamentary privileges are available not only to the members of a House but also to those who, though not members of a House, are under the Constitution entitled to speak and take part in the proceedings of a House or any of its committees. These persons are Ministers and the Attorney-General.[48]

The privileges of a House have two aspects—(i) external, and (ii) internal. They refrain anybody from outside the House to interfere with its working. This means that the freedom of speech and action are restricted to some extent. The privileges also restrain the members of the House from doing something which may amount to an abuse of their position.[49]

Article 105 defines the privileges of the two Houses of Parliament. This constitutional provision does not exhaustively enumerate the privileges of the two Houses. It specifically defines only a few privileges, but, for the rest, it assimilates the position of a House to that of the House of Commons in Britain. The endeavour of the framers of the Constitution was to confer on each House very broad privileges, as broad as those enjoyed by the House of Commons which possesses probably the broadest privileges as compared to any other legislature in the world.

It may be noted that under Art. 194, in the matter of privileges the position of State Legislatures is the same as that of the Houses of Parliament. Therefore, what is said here in the context of Art. 105 applies *mutatis mutandis* to the State Legislatures as well.[50] Questions regarding legislative privileges concerning State Legislatures have been raised frequently before the courts and these judicial pronouncements are as relevant to Art. 105 as to Art. 194 and a number of these cases are cited here.

(i) PRIVILEGES EXPRESSLY CONFERRED BY THE CONSTITUTION

(a) FREEDOM OF SPEECH

The essence of parliamentary democracy is a free, frank and fearless discussion in Parliament. For a deliberative body like a House of Parliament, freedom of speech within the House is of utmost significance. To enable members to express themselves freely in the House, it is essential to immunize them from any fear that they can be penalised for anything said by them within the House.

---

47. For a detailed study of Parliamentary Privileges, see : MUKHERJEA, *PARLIAMENTARY PROCEDURE IN INDIA*, 350-407 (1967); *Privileges Digest* (Lok Sabha Secretariat)*; Journal of Parliamentary Information*; HIDAYATULLAH, PARLIAMENTARY PRIVILEGES : PRESS AND THE JUDICIARY, 2 JI. of *Constitutional and Parl. Studies*, I (April-June, 1968); Report of the Select Committee on Parliamentary Privilege (House of Commons, 1967); DE SMITH, *CONSTITUTIONAL & ADMN. LAW*, 316-332 (1971); CAMPBELL, *PARLIAMENTARY PRIVILEGE IN AUSTRALIA* (1966); ERSKINE MAY, *PARLIAMENTARY PRACTICE*; JAIN, M.P., *PARLIAMENTARY PRIVILEGES AND THE PRESS*, (1984); see also *P. Sudhir Kumar v. Speaker, A.P. Legislative Assembly*, (2003) 10 SCC 256 : (2002) 2 Scale 254.

48. Arts. 88, 105(4); *supra*, 61.

49. See SAMARADITYA PAL—LAW OF CONTEMPT (2006); JAGDISH SWARUP—CONSTITUTION OF INDIA, 2nd Edn., Vol. 2, Ed.L.M. SINGH (2006).

50. Ch. VI, *infra.*

The rule of freedom of speech and debate in Parliament became established in Britain in the 17th century in the famous case of *Sir John Eliot*.[51] Eliot was convicted by the Court of King's Bench for seditious speeches made in the House of Commons. The House of Lords reversed this decision on the ground *inter alia* that the words spoken in Parliament should only be judged therein. Finally, the Bill of Rights, 1688, laid down that the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place outside Parliament. A member may thus say whatever he thinks proper within the House and no action can be brought against him in any court for this.

In India, the freedom of speech in Parliament has been expressly safeguarded by Arts. 105(1) and (2). Art. 105(1) says: "Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of Parliament, there shall be freedom of speech in Parliament". The corresponding constitutional provision for the State Legislatures is Art. 194(1).[52]

Article 105(1) secures freedom of speech in Parliament to its members. This freedom is "subject to the provisions of this Constitution". These words have been construed to mean subject to the provisions of the Constitution which regulate the procedure of Parliament.[53], i.e. Arts. 118 and 121.

Article 105(2) confers immunity in relation to proceedings in courts. It says that no member of Parliament is liable to any 'proceedings' in any court "in respect of" anything said, or any vote given in Parliament, or a committee thereof. The word 'proceedings' means any proceeding civil, criminal or even writ proceedings.[54] Nothing said within a House is actionable or justiciable.

This freedom is, however, subject to the provisions of the Constitution. A constitutional restriction imposed by Art. 121 on this freedom is that no discussion can take place in any House with respect to the conduct of a Supreme Court or a High Court Judge in the discharge of his duties except when a motion for his removal is under consideration. This provision is very essential to protect the integrity of the judiciary so that it can function without being subjected to political pressures and criticism which it cannot meet or answer publicly. However, the question whether a member has contravened Art. 121 while speaking in the House is one for determination by the presiding officer of the House and not for the court.[55]

Further, the rules of procedure of a House somewhat curtail the members' freedom of speech so that the freedom may not degenerate into an unrestrained licence of speech. There, however, prevails an absolute immunity from any court action against a member for anything said within the House. If a member exceeds the limits imposed on this freedom by the Constitution or the rules of procedure of the House, he can be dealt with by the Speaker, or the House itself, but not by a court. A person aggrieved by a speech of a member in the House has no remedy

---

51. 3 State Trials, 294.
52. See, Ch. VI, *infra.*
53. See, *M.S.M. Sharma v. Sinha* (1) AIR 1959 SC 395, 408-9 : 1959 Supp (1) SCR 806; *Keshav Singh's* case, AIR 1965 SC 745, 76.
54. *A.K. Subbiah v. Karn. Leg. Council, infra,* footnote 57, *infra*.
55. *Ibid.*
The corresponding provision for the State Legislatures is Art. 194(2).

in the courts.[56] A statement made in the House derogatory to the High Court does not amount to its contempt even though in making the statement the provision of the Constitution is infringed.[57]

The Rajya Sabha has decided that a Parliament member cannot be questioned in any court or any place outside Parliament for any disclosure he makes in Parliament. The reason is that if such questioning is permitted, it would amount to interference with his freedom of speech in Parliament.[58] The Lok Sabha Committee on Privileges has held on August 12, 1970 that it amounts to contempt of the House and a breach of its privilege if a person were to file a suit for damages in a court against a member of Parliament for what he says on the floor of the House.

The principle underlying Arts. 105(1) and 105(2), can be illustrated by reference to *Tej Kiran.*[59] The plaintiffs were disciples of Jagadguru Shankaracharya. In March, 1969, at the World Hindu Religious Conference held at Patna, Shankaracharya made certain remarks concerning untouchability. On April 2, 1969, a discussion took place in Lok Sabha in which certain derogatory words were spoken against Shankaracharya. His disciples filed a suit for damages against six members of the House. The High Court rejected the plaint and the plaintiffs came before the Supreme Court by way of appeal.

The Supreme Court dismissed the appeal. Referring to Art. 105(1), the Court emphasized that whatever is said in Parliament, i.e. during the sitting of Parliament and in the course of the business of Parliament, is immunized. "Once it was proved that Parliament was sitting and its business was being transacted, anything said during the course of that business was immune from proceedings in any court".[60] It is of the essence of parliamentary democracy that people's representatives should be free to express themselves without fear of legal consequences. The members are only subject to the discipline of the Speaker and the House in the matter. The courts have no say in the matter and should really have none.

Two very significant questions concerning parliamentary privileges have been decided by the Supreme Court in *P.V. Narsimha Rao v. State.*[61] These questions arose in the following factual context. The Narsimha Rao Government at the Centre did not enjoy majority in Lok Sabha in 1993. A vote of no-confidence was moved against the Government by the opposition parties. To avert defeat on the floor of the House, certain members of the ruling party gave large sums of money to a few members of the Jharkhand Mukti Morcha (JMM) to vote against the motion on the floor of the House. Consequently, the no-confidence motion was defeated in the House with 251 for and 265 against. Two questions arose for the consideration of the Supreme Court in the instant case:

(a) whether by virtue of Arts. 105(1) and 105(2), a member of Parliament can claim immunity from prosecution before a criminal court on a charge of bribery in relation to the proceedings in Parliament?

---

56. *Jagdish Gandhi v. Leg. Council, Lucknow,* AIR 1966 All. 291.
57. *Surendra v. Nabakrishna,* AIR 1958 Ori. 168; *A.K. Subbiah v. Karnataka Leg. Council,* AIR 1979 Kant. 24.
58. XII Report of the Committee of Privileges, Rajya Sabha, Dec. 6, 68; R.S. Debates, Dec. 20, 68.
59. *Tej Kiran Jain v. Sanjiva Reddy,* AIR 1970 SC 1573 : (1970) 2 SCC 272; AIR 1971 Del 86.
60. AIR 1970 SC at 1574. Also see, *Church of Scientology v. Johnson-Smith,* [1972] 1 Q.B. 522.
61. AIR 1998 SC 2120 : (1998) 4 SCC 626.

(b) whether a member of Parliament is a 'public servant' under the Prevention of Corruption Act, 1988?

The five Judge Bench deciding the case split 3 : 2

On the first point, the majority view is that ordinary law does not apply to acceptance of bribery by a member of Parliament in relation to proceedings in Parliament. The Court gave a very broad interpretation to Art. 105(2). On behalf of the majority, BHARUCHA, J., has stated :

> "Broadly interpreted, as we think it should be, Art. 105(2) protects a Member of Parliament against proceedings in Court that relate to, or concern, or have a connection or nexus with anything said, or a vote given, by him in Parliament"[62]

The majority has ruled that while the bribe-givers (who are also members of Parliament) can claim no immunity under Art. 105(2), the bribe-takers stand on a different footing. The alleged bribe-takers are said to have received monies "as a motive or reward" for defeating the no-confidence motion and, thus, the nexus between the bribe and the non-confidence motion is explicit. The majority Judges have insisted that to enable members to participate fearlessly in Parliamentary debates, members need the wider protection of immunity against all civil and criminal proceedings that "bear a nexus to their speech or vote".

The reason for such a broad view is that otherwise a member who makes a speech or cast a vote that is not to the liking of the powers that be may be troubled by a prosecution alleging that he has been paid a bribe for the purpose. But a member who is alleged to have accepted bribe but has not voted cannot enjoy immunity under Art. 105(2). Also, the members of the House who have given the bribe do not enjoy any immunity from prosecution. On this view, the majority held that the four JMM members who had taken the money and voted against the motion were not guilty of corruption. But one member (Ajit Singh) who had taken the money but did not vote was held liable to be prosecuted.

But the minority Judges expressed the view, (per S.C. AGRAWAL, J.) narrowly interpreting Art. 105(2), that the immunity under the Article which can be claimed is "the liability that has arisen as a consequence of the speech that has been made or the vote that has been given in Parliament'.[63]

The minority Judges have argued that the criminal liability incurred by a Member of Parliament who has accepted bribe for speaking or giving his vote in Parliament in a particular manner arises independently of the making of the speech or giving of vote by the member and such liability cannot be regarded as a liability "in respect of anything said or any vote given in Parliament".[64]

---

62. *Ibid,* at 2182.

63. *Ibid,* at 2147.

64. In 1972, in the U.S.A., the Supreme Court has decided in *U.S. v. Brewster,* (1972) 33 L.Ed, 2d. 507, by majority (6:3) that the charter of absolute freedom given to the members of the Congress cannot be regarded as a charter for corruption. It amounts to preventing the basic concept behind the charter of freedom. Members cannot sell themselves. On the other hand, the minority took the view that if such freedom was not guaranteed to the members of the legislatures, then they may feel constrained in the matter of speaking or voting on the floor of the House. The threat of prosecution may have a chilling effect on the right of free speech in the House. The *Brewster* case was widely referred to by the Judges in the *Narsimha* opinion. The majority in *Narsimha* followed the minority opinion in *Brewster* whereas the minority in *Narsimha* went by the majority view in Brewster.

In the view of the author, the minority view is preferable to the majority view which may open the gate for corruption among members of Parliament (or of the State Legislatures). When a member casts a vote after accepting money it is a travesty of a free vote. Nothing which promotes corruption in any sphere of life ought to be given constitutional protection.

It is true that the House can hold a member accepting bribe for voting in a particular manner guilty of its contempt, but the House has very limited penal power (see below). Another difficulty is that with the present politicisation in the country, any action against a guilty member will become politicised, dividing the House on political lines.

The members of Parliament who represent the people must set a very high standard of rectitude than ordinary people. A much more serious aspect of the matter is that since the life of the government depends on the majority support in the House, any government may be destablised by interested persons by bribing the MPs.

On the second question mentioned above, all the Judges are agreed that a member of Parliament or a State Legislature is a 'public servant' under S. 2(c) of the Prevention of Corruption Act, 1988, because he holds an office and he is required and authorised to carry out a public duty, viz., effectively and fearlessly representing his constituency.

Under S. 19(1) of the Prevention of Corruption Act, a public servant cannot be prosecuted for certain offences without the sanction of the competent authority, i.e., the authority competent to remove him from office. In case of a member of Parliament/State Legislature, there exists no such authority capable of removing him.[65] Therefore, the majority view is that a member can be prosecuted for such offences without such sanction, but after obtaining the permission of the Chairman/Speaker of the concerned House, as the case may be.

This part of the ruling is not palatable. Speaker is a political creature and it is difficult to visualise that he would use this power in an objective, impartial and a non-partisan manner.

The minority view is that a member cannot be prosecuted for such offences for which sanction of the competent authority is needed. In any case, all judges have urged Parliament to make suitable provision for the purpose and remove the lacuna in the law.

In a recent decision the Supreme Court held that a special Judge exercising jurisdiction under the provisions of the West Bengal Criminal Law Amendment (Special Courts) Act, 1949, cannot take cognizance of an offence against a member of the State Legislative Assembly when he had ceased to be an MLA, though the offence was alleged to have been committed when he was a sitting MLA.[66]

WORDS SPOKEN OUTSIDE A HOUSE

A member is protected for what he says within the House, but not for words spoken outside the House except when these are spoken in the essential perform-

65. See, *supra*, note 53; *Election Commission v. Subramaniam Swamy*, AIR 1996 SC 1810.
66. *State of W.B. v. Shyamadas Banerjee*, (2008) 9 SCC 45, at page 47.

ance of his duty as a member, *e.g*., a conversation on parliamentary business in a Minister's private house.

This view arises out of an extended meaning given to the term "proceedings in Parliament" used in the Bill of Rights.[67] Though the relevant Article in the Constitution confers the freedom of speech in Parliament, or a committee thereof, yet it may be possible to claim the freedom on an extended basis on the analogy of the House of Commons. But letters written by M.P.s to Ministers are not privileged.[68]

A member who publishes outside Parliament a slanderous speech made by him within Parliament is not protected from a court action.[69]

(b) PUBLICATIONS UNDER PARLIAMENTARY AUTHORITY

In Britain, in *Stockdale v. Hansard*,[70] a book containing defamatory matter against the plaintiff published under the authority of the House of the Commons, was held to enjoy no privilege and damages were awarded to the plaintiff against the publisher. As a consequence thereof, the Parliamentary Papers Act, 1840, was passed which made the publication of any reports, papers, votes, or proceedings of a House of Parliament, ordered by the House, completely privileged whether the publication was only for the use of the members of Parliament, or for a wider circulation.

On the same basis, in India, under Art. 105(2), no person is to be liable to any proceedings in any court in respect of the publication of any report, paper, votes or proceedings by or under the authority of a House of Parliament. Thus, all persons connected with the publication of proceedings of a House are protected if the same is made under the authority of the House itself. This Article does not protect publications made without the authority of the House.

To explain the true scope of Arts. 105(1) and 105(2), reference may be made to the Supreme Court case *Dr. Jatish Chandra Ghosh v. Hari Sadhan Mukerjee.*[71] A member of the State Legislature gave notice of his intention to ask certain questions in the Assembly. The Speaker disallowed the questions. Nevertheless, the member published the disallowed questions in a local journal. A government servant filed a complaint (under Ss. 500 and 501, I.P.C.) against the member as well as the editor, printer and publisher of the journal that the member concerned had published false and scandalous imputations against him with a view to harming his reputation. The matter ultimately came before the Supreme Court.

The Court ruled that the said publication did not fall within the scope of Art. 194(2) [equivalent to Art. 105(2)][72] as it was neither under the authority of the House nor "anything said or vote given by a member of the Assembly." Immunity of a member of a House for speeches made by him in the House does not extend to publication thereof by him outside the House. A member has an abso-

---

67. DE SMITH, PARLIAMENTARY PRIVILEGE AND THE BILL OF RIGHTS, 21 *Mod. L.R.,* 477-82 (1958).
68. *The Strauss* case, 2. *Privileges Dig*., 107-41 (1958).
69. *Jatish Chandra v. Hari Sadhan Mukherjee,* AIR 1961 SC 613 : (1961) 3 SCR 486.
70. (1839) L.J. (N.S.) Q.B. 294.
71. *Supra*, footnote 60.
72. Art. 194 defines the privileges of the State Legislatures, see, *infra,* Ch. VI. Arts 105 and 194 are similar in phraseology.

lute privilege in respect of what he says within the House but has only a qualified privilege in his favour even in respect of what he says himself in the House if he causes the same to be published in the public press. The Court left open the question whether disallowed questions can be said to form part of the proceedings of a House of Legislature.

A wider privilege is however available in Britain. In the course of a debate in the House of Lords, allegations disparaging to the character of the plaintiff were spoken. A faithful report of the debate was published in the *Times*. The plaintiff sued the *Times* for libel. In *Wason v. Walter,*[73] the court dismissed the action saying that the advantage to the community from publication of the proceedings of a House "is so great, that the occasional inconvenience to individuals arising from it must yield to the general good". Therefore, a fair and faithful report of the proceedings of a House is not actionable in Britain. Publication of a garbled or partial report, or of detached parts of proceedings, with intent to injure an individual, is not entitled to protection.

Article 105(2) does not confer such a protection. A newspaper not being a publication authorised by the Legislature was not protected if it published a faithful report of a debate in a House which contained matter disparaging to the character of an individual, or amounting to the contempt of court.[74]

Reference may be made in this connection to *Suresh Chandra Banerji v. Punit Goala.*[75] A member made a speech in the W.B. Legislative Assembly. A newspaper published a report of the proceedings of the House including the speech. The complainant filed a complaint before the chief presidency magistrate against the newspaper alleging that the said speech contained matter highly defamatory to him and the newspaper by publishing the speech had defamed him. The Calcutta High Court ruled that the member who had made the speech in the House could not be prosecuted for uttering the words complained of . But as the reports of the said speech in the newspaper were not published by or under the authority of the State Assembly, Art. 194(3) [Art. 105(3) in case of Parliament] had no application whatsoever. The High Court refused to apply *Wason v. Walter* principle to India. The Court stated : "We have to apply the criminal law of the land and unless reports of the proceedings in a Legislative Assembly are given a privilege by Indian Law then we cannot possibly extend the principle of *Wason v. Walter*... to proceedings in this country". The offence of defamation is dealt with under Ss. 499 and 500 of the Indian Penal Code.

This state of law came to be regarded as unsatisfactory as it was felt that many advantages would accrue to the community if the newspapers were enabled to publish reports of proceedings of Parliament in good faith. Accordingly, Art. 361-A now enacts that no person shall be liable to any proceedings, civil or criminal, in any court in respect of the publication in a newspaper of a substantially true report of any proceedings of either House of Parliament or the Legislative Assembly, unless the publication is proved to have been made with malice.[76]

---

73. LR 4 QB 73 (1868).
74. *Jatish Chandra v. Hari Sadhan,* AIR 1956 Cal. 436; *Surendra v. Nabakrishna,* AIR 1958 Ori 168.
75. AIR 1951 Cal 176.
76. *C.K. Daphtary v. O.P. Gupta,* AIR 1971 SC 1132.

This immunity does not apply to the publication of any report of the proceedings of a secret sitting of any House of Parliament or of the State Legislature.

A similar immunity is extended to broadcast on the air. The protection is available only to the newspapers and air broadcasts and not to any other type of publication like a pamphlet or booklet.[77] It may be noted that the immunity extends only to a 'report' of the proceedings of the House and not to an 'article' or 'comment' on the proceedings.

(c) RULE-MAKING POWER

Each House of Parliament in India is authorised, subject to the provisions of the Constitution, to make rules for regulating its own procedure and conduct of business. A rule made by a House is not valid if it infringes any provision of the Constitution [Art. 118(1)].

The procedure of a House is thus regulated by—(1) the provisions of the Constitution; (2) rules of procedure and conduct of business made by the House; (3) directions issued by the Speaker/Chairman from time to time under those rules, and (4) conventions, traditions or past practices of the House.

(d) INTERNAL AUTONOMY

It is very necessary for the proper working of Parliament that each House is able to discharge its functions without any outside interference. In Britain, the courts do not interfere with what takes place inside the House.[78] The House has an exclusive right to regulate its own internal proceedings and to adjudicate upon matters arising there. It enjoys complete autonomy within its own precincts. "What is said or done within the walls of Parliament cannot be enquired into in a court of law."[79] But, it was also stated by STEPHEN, J. : "I know of no authority for the proposition that an ordinary crime committed in the House of Commons would be withdrawn from the ordinary course of criminal justice".

On the other hand, this immunity has been taken to such an extent that in *R. v. Graham Campell*,[80] the court refused to convict members of the Kitchen Committee for breach of the licensing law for selling liquor without a licence in the precincts of the House of Commons saying that a tribunal would feel "an invincible reluctance to interfere" in a matter within the area of the internal affairs of the House.

On the same basis, under Art. 122(1), internal autonomy has been conferred on the House of Parliament in India as well. The validity of any proceedings in Parliament cannot be called in question on the ground of any alleged irregularity of procedure. A House has absolute jurisdiction over its own internal proceedings. Further, under Art. 122(2), no officer of Parliament who is empowered by or under the Constitution—

(*i*) to regulate the procedure or conduct of business, or

---

77. An Act was first enacted in 1956, but was repealed in 1976 to curb the freedom of the press in the wake of the emergency declared in 1975. The Act was re-enacted in 1977 after the emergency came to an end in March, 1977. Now it is a constitutional provision. For Emergency Provisions, see, *infra*, Part IV, Ch. XIII.

78. WADE AND PHILLIPS, *op. cit*., 204, 206.

79. LORD COLERIDGE, C.J., in *Bradlaugh v. Gossett*, 12 QBD 271 (1884).

80. (1935) 1 KB 594.

(*ii*) to maintain order in Parliament,

is subject to the jurisdiction of any court in respect of the exercise by him of those powers. Thus, each House of Parliament has freedom from judicial control in its working.

The validity of proceedings within a House cannot be called in question in a court even if the House deviates, or does not strictly follow, or suspends its own rules of procedure. Each House reserves to itself the power to suspend any rule of procedure in its application to a particular business before it.[81]

The courts do not interfere with the functioning of the Speaker inside the House in the matter of regulating the conduct of business therein by virtue of powers vested in him.[82] For example, the Speaker cannot be sued for damages for wrongful arrest by a person who is arrested on his warrant to answer a charge of contempt of the House, but is later released by the court, as the Speaker acts in this matter in performance of his duties connected with internal affairs of the House.[83]

A High Court would not issue prohibition to restrain the Committee of Privileges to consider a privilege matter.[84] A High Court would not issue a writ under Art. 226 to a House of Parliament or the Speaker or any of its officers, to restrain the House from enacting any legislation even if it may be *ultra vires* Parliament. The courts would not interfere with the legislative process in a House either in the formative stages of law-making, or with the presentation of the bill as passed by the Houses of Parliament to the President for his assent.[85]

A member of a House cannot be restrained from presenting any bill, or moving a resolution in the House.[86] It is only when a bill becomes a law that the courts would adjudicate upon its constitutional validity. The immunity available to a House from judicial process also applies to a committee of the House, for a committee is only an agency or instrument through which the House functions.[87]

While the courts do not interfere with the working of a House on the ground of irregularity of procedure, they may scrutinize the proceedings of the House on the ground of illegality or unconstitutionality.[88]

In *In re under Art. 143 of the Constitution of India*[89] commenting on Art. 212(1) applicable to the State Legislatures [which is equivalent to the present Article 122(1)],[90] the Apex Court has stated:

---

81. *M.S.M. Sharma v. Sinha,* AIR 1960 SC 1186 : 1959 Supp (1) SCR 806; *Jai Singh v. State of Haryana,* AIR 1970 P&H 379; *K.A. Mathialagan v. P. Srinivasan,* AIR 1973 Mad. 371; *S.V. Sirsat v. Legislative Assembly of State of Goa,* AIR 1996 Bom. 10.

82. *Surendra v. Nabakrishna,* AIR 1958 Ori. 168.

83. *Homi D. Mistry v. Nafisul Hassan,* ILR 1957 Bom. 218.

84. *C. Subramaniam v. Speaker, Madras Legislative Ass.,* AIR 1969 Mad. 10.

85. *Bihar v. Kameshwar,* AIR 1952 SC 252; *K.P. K. Thirumulpad v. State of Kerala,* AIR 1961 Ker. 324; *Ramachandra Rao v. A.P. Regional Comm.,* AIR 1965 AP 306; *L.N. Phukan v. Mohendra Mohan,* AIR 1965 Ass. 74; *Jagdish Gandhi v. Leg. Council,* AIR 1966 All. 291.

86. *Hem Chandra v. Speaker, Legislative Ass.,* AIR 1956 Cal. 378.

87. *Ramchandra Rao v. A.P. Regional Committee, supra,* footnote 85.

88. *A.J. Faridi v. Chairman, U.P. Legislative Council,* AIR 1963 All. 75; *Syed Abdul v . State of W.B. Leg. Ass.,* AIR 1966 Cal. 363; *Ram Lal Chauhan v. T.S. Nagi,* ILR 1979 H.P. 371; *Om Parkash Chautala v. State of Haryana,* AIR 1998 P&H 80; *S. Ramachandran, M.L.A. v. Speaker, T.N. Legislative Assembly,* AIR 1994 Mad. 332.

89. *Keshav Singh's* case, AIR 1965 SC 745; see, *infra,* p. 147 *et seq.*

90. *Infra,* Ch. VI.

> "Art. 212(1) seems to make it possible for a citizen to call in question in the appropriate court of law, the validity of any proceedings inside the legislative chamber, if his case is that the said proceedings suffer not from mere irregularity of procedure, but from an illegality. If the impugned procedure is illegal and unconstitutional, it would be open to be scrutinised in a court of law, though such scruntiny is prohibited if the complaint against the procedure is not more than this that the procedure was irregular".

It is the duty of the courts to keep the Executive and the Legislative within the confines of the powers conferred on them by the Constitution.

In *State of Punjab v. Sat Pal Dang*,[91] a ruling given by the Speaker adjourning the House, when he was powerless to do so because of an Ordinance, was declared to be "null and void" and of "no effect" as the Speaker had acted contrary to law and constitutional injunction. The Supreme Court held as unfounded the claim that whatever the Speaker's ruling may be, it must be treated as final. Points of order can be raised in the House only in relation to interpretation and enforcement of procedural matters. Speaker's ruling on the validity of the Ordinance could not be regarded as final and binding. A Speaker cannot act contrary to law and constitutional injunctions.

The validity of the proceedings of a House of Parliament cannot be challenged on the ground that a number of members were in preventive detention. This question relates to the validity of the proceedings of the House and pertains to the internal domain of the House and is thus non-justiciable.[92]

Many provisions in the Constitution lay down procedure to be followed by the Houses of Parliament in several matters. Some of these provisions may be regarded by the courts as merely directory and not mandatory, the breach of which would amount only to procedural irregularity (curable under Art. 122) which would not vitiate the action taken by the House. Thus, the provision that the certificate that a bill is a Money Bill is to be granted by the Speaker, is only directory and if the certificate is granted by the Deputy Speaker who presides over the House, and the Upper House acting on it proceeds with the bill as a Money Bill, the resultant Act is not bad constitutionally.[93] Similarly, a Money Bill passed without following the procedure laid down for passing a Money Bill [Art. 109] cannot be questioned on the ground of irregularity of procedure.[94]

(ii) OTHER PRIVILEGES

The above-mentioned specific privileges have been expressly conferred on the Houses of Parliament by the Constitution. But the Constitution does not exhaustively enumerate all the privileges of Parliament.

Originally Art. 105(3) said that other powers and privileges of a House, its members or Committees would be the same as those of the House of Commons in Britain on the date of the commencement of the Constitution. The constitutional provision was so framed deliberately because the privileges of the House

---

91. AIR 1969 SC 903.
92. *Indira Nehru Gandhi v. Raj Narain*, AIR 1975 SC 2299, 2343 : 1975 Supp SCC 1.
93. *State of Punjab v. Dang*, AIR 1969 SC 903.
94. *Mangalore Ganesh Beedi Works v. State of Mysore*, AIR 1963 SC 589 : 1963 Supp (1) SCR 275.
For procedure to pass a Money Bill, see, *supra*, pp. 97-99.

of Commons could not be exhaustively catalogued.[1] On this basis, the two Houses of Parliament came to enjoy a number of privileges.

In course of time, a feeling grew in the country that it was anomalous for the Constitution of a sovereign country to contain explicit references to a foreign country. Accordingly, Art. 105(3) has now been amended by the 44th Amendment of the Constitution in 1978[2]. Art. 105(3) as it stands now has two aspects, viz.:

(1) The powers, privileges and immunities of each House of Parliament, its members and committees "shall be such as may from time to time be defined by Parliament by law."

(2) Until so defined, "shall be those of that House, and of its members and committees immediately before the coming into force of section 15 of the Constitution (Forty Fourth Amendment) Act, 1978".

This means that all the privileges available to a House on that date will continue until Parliament makes a law. The 44th Constitutional Amendment came into force on the 20th June, 1979.[3]

Although a direct reference to the House of Commons has been dropped from the second part of Art. 105(3), indirectly it may still be relevant to refer to its privileges, whenever a question arises about parliamentary privilege in India. For to find out what were the privileges of the House at the date of enforcement of the 44th Amendment, it would still be necessary to find out what were the privileges of the House of Commons on January 26, 1950. This position can change only when Parliament enacts a law defining its present privileges.

The privileges at present enjoyed by a House by virtue of Art. 105(3) are as follows.

(a) FREEDOM FROM ARREST

A member cannot be arrested on a civil proceeding within a period of 40 days before and 40 days after a session of the House. The object of this privilege is to secure the safe arrival and regular attendance of members on the scene of their parliamentary duties. The privilege extends only to civil arrest and not to arrest on a criminal charge,[4] or for contempt of court, or to preventive detention.[5] The reason to exempt preventive detention from the scope of parliamentary privilege is that privileges of Parliament are granted for the service of the country and not to endanger its security.

A detenu has no right to attend meetings of Parliament.[6] A House of Parliament, however, has a right to receive immediate information about the arrest of

---

1. *See*, VIII *CAD* 149.
2. *See, infra*, Ch. XLII.
3. *See, infra*, Ch. XLII, for further details of this Amendment.
4. *Goudy v. Duncombe*, 74 R.R. 706; May, *op. cit.*, 103-6.
5. *Captain Ramsay's* case, The Committee of Privileges of House of Commons (1940). Also, *Ansumali v. State of West Bengal*, AIR 1952 Cal. 632, 636.
6. *Ananda v. Chief Secretary, Government of Madras*, AIR 1966 SC 657 : (1966) 2 SCR 406. Also, the *Dasrath Deb* case and the *Deshpande* case, *Reports of the Committee of Privileges*, Lok Sabha (1952). The Privilege Committee of the House of Commons has ruled in 1970 that a member of the House imprisoned for a criminal matter has no right to attend a meeting of the House.

any of its members, or about the offence and conviction, if any, of the member after trial. According to the Lok Sabha Rules, when a member is arrested on a criminal charge or sentenced to imprisonment by a court, or detained by an executive order, the committing judge, magistrate or executive authority should immediately intimate to the Speaker the fact of arrest, conviction or detention, its reasons, and the place of detention or imprisonment.

The fact of release of the arrested member after conviction on bail pending an appeal or otherwise, is also to be notified to the Speaker. The Speaker reads out in the House the communications received by him under these rules. Failure to intimate to the House the detention of one of its members amounts to a breach of the privilege of the House.[7]

A member of the Legislature arrested or detained has a right to correspond with the Legislature, to make representations to the Speaker and the Chairman of the Committee of Privileges, and the executive authority has no right to withhold such correspondence.[8] The House may also obtain information about the condition of the member under detention, the treatment meted out to him and other facilities afforded to him by putting questions to the government.[9]

(b) INQUIRIES

A House has power to institute inquiries and order attendance of witnesses, and in case of disobedience, to bring witnesses in custody to the bar of the House.

A person charged with contempt and breach of privilege, can be ordered to attend to answer it, and if there is a wilful disobedience of the order, the House has power to take the person into custody, and the House alone is the proper judge when these powers are to be exercised.[10]

A committee of the House also has power to send for persons, papers and records and to administer an oath or affirmation to a witness examined before it. To present any obstruction to the inquiring function of the House, the following are treated as breach of its privilege : to tamper with a witness in regard to the evidence to be given before the House or a committee; to deter or hinder any person from appearing as a witness; molestation of any witness on account of his evidence, etc.

(c) DISCIPLINARY POWERS OVER MEMBERS

A House of Parliament has power to enforce discipline, to punish its members for their offending conduct in the House, or to expel a member who conducts himself in a manner unfit for membership or for unbecoming behaviour whether inside or outside the House.[11]

Expulsion vacates the seat of the member but does not disqualify him from being re-elected. The House may reprimand or suspend a member from the House and use such force as may be absolutely necessary for the purpose.

---

7. *In re Anandan*, AIR 1952 Mad 117.
8. 12 *Privilege Dig*., 101 (1967).
9. *Deshpande and Dasrath Deb* cases (1952), *supra*, footnote 6.
10. *Howard v. Gossett*. 10 Q.B. 359 (1846).
For the position in the U.S.A. on this point *see*, CONSTITUTIONAL LIMITATIONS UPON INVESTIGATING POWER OF THE U.S. CONGRESS, *JI. of Parl. Inf.*, 33 (1958) .
11. WADE AND PHILLIPS, *op. cit*., 205; MAY, *op. cit*., 139 (20th Ed.).

The jurisdiction of the House over its members, and its right to impose discipline within its walls, is absolute and exclusive.

The Courts do not interfere with a resolution of the House directing expulsion or suspension of a member.[12] Mudgal, a member of Lok Sabha, used to receive monetary benefits in exchange for services rendered as a member of the House such as putting questions in the House, moving amendments to bills and arranging interviews with the Ministers, etc. This conduct was regarded as derogatory to the dignity of the House and inconsistent with the standards which Parliament was entitled to expect from its members. Accordingly, Prime Minister Nehru moved a resolution in the House to expel Mudgal. While the resolution was being discussed, Mudgal resigned from the House. The House thereafter adopted an amended resolution declaring that Mudgal had deserved expulsion.[13]

Rajya Sabha expelled Subramanian Swamy on the 15th November, 1976, for conduct "derogatory to the dignity of the House and its members, and inconsistent with the standards which the House expects from its members…."

Suspension of members from the House is a matter of daily occurrence. Members are often suspended by a House for persistently flouting the authority of the Speaker, or for casting reflections on the impartiality of the Chair, or for defiance of the Chair. The Speaker/Chairman has power to suspend a member from the House for a day for grossly disorderly conduct. If a member disregards the authority of the Chair, or abuses the rules of the House by persistently and wilfully obstructing its business, the Speaker/Chairman may name the defaulting member, and then by a motion of the House the member is suspended for a specified number of days which may not exceed the rest of the session.[14] The House has power to terminate suspension when it so desires.[15]

Giving of wrong information deliberately to the House is regarded as a breach of discipline by the member concerned. There have been occasions when the Speaker has reprimanded the members for indulging in undignified conduct, like a walk-out from the House on the occasion of the ceremonial opening of Parliament by the President.[16]

---

12. *Bradlaugh v. Gossett, supra,* footnote 79; *Jai Singh v. State of Haryana,* AIR 1970 P.H. 379; *Yogenara Nath v. State of Rajasthan,* AIR 1967 Raj, 123; *Yeshwant Rao v. State of Madhya Pradesh Leg. Ass.,* AIR 1967 MP 95; *K. Anbazhagan v. Secretary, T.N. Legislative Assembly, infra*; *Om Parkash Chautala v. State of Haryana,* AIR 1998 P&H 80.

But *see, Hardwari Lal v. Election Comm*., I.L.R. 1977 (2) P. & H. 269, where the Punjab and Haryana High Court ruled that a State Legislature has no power to expel its members from the House. This judicial view is untenable.

13. MORRIS-JONES, *op. cit*., 251; 12 *Privileges Dig.*, 54.

Also see, ENID COMPBELL, Expulsion of Members of Parliament, 21 *UTLJ* 15 (1971).

14. Lok Sabha suspended Maniram Bagri for seven days in its session in March 1983.

15. Walk-outs, raising of slogan on the floor of Lok Sabha, and disruption of its proceedings have become matters of daily occurrence. This has lowered the dignity of the House in the public eyes. To preserve its dignity and maintain decorum in the House, a code of conduct for the Lok Sabha and Rajya Sabha members has been evolved. The code contains the do's and do'nts for the members. A violation of the code by a member will subject him to such punishment as admonition, reprimand, censure, directing him to withdraw from the house, or his suspension.

The Times of India, dt. Nov. 26, 2001, p-1, *The Hindustan Times,* dt., Nov. 28, 2001, p. 1.

16. L.S. DEB., February 18, 1963; L.S. DEB., February 28, 1968; 9 *Jl. of Parl. Inf*., 20-25 (1963).

Indira Gandhi was held guilty of breach of privilege of Lok Sabha on the charge that while she was the Prime Minister she caused "obstruction, intimidation, harassment" to, and caused false cases instituted against, some officials who were collecting facts about Sanjay Gandhi's Maruti Ltd. to enable the Minister to reply to a question tabled in the House. She was expelled from the House as well as sentenced to imprisonment which ended with the prorogation of the House a week later. She again became the Prime Minister in 1980. On May 7, 1981, the Lok Sabha rescinded its earlier resolution characterising it as politically motivated.

The propriety of this resolution is not beyond a shadow of doubt. In adjudicating on privilege matters, the House acts in a judicial capacity and sanctity and finality should attach to a judicial decision. This concept has been undermined by this resolution. Lok Sabha has undermined its own dignity and prestige by showing that the House treats its own decisions on privilege matters as of a political nature.

In *Raja Ram Pal*,[17] the Supreme Court had to again deal with the question of powers, privileges and immunities of the Legislatures and in particular the power to expel a Member of Parliament (MP). The case related to a telecast by a TV channel of a programme on 12th December, 2005 based on sting operations conducted by it depicting 10 MPs of the Lok Sabha and one of the Rajya Sabha accepting money, directly or through middlemen, as consideration for raising certain questions in the House or for otherwise espousing certain causes for those offering the lucre. The Presiding Officers of both the Houses made enquiries through separate committees. The report of the inquiry concluded that the evidence against the 10 MPs was incriminating. The report was laid on the table of the House, a motion was adopted by Lok Sabha resolving to expel the 10 MPs and notification was issued by the Lok Sabha notifying the expulsion of the 10 MPs. Similar process was also followed in the Rajya Sabha. It was contended on behalf of the MPs that the expulsion was malafide and the result of a predetermination of the issue and for this purpose relied on the declaration made by the Speaker on the floor of the House that 'nobody would be spared". The MPs also argued that the circumstances do not warrant the exercise of the power of expulsion.

In the above context the Supreme Court framed three questions which arose for decision in the case:—

1. Does the Supreme Court, within the constitutional scheme, have the jurisdiction to decide the content and scope of powers, privileges and immunities of the legislatures and its Members ?
2. If the first question is answered in the affirmative, can it be found that the powers and privileges of the legislatures in India, in particular with reference to Article 105, include the power of expulsion of its Members ?
3. In the event of such power of expulsion being found, does the Supreme Court have the jurisdiction to interfere with the exercise of the said power or privilege conferred on Parliament and its Members or committees and, if so, is this jurisdiction circumscribed by certain

17. *Raja Ram Pal v. Hon'ble Speaker, Lok Sabha* , (2007) 3 SCC 184 : (2007) 2 JT 1.

limits ? In other words if the power of expulsion exists, is it subject to judicial review and if so, the scope of such judicial review ?

In answering these questions the Constitution Bench went into the history of the parliamentary privileges in England as well as the application of the principles decided by the Supreme Court in U. P. Assembly case.[18] The Court explained the difference between disqualification and expulsion by saying that while disqualification strikes at the very root of the candidate's qualification and renders him or her unable to occupy a Member's seat, expulsion deals with a person who is otherwise qualified, but in the opinion of the House is unworthy of membership. The Court rejected the submission that the provisions of Article 101 or 102 restrict in any way the scope of Article 105(3). After a close analysis of the Articles 102, 103, 104 and 105, and several English authorities and texts, the majority after perusal of the enquiry report found that there was no violation of any of the fundamental rights in general and Articles 14, 20 or 21 in particular. The majority was of the view that proper opportunity to explain and defend had been given to the MPs. These observations and findings imply that the Court has affirmed the justiciability issue and consequently its power of judicial review]

(d) FREEDOM FROM JURY SERVICE

Members of Parliament are exempted from jury service. Members may decline to give evidence and appear as a witness in a court of law when Parliament is in session. These privileges are founded on the paramount right of the House to the attendance and service of its members.

(e) PRIVACY OF DEBATES

A House of Parliament has a right to exclude strangers from its proceedings and hold its sittings in camera. This power may be used by the House to go into secret session for reasons of national security. The Speaker/Chairman may, whenever he thinks fit, order the withdrawal of strangers from any part of the House.

(f) PUBLICATION OF PROCEEDINGS

There was a time when the House of Commons used to prohibit publication of its proceedings by passing resolutions. Even as late as 1762, the House of Commons characterised in a resolution the publication of its proceedings as "a high indignity to and a notorious breach of the privilege of this House."

The reasons for this attitude was that there was no adequate protection against arbitrary kings, and members of the House could come to grief for doing plain speaking in the House. In such a situation, secrecy of parliamentary debate was considered necessary not only for the due discharge of the responsibilities of the members but also for their personal safety. This object could be achieved by prohibiting publication of any report of the debates and proceedings of the House and also by excluding strangers from the House and holding debates behind closed doors.

In course of time, the House gave up this practice, and even encouraged publication of its proceedings as it became conscious of the advantages to be derived from a full and clear account of its debates. In 1836, the House of Commons pro-

18. AIR 1965 SC 745.

vided for the publication of parliamentary papers and reports, which led to the famous case of *Stockdale v. Hansard.* But, as the old resolutions were not rescinded, it was still technically a breach of privilege to publish a report of any proceeding of the House or any of its committees.

The House did not, however, entertain any complaint in respect of publication of any of its proceedings except when such proceedings were conducted within closed doors, or when such publication was expressly prohibited by the House or by any committee, or in case of wilful misrepresentation, or any other offence in relation to such publication. Breach of privilege of the House was occasionally raised in case of misreporting or publication of inaccurate or garbled versions of speeches in the press.

On July 16, 1971, the House of Commons passed a resolution waving its privilege as regards the publication of its proceedings. Such publication is no longer to be regarded as a breach of privilege of the House except when the proceedings have been conducted within closed doors or in private, or when such publication has been expressly prohibited by the House.

In India, however, the position in this respect remains as it was in Britain before 1971. The Houses of Parliament in India still enjoy the same power as the House of Commons did before 1971 in this respect.

In the *Searchlight* case,[19] the Supreme Court has ruled that publication of inaccurate or garbled version of speeches delivered in the House, or misreporting the proceedings of the House amounts to a breach of privilege of the House.

The Court has also held that publication by a newspaper of a portion of a member's speech in the House which the Speaker had ordered to be expunged would amount to breach of privilege of the House for which it can take action against the offending party. The effect in law of the order of the Speaker to expunge a portion of the speech of a member may be as if that portion had not been spoken. A report of the whole speech in such circumstances, though factually correct, may, in law, be regarded as perverted and unfaithful report of a speech, i.e, publishing the expunged portion in derogation of the orders of the Speaker passed in the House may, *prima facie,* be regarded as constituting a breach of privilege of the House.

Besides the above, the Houses in India have claimed a few more privileges with respect to the publication of their proceedings. Following constitute breach of privilege of a House.

(i) Disclosing the proceeding of a secret session of the Parliament.

(ii) Misrepresentation of a report of a parliamentary committee by a newspaper.

(iii) Misreporting or misrepresenting the speech of a member of a House of Parliament.

(iv) Misreporting or misrepresentation of the proceedings of the House.

(v) Report or the conclusions of a committee of the House ought not to be publicized, disclosed or referred to by anyone before the same are presented to the concerned House.

---

19. *M.S.M. Sharma v. Sinha,* AIR 1959 SC 395 : 1959 Supp (1) SCR 806; *also,* 12 *Privileges Dig.,* 35.

(vi) No document, or paper presented to a committee should be published before the committees report is presented to the House.

Reference may be made in this connection to *Phukan.*[20] There a case of breach of privilege of the House arose because the newspaper published the report of the enquiry commission when it was under the active consideration of a committee of the House.

Had the report of the enquiry commission been published before it reached the committee, no case of breach of privilege would have arisen because the enquiry commission cannot be regarded as an organ of the House as it is appointed by the government under an Act of Parliament—The Commissions of Inquiry Act, 1952.

(vii) Premature publication of proceedings of a committee of a House, or the report, or the conclusions arrived at by the committee, or the proceedings of a meeting thereof before the committee completes its task and presents its report to the House.

(viii) Premature publication of motions tabled before the House.[21]

It may be observed that the above legislative privileges do somewhat adversely affect the freedom of the press as the press is not free to publish the proceedings of a House freely; the press has to take care not to publish anything which may amount to a breach of privilege of any House. This results in substantial restriction on the freedom of the press.

(g) POWER TO PUNISH FOR CONTEMPT

A House has power to punish a person, whether its member or outsider, for its 'contempt' or 'breach of privilege'. A House can impose the punishment of admonition, reprimand, suspension from the service of the House for the session, fine and imprisonment.[22]

This power to commit for contempt is truly described as the 'keystone of parliamentary privilege' for it is used by the House to protect its privileges, punish their violation, and vindicate its authority and dignity.

The grounds on which a person can be held guilty of contempt of the House are vague, uncertain and indefinite as these have not been defined anywhere. The scope of the phrases 'contempt of the House' and 'breach of privilege' is very broad and covers a variety of situations when the House can take action. Generally speaking, a case of contempt of House arises when any act or omission obstructs or impedes it in the performance of its functions, or which obstructs or impedes any member or officer of the House in the discharge of his duties, or which has a tendency, directly or indirectly, to produce such results.[23]

There is no closed list of classes of offences punishable as contempt of the House as new ways of obstructing a House or its Members in performing their

---

20. *L.N. Phukan v. Mohendra Mohan,* AIR 1965 A&N 75.

21. For a detailed discussion on these privileges, see, M.P. JAIN, *PARLIAMENTARY PRIVILEGES AND THE PRESS,* Ch. 7.

22. *Hardwari Lal v. Election Commission of India,* ILR (1977) 2 P&H 269.

23. WADE AND PHILLIPS, *op. cit.*; 206; MAY, *op. cit.*, 136; *Report of Press Commission,* 418-431 (1954); 12 *Privileges Digest,* 31-40, 105; *Report of the Select Committee,* 95-108.

functions may manifest themselves.[24] Comments in newspapers or statements made by individuals casting reflections on the proceedings of the House, or, on the character or conduct either of the members collectively, or of individual members, and thereby lowering their prestige in the eyes of the public;[25] comments on the officers of the House casting reflections on them; comments tending to bring Parliament into disrespect and disrepute; premature publication of a report of a meeting of a committee of the House before it is presented to the House;[26] any attempt by improper means, *e.g.*, intimidation, threats or coercion, to influence members of the House;[27] misreporting or misrepresentation of the proceedings of the House or of the speech of a member in the House[28]; deliberately telling a lie or misleading the House by a member[29], are some of the instances of what have been regarded as amounting to contempt of the House.

It is for the House to decide whether any particular factual situation amounts to its contempt or not. The right of the House to punish for its contempt is analogous to the right of a superior court to punish for its contempt,[30] and in fact was justified in early days in Britain by a reference to the mediaeval concept of Parliament being the highest court in the land.

In modern times, however, the phrase 'breach of privilege' is very much in vogue, as it is more flexible and broader a concept than the phrase 'contempt of the House'. 'Breach of privilege' means not only breach of a recognised and accepted privilege of the House but also any action, which though not breach of a specific privilege, yet undermines the dignity or authority of the House[31], or tends to obstruct the House or an individual member thereof, in the discharge of the constitutional functions. The main advantage of the term 'breach of privilege' lies in the fact that it enables the House to uphold its dignity, defend itself against disrespect and affronts which could not be brought, or could be brought, only by implication under any accepted specific privilege.

Questions of breach of privilege are invoked every day in the Houses. A few cases may be mentioned here to illustrate the point. Publishing an article undermining the very foundations of parliamentary system of government[32], casting aspersions on the impartiality of the Speaker[33], attributing *mala fides* to him in the discharge of his duties in the House in a writ petition before a High Court[34], ridiculing a member of a House for a speech delivered by him in the House,[35] constitute breach of privilege of the House. To characterise Parliament as star

---

24. *Report of the Select Comm*., 97 (1967).
25. *The Sinha case,* Lok Sabha (1952).
26. *The Sundarayya case*, *Lok Sabha* (1952). While a committee of Parliament is holding its sittings from day to day, its proceedings should not be published nor any document or papers presented to the committee or the conclusions to which it may have arrived at referred to in the Press. *Also,* 12 *Privileges Dig*. 17.
27. 12 *Privileges Dig*., 6.
28. *Ibid,* 13, 99, 110.
29. *Ibid,* 33.
30. On Contempt of Court, see, Chs. IV and VIII, *infra.*
31. The case of John Junor, *JI of Parl. Inf.,* 75 (1957).
32. *Ibid,* 185.
33. The *Blitz case,* ILR 1957 Bom 239; 12 *Privileges Digest,* 30.
34. *Committee of Privileges* (Third Lok Sabha), *IV and VII Reports;* 12 *Privileges Digest,* 1-5 (1967).
35. *The Times of India,* Aug. 20, 61, 1.

chamber amounts to a gross breach of privilege as it casts grave reflection on the institution of Parliament.[36]

In 1964, during discussion in the Maharashtra Legislative Assembly, a few members severely criticised the Bombay Municipal Corporation. The Corporation passed an adjournment motion to record its strong resentment against the speeches made in the Assembly. The Assembly held that the Corporation had committed a breach of privilege and contempt of the House since the tone and the content of the speeches made by the councillors as also the passing of the adjournment motion affected the dignity and authority of the House. The freedom of speech of the members of the Assembly being an important right, any interference with this right constitutes a breach of privilege. The House therefore decided to levy a fine of Rs. 10,000 on the Corporation if it did not rescind its offending resolution. The councillors who had participated in the discussion on the adjournment motion in the Corporation were to be admonished unless they apologised unconditionally to the House.[37]

On December, 9, 1970, the Speaker of the Lok Sabha admonished a senior government servant for "having deliberately misrepresented the facts and given false evidence before the Public Accounts Committee."

The punishments which a House may impose on non-members for its contempt or breach of privilege are admonition, reprimand, imprisonment and fine. The punishment by way of 'reprimand' or 'admonition' to the offending party is more commonly resorted to. In such a case, the Speaker of the House summons the wrongdoer to the bar of the House and admonishes or reprimands him.

The House of Commons does not enjoy the power to impose fines, though the Select Committee has suggested that it should have this power because at times a mere rebuke might appear to be an inadequate penalty whilst imprisonment might be too harsh, and also because this is the only penalty which can be imposed on corporations.[38] In India, the position is not clear though, as stated above, the Maharashtra Legislature did impose a fine on the Bombay Corporation for breach of its privilege.

Members of the House may, in addition, be suspended or expelled from the House as noted earlier.[39] Imprisonment for contempt of the House can be imposed by a House but it can only be till the close of the existing session, and the prisoner is entitled to be released automatically when the House is prorogued or dissolved. If the House passes an order detaining a person for its contempt for a fixed term, the unexpired portion of the sentence would lapse as soon as the session during which the order was made comes to an end by prorogation or dissolution.[40] The punishment of imprisonment for breach of privilege or contempt of the House is awarded very rarely and only in extreme situations when the privilege offence is regarded to be very serious.

The Select Committee of the House of Commons has accepted that the complaint of 'uncertainty' made against the power of the House to commit for its

---

36. *Committee of Privileges* (Fourth Lok Sabha), *IV Report*, 205.
37. *The Case of Bombay Municipal Corporation, Report of the Privileges Committee, II Maharashtra Leg. Ass.*, April, 1966.
38. *Report*, xlviii.
39. *Supra*, p. 132.
40. *Sushanta Kumar Chand v. Speaker, Orissa Legislative Assembly*, AIR 1973 Ori. 111.

contempt is 'justified', and to mitigate this, the Committee has emphasized that Parliament should use its power as sparingly as possible and only to protect itself, its members and its officers, to the extent absolutely necessary for the due execution of its powers.[41] Consequently, the Committee has suggested that in an ordinary case where a Member has a remedy in the courts he should not be permitted to invoke the penal jurisdiction of the House in lieu of that remedy. Further, the House should be reluctant to use its penal powers to stifle criticism, however strong or unjustified the criticism may appear to be, as such criticism is the life and blood of democracy. But the House would be justified in using its penal powers if the criticism is liable to become an improper obstruction to the functioning of Parliament.

Usually, the House drops the action against a person infringing its privileges if he apologies to the House and accepts his mistake. A House is not vindictive; it uses its powers only to vindicate its dignity and honour, or to protect the dignity and honour of its members, or protect them against vilification as members. If a satisfactory apology is not forthcoming from the guilty party, then the House may proceed to punish him.

Prorogation of the House does not put an end to a privilege matter pending before it. The House can again take up the matter when it meets after prorogation. The Supreme Court has argued that prorogation is not dissolution; the House remains the same; only the sessions of the House are interrupted by prorogation.[42]

It is also beyond doubt now that a matter of breach of privilege of the House could be raised, after the dissolution of the House; in the next House. The point came into sharp focus in Lok Sabha in November, 1977, when a privilege motion was raised in the Sixth Lok Sabha against Indira Gandhi for her conduct in the Fifth Lok Sabha. The Privileges Committee ruled that the motion could be raised. "The dissolution of Lok Sabha does not imply discontinuity of the institution of Parliament...the Lok Sabha possesses the power to punish a breach of privilege and contempt of the earlier Lok Sabha." The House agreeing with the recommendation of the committee decided to imprison Indira Gandhi till the prorogation of the House and also expelled her from the membership of the House.[43]

(h) COMMITTEE OF PRIVILEGES

Each House of Parliament has a Committee of Privileges to advise it in matters affecting its powers, privileges and immunities as well as those of its members and committees.[44] The Lok Sabha Committee consists of fifteen members nominated by the Speaker; the Rajya Sabha Committee has ten members nominated by the Chairman.

The necessary reference may be made to the committee either by the Speaker or the Chairman *suo motu*, or by the House upon a motion of a member.

The function of the Committee is to examine every question referred to it and to determine with reference to the facts of each case whether a breach of privilege is involved. If so, what is its nature and what are the circumstances leading to it? It can call for oral and documentary evidence. The committee may administer oath or affirmation to a witness examined before it.

---

41. *Report of Select Committee of Parliamentary Privileges*, viii, ix (Dec. 1967).
42. *M.S.M. Sharma v. Shree Krishna Sinha*, AIR 1960 SC 1190 : 1959 (Supp) 1 SCR 806.
43. Also see, KAUL & SHAKHDHER, *PRACTICE AND PROCEDURE OF PARLIAMENT*, 941-51 (1978).
44. JENA, *PARLIAMENTARY COMMITTEES IN INDIA*, 58-71.

The committee may make such recommendations as it may deem fit. It may also state in its report the procedure to be followed by the House in giving effect to the committee's recommendations.[45] The report of the committee is presented to the House concerned which takes appropriate action on it. The recommendation of the committee is not binding on the House which may accept, modify or even reject the same.

The Committee of Privileges exercises an essentially adjudicatory function. This committee has a special obligation to discharge its functions objectively with a judicial approach and in a non-political or non-partisan manner because, in a way, in deciding whether its privilege has been infringed or not, the committee is acting as a judge in its own cause. The procedure of the committee ought to conform with the canons of natural justice. Whenever some one is arraigned before the committee for breach of parliamentary privilege, it is necessary that he be given a full and fair opportunity to defend himself and explain his conduct. In this connection, the comment made by the Second Press Commission may be taken note of.[46]

> "We are of the view that the rules of business of the House of Parliament and State Legislatures in India dealing with the procedure for taking action against alleged breaches of privilege, etc. should be reviewed and necessary provisions incorporated therein to provide for a reasonable opportunity to alleged contemners to defend themselves in the proceedings for breach of privilege..."

(iii) PRIVILEGES AND FUNDAMENTAL RIGHTS

There has been some confusion on the question whether the Fundamental Rights[47] control in any way the privileges which the Houses enjoy under Art. 105(3). Which is to prevail in case of a conflict between such a privilege and a Fundamental Right?

This question arose for the first time in *Gunupati*.[48] In one of its issues, the *Blitz* published a news item casting derogatory aspersions on the Speaker of the U.P. Legislative Assembly. The Speaker referred the matter to the Committee of Privileges of the House for investigations and report. The committee summoned D.H. Mistry, editor of the *Blitz,* to appear before it to clarify the position. Mistry neither appeared before the committee nor did he send any reply. Thereafter, the Assembly adopted a resolution authorising the Speaker to issue an arrest warrant against Mistry with a view to enforcing his presence before the House to answer the charge of breach of privilege. Accordingly, the Speaker issued the warrant and, consequently, Mistry was arrested in Bombay on the charge of committing contempt of the U.P. Legislative Assembly. He was brought to Lucknow and was lodged in a hotel for a week without anything further being done in the matter. In the meantime, a petition for a writ of *habeas corpus* was moved in the Supreme Court on his behalf on the ground that Mistry's Fundamental Right under Art. 22(2) had been violated. Art. 22(2) envisages that a person arrested must be produced before a magistrate within 24 hours of his arrest. The Supreme Court accepted the contention that as Mistry had not been produced before a magistrate,

---

45. Rules 314 and 315 of the Rules of procedure of the Lok Sabha.
46. *Second Press Comm. Report,* I, 58 (1982).
47. Arts. 12 to 35 of the Constitution; See, *infra,* Chs. XX-XXXIII.
48. *Gunupati Keshavram Reddy v. Nafisul Hasan,* AIR 1954 SC 636 : 1954 Cri LJ 1704. For further discussion on this case, see, *infra,* Ch. VI.

his Fundamental Right under Art. 22(2) was infringed and, accordingly, the Court ordered his release.[49]

This pronouncement created the impression that the Fundamental Rights would control parliamentary privileges. However, in the *Searchlight* case,[50] the Supreme Court held by a majority that the privileges enjoyed by a House of Parliament under Art. 105(3) [or a House of State Legislature under Art. 194(3)], were not subject to Art. 19(1)(*a*) and, therefore, a House was entitled to prohibit the publication of any report of its debates or proceedings even if the prohibition contravenes the Fundamental Right of Speech and Expression of the publisher under Art. 19(1)(*a*).[51]

The ruling in *Gunupati* was held not binding as it was not 'a considered opinion' on the subject. The Court argued that Art. 105(3) [or Art. 194(3)] was not declared to be 'subject to the Constitution', and, therefore, it was as supreme as any provision of the Constitution including the Fundamental Rights. Any inconsistency between Arts. 105(3) [or Art. 194(3)] and 19(1)(*a*) could be resolved by 'harmonious construction' of the two provisions, and Art. 19(1)(*a*) being of a general nature must yield to Art. 105(3) [or Art. 194(3)] which was of a special nature.

The factual situation in *Searchlight* was as follows: A member of the Bihar Legislature made a speech on the floor of the House. The Speaker ordered certain portions of the speech to be expunged. The *Searchlight* however published the entire speech containing the expunged portion as well. The House referred the question of breach of its privilege by the newspaper to its Committee of Privileges. When the committee summoned the editor of the *Searchlight* to answer the charge of breach of privilege, he moved a writ petition in the Supreme Court under Art. 32 claiming that the said notice and the proposed action by the committee infringed his Fundamental Right to freedom of speech and expression guaranteed by Art. 19(1)(a). But, as stated above, the Supreme Court rejected the Editor's contention.[52]

The petitioner also contended that the proceedings before the Committee of Privileges threatened his Fundamental Right under Art. 21 as well.[53] According to Art. 21, no person can be deprived of his personal liberty otherwise than in accordance with the procedure established by law. The editor's contention was that the proceedings before the Committee of Privileges violated Art. 21. The Court also rejected this contention. The Court argued that the House can make rules under Art. 118 in case of a House of Parliament, or Art. 208 in case of a House of the State Legislature.[54] Therefore, the rules made by the House regulating the procedure for enforcing its powers, privileges and immunities would fulfil the requirement of Art. 21.

After the above decision, the Committee of Privileges proceeded to consider the case of breach of privilege against the editor of the *Searchlight.* Again, the

---

49. For discussion on Art. 22(2), see, *infra,* Ch. XXVII.
For writ of *habeas corpus*, see, *infra,* Ch. VIII.
50. *M.S.M. Sharma v. Sinha (I)*, AIR 1959 SC 395 : 1959 Supp(1) SCR 806.
51. For discussion on Art. 19(1), see, *infra,* Ch. XXIV.
52. For discussion on Art. 32, see, Ch. XXXIII.
53. For discussion on Art. 21, see, *infra,* Ch. XXVI.
54. For Rule-making power of a House, see, *supra,* p. 127.

editor came before the Supreme Court under Art. 32 in effect seeking a reconsideration of its earlier decision. He again repeated his argument that the State Legislature could not claim a privilege contrary to Art. 19(1)(a) which included the freedom of publication and circulation. He also claimed that the privileges conferred on the Assembly under Art. 194(3) [Art. 105(3) in case of a House of Parliament] were subject to Art. 19(1)(a). Thus, *Searchlight* II[55] raised substantially the same questions as had been agitated in *Searchlight* I. The Court however refused to reconsider its earlier decision. Thus, the Court in a way reaffirmed the propositions of law laid down by it in *Searchlight* I .

Though the Supreme Court in the *Searchlight cases* was concerned specifically with the question of applicability of Art. 19(1)(*a*) to the area of legislative privileges, an impression got around, because of certain observations made by the Court and the way the Court treated the earlier case of *Gunupati* that, perhaps, all Fundamental Rights were so inapplicable. Reconsidering the question of mutual relationship between the Fundamental Rights and legislative privileges in the *Keshav Singh* case[56], the Supreme Court held that the *Searchlight* case excluded only Art. 19(1)(*a*), and not other Fundamental Rights, from controlling the legislative privileges.[57] The Court held that Art. 21 would apply to parliamentary privileges and a person would be free to come to the Court for a writ of *habeas corpus* on the ground that he had been deprived of his personal liberty not in accordance with law but for capricious or *mala fide* reasons. The Court argued in this connection : Art. 226 confers on the High Court the power to issue a writ of *habeas corpus.* A person may complain, under Art. 21, that he has been deprived of his personal liberty not in accordance with law but for malicious or *mala fide* reasons. The Court will then be bound to look into the matter. Therefore, an order of the House punishing a person for its contempt cannot be final and conclusive. The court can go into it.

The Supreme Court left open the question whether any other Fundamental Right would apply to legislative privileges as it was not pertinent to the issues in hand.

Later, disposing of the *Keshav Singh* case, the Allahabad High Court held that when the Legislature acts under the rules framed by it laying down the procedure for enforcing its power to commit for contempt, that would be compliance of Art. 21 requiring procedure to be laid down by law for deprivation of personal liberty. It was also held that Art. 22(2) has no application when a person has been adjudged guilty of contempt of the House and has been detained in pursuance of such an adjudication.[58]

---

55. *M.S.M. Sharma v. S.K. Sinha*, II, AIR 1960 SC 1186 : 1959 (Supp) 1 SCR 806.

56. AIR 1965 SC 745.
For further discussion on this case, see, *infra.*

57. The Chief Justice observed on this point:
"Therefore, we do not think it would be right to read the majority decision as laying down a general proposition that whenever there is a conflict between the provisions of the latter part of Art. 194(3) [Art. [105(3)] and any of the provisions of the fundamental rights..., the latter must always yield to the former. The majority decision, therefore, must be taken to have settled that Art. 19(1)(a) would not apply, Art. 21 would".
See, AIR 1965 SC at 765.

58. *Keshav Singh v. Speaker, Leg. Assembly*, AIR 1965 All. 349. Also see, *infra*, footnote 86.

Thus, the position appears to be that it is wrong to suppose that no Fundamental Right applies to the area of legislative privileges. Some Fundamental Rights, like Art. 19(1)(*a*), do not apply. Perhaps, Arts. 19(1)(*b*) to 19(1)(*g*) would also not apply. On the other hand, some Fundamental Rights, *e.g.*, Art. 21 do apply, while the position with regard to others, *e.g.*, Arts. 22(1) and 22(2), is not clear.

There is, however, no doubt that if Parliament were to enact a law defining its privileges,[59] as is envisaged by Art. 105(3), then such a law would not be free from the controlling effect of the Fundamental Rights. Such provisions of the law as contravene Fundamental Rights would be invalid.[60]

The Supreme Court has specifically accepted this position in *Searchlight* I[61], viz., that if a law were to be made by Parliament or a State Legislature under Art. 105(3) or Art. 194(3) to define its privileges then such a law would be subject to Art. 19(1)(a). Such law would be one made in exercise of its ordinary legislative powers under Art. 246. Consequently, if such a law takes away or abridges any of the Fundamental Rights, it will contravene the peremptory provisions of Art. 13(2),[62] and, thus, such a law would be void to the extent of such contravention.

(iv) PRIVILEGES AND THE COURTS

The question of Parliament-court relationship often arises in privilege matters. This involves several postulates:

(1) Who, whether the court or the legislature, decides whether a particular privilege claimed by a House exists or not?

(2) When a privilege is held to exist, is a House the final judge of how, in practice, that privilege is to be exercised?

(3) Can the courts go into the question of validity or propriety of committal by a House for its contempt or breach of privilege?

(4) Can the courts interfere with the working of the Committee of Privileges?

In Britain, there has been a good deal of controversy and animosity in the past between the House of Commons and the courts on these questions. Difficulties arose because the parliamentary privileges are largely uncodified and are based on the non-statutory common law. There was a time in the British History when the position of the House of Commons had not been stabilised as it had to fight against the Monarch as well as the House of Lords for its recognition, and the judges at times gave opinions which the House did not like. Therefore, controversies arose between the House and the courts.

In 1689, the House of Commons called two judges of the King's Bench to its bar to explain their conduct and later these judges were ordered to be imprisoned. Their fault was that, seven years earlier, they had ordered Jay to be released from the custody of the Sergeant at arms of the House.[63]

---

59. Art. 246, Entry 74, List I, *infra*, Ch. X; *Searchlight* case, *supra*; *Keshav Singh's* case, *supra*.

60. *See*, further under "Codification of Privileges".
Also see, *C. Subramaniam v. Speaker, L.A.*, AIR 1969 Mad. 10.

61. *Supra*, p. 141.

62. For discussion on Art. 13, see, *infra*, Ch. XX.

63. *Jay v. Topham*, 12 St. Tr. 821.

The most notable controversy between the House of commons and the courts in a privilege matter was *Stockdale v. Hansard* in the early nineteenth century.[64]

The era of legislative–judiciary conflict in matter of privileges is now past in Britain. A balance between the two institutions has now been established along the following lines:

(1) The courts recognise the common law privileges;

(2) A new privilege can be created for the House only by a law passed by Parliament and not merely by a resolution of one House;

(3) Whether a particular privilege claimed by a House exists or not is a question for the courts to decide. The courts have the right to determine the nature and limits of parliamentary privileges, should it be necessary to determine the same;[65]

(4) When a privilege is recognised as being existent, the question whether it has been infringed or not in a particular set of circumstances is a question for the House to determine. The courts do not interfere with the way in which the House exercises its recognised privileges.

The position, therefore, is that while the courts deny to the House of Commons the right to determine the limits of its own privileges, they allow it exclusive jurisdiction to exercise its privileges within the established limits.

As regards committal by the House of Commons for its 'contempt' or 'breach of privilege', the present position appears to be that if the House mentions specific grounds for holding a person guilty of its contempt or breach of privilege, and the warrant ordering imprisonment is a speaking warrant, then the courts can go into the question whether in law it amounts to a breach of privilege; whether the grounds are sufficient or adequate to constitute "contempt" or "breach of privilege" of the House. But if the warrant putting the contemner under arrest mentions contempt in general terms, but does not mention the specific grounds on which the House has held that its contempt has been committed, then the courts have nothing to go into, and they cannot question the same in any way. To this extent, therefore, the powers of the House would appear to be autocratic. The point was clearly established in the case of *Sheriff of Middlesex*.[66] The House of Commons confined the sheriff into custody: the warrant did not mention the facts constituting the contempt of the House. The court refused to issue the writ of *habeas corpus* to discharge the Sheriff from imprisonment saying that "if the warrant merely states a contempt in general terms, the court is bound by it." A very striking case of assertion of parliamentary power to commit for contempt occurred in Australia in 1955. The proprietor and the editor of the 'Banstown Observer' were imprisoned for breach of privilege of the Australian House of Representatives. The High Court of Australia refused to issue the writ of *habeas corpus* saying that it was not entitled to look behind the warrant which was conclusive of what it stated, namely, that a breach of privilege had been committed. The Privy Council characterised the High Court decision as "unimpeachable".[67] The House of Commons has power to commit any person for its contempt and if it issues a general warrant which does not state the grounds on which it regards its

64. *Supra*.
65. *Stockdale v. Hansard*, (1839) 9 Ad. & E. 1; *Supra*, p. 125.
66. (1840) 11 Ad. & E. 273. *Also, Bradlaugh v. Gossett, supra*, footnote 12.
67. *Queen v. Richards*, 92 C.L.R. 157, 164, 171.

contempt having been committed, the courts would be helpless to do anything about the matter. The House of Commons thus has practically an absolute power to commit a person for its contempt, since the facts constituting the alleged contempt need not be stated by it on its warrant of committal and the courts would not go behind the same.[68]

The right of committal through a general warrant can be used by the House to punish a person for its contempt for infringing what it regards as its privilege, even though the courts may not have accepted the same as such. This, thus, means that ultimately it is the view of the House that will prevail in the matter of its privileges. It is thus quite possible that there may be two views as to a privilege of the House. The House may act upon one view while regulating its own proceedings and committing some one for contempt, while the courts may act upon another view when privileges arise in civil disputes.[69]

In the words of KEIR and LAWSON, by conceding to the House of Parliament "the right of committing for contempt without cause shown, the courts have really yielded the key of the fortress, by giving them the power of enforcing against the world at large their own views of the extent of their privileges."[70]

The reason why the courts in Britain have not interfered with the House of Commons in privilege matters is that they have treated the House as a court and its warrant as that of a superior court. But the practice has been that a return has always been made when a person imprisoned under orders of the House has moved a petition for *habeas corpus*. The House accepts the summons from the courts and is represented there.

When the return sets out the general warrant of commitment issued by the House, the courts do not go behind the same as orders of the superior courts are never re-examined. Also, since 1689, there has not been a case of the House taking action against a party, his counsel, or a judge for moving or entertaining a *habeas corpus* petition. Under the *Habeas Corpus* Acts, the courts are bound to entertain petitions for *habeas corpus*, but the courts respect the general warrant of the House and treat it as conclusive answer to the rule *nisi*.[71]

So far as India is concerned, a House of Parliament may claim a privilege if—(*i*) the Constitution grants it specifically; or, (*ii*) it has been created by a law of Parliament; or (*iii*) it was enjoyed by the House under Art. 105(3). This naturally brings the courts into the area of parliamentary privileges. When a question arises whether a particular privilege exists or not, it is for the courts to give a definitive answer by finding out whether it falls under any of the sources mentioned above.

Parliament has not passed any law defining its privileges, and the Constitution specifically grants only a few privileges. Therefore, in the main the question which arises is whether the privilege claimed by the House is one which was enjoyed by the House of Commons on January 26, 1950. This envisages that any privilege claimed by the House of Commons in the remote past but which has later fallen into disuse, cannot be claimed by any House in India, nor can it claim

---

68. MAY, *op. cit*, 200; *Select Comm. Report*, 95 (1967).
69. WADE and PHILIPS, *op cit*, 209.
70. KEIR and LAWSON, *CASES IN CONST. LAW*, 255 (1979).
71. HIDAYATULLAH, *op. cit*., 27, 32.

any new privilege which may be conferred on the House of Commons after January 26, 1950.

In a number of cases the courts have decided the question whether a particular privilege claimed by a House exists or not on the basis whether the House of Commons had enjoyed the same on January 26, 1950[72]. Thus, in *Keshav Singh*[73] the Allahabad High Court did assert that it was its duty to find out whether the privilege claimed by the House was a privilege enjoyed by the House of Commons on the date of commencement of the Constitution.

The matter was put in the right perspective by the Supreme Court in *Searchlight* I.[74] On the one hand, the Court decided the general question whether a breach of privilege occurs when a newspaper prints a report on a member's speech including the portions ordered to be expunged by the Speaker. The Court answered the question in the affirmative. But, on the other hand, when the question arose whether the expunged portion had been printed by the newspaper or not, the Court refused to express any opinion on this controversy saying that "it must be left to the House itself to determine whether there has, in fact, been any breach of its privilege". Of course, when once it is held that a particular privilege exists, then it is for the House to judge the occasion and the manner of its exercise and the courts would not sit in judgment over the way the House has exercised its privilege.

Each House of Parliament in India has power to commit a person for its contempt. But the position remains vague on the question whether such committal is immune from judicial scrutiny or not.

The question whether courts can interfere with the power of a House to commit for its contempt arose most dramatically in 1964 in the *Keshav Singh* case,[75] where the U.P. Legislative Assembly claimed an absolute power to commit a person for its contempt and a general warrant issued by it to be conclusive and free from judicial scrutiny.

The question however arises whether such a claim can be accepted in India in view of the fact that, unlike England, India has a written Constitution containing Fundamental Rights, and the doctrine of judicial review of legislative action forms a part of the country's constitutional jurisprudence. *Keshav Singh's* case may be regarded as the high-water mark of legislative-judiciary conflict in a privilege matter in which the relationship between the two was brought to a very critical point,[76] and the whole episode was reminiscent of the conflict between

---

72. The *Searchlight* case, *supra; Yeshwant Rao v. State of M.P. Leg. Ass.*, AIR 1967 M.P. 95; *Yogendra Nath v. State of Rajasthan*, AIR 1967 Raj. 123.

73. AIR 1965 All 349; *supra*, footnote 58.

74. *Supra*, footnote 50.

75. AIR 1965 SC 745.

76. A sort of controversy arose between Lok Sabha and the Supreme Court in 1969. Some remarks were made in the Lok Sabha against the Sankaracharya. A suit for damages against the members was filed in the Delhi High Court but was dismissed. An appeal was then filed in the Supreme Court. Notice of lodgement of the appeal was sent to the concerned members and the Speaker. This was debated in the Lok Sabha in Aug. 1969. The Speaker advised the members concerned not to appear before the Court. The Court later explained the position saying that the notice of lodgement of an appeal was not a summons to appear before it.
Tej Kiarn Jain v. Sanjiva Reddy, AIR 1970 S.C. 1573 : (1970) 2 SCC 272; *supra*.

the House of Commons and the judiciary in Britain in 1689 when two Judges were committed by the House.[77]

Keshav Singh printed and published a pamphlet against a member of the State Legislative Assembly. The House adjudged him guilty of committing its contempt and sentenced him to be reprimanded. On March 16, 1964, when the Speaker administered a reprimand to him, he behaved in the House in an objectionable manner. Accordingly, the House directed that he be imprisoned for seven days for committing contempt of the House by his conduct in the House at the time of his being reprimanded by the Speaker. On March 19, 1964, Advocate Solomon presented a petition under Art. 226 to the Allahabad High Court for a writ of *habeas corpus* on behalf of Keshav Singh alleging that his detention was illegal as the House had no authority to do so; he had not been given an opportunity to defend himself and that his detention was *mala fide* and against natural justice. The Court passed an interim bail order releasing Keshav Singh pending a full hearing of the petition on merits. Instead of filing a return to Keshav Singh's petition, the House resolved pre-emptorily that Keshav Singh, Advocate Solomon and the two Judges of the High Court who had passed the interim bail order, had committed contempt of the House and that they be brought before it in custody.

The Judges moved petitions under Art. 226 in the High Court asserting that the resolution of the House was wholly unconstitutional and violated the provisions of Art. 211 [Art. 121 in case of Parliament];[78] that in ordering release of Keshav Singh on the *habeas corpus* petition, the Judges were exercising their jurisdiction and authority vested in them as Judges of the High Court under Art. 226. A full Bench consisting of all the 28 Judges of the High Court ordered stay of the implementation of the resolution of the House till the disposal of the said petition.

Thereafter, the House then passed a clarificatory resolution saying that its earlier resolution had given rise to misgivings that the concerned persons would be deprived of an opportunity of explanation; that it was not so and that the question of contempt would be decided only after giving an opportunity to explain to the Judges. The warrants of arrest against the two Judges were withdrawn, but they were placed under an obligation to appear before the House and explain why the House should not proceed against them for its contempt. The High Court again granted a stay order against the implementation of this resolution. Thus, there emerged a complete legislative-judiciary deadlock.

At this stage, the President of India referred the matter to the Supreme Court for its advisory opinion under Art. 143[79]. By a majority of 6 to 1, the Court held

---

77. *Supra*, footnote 63.

78. For Art. 226, see, *infra*, Ch. VIII.

79. *Infra*, Ch. IV.

The Presidential reference framed the following five questions for the Court's advisory opinion.

(i) The first question in substance was whether the High Court was competent to entertain and deal with a petition for *habeas corpus*, and to issue bail, when the petitioner had been committed to imprisonment by the assembly for the infringement of its privileges and for its contempt.

(ii) The second question in substance was whether by ordering release of Keshav Singh on bail the judges had committed contempt of the Assembly.

[Footnote 79 Contd.]

that the two Judges had not committed contempt of the legislature by issuing the bail order. The judges had jurisdiction and competence to entertain Keshav Singh's petition and to pass the orders as they did. The Assembly was not competent to direct the custody and production before itself of the advocate and the judges. The keynote of the Court's opinion is the advocacy of harmonious functioning of the three wings of the democratic state, viz., Legislature, Executive and the Judiciary. The Court emphasized that these three organs must function "not in antinomy nor in a spirit of hostility, but rationally harmonisouly." Only a harmonious working of the three constituents of the democratic state will help the peaceful development, growth and stabilisation of the democratic way of life in this country.

The Court pointed out that Art. 211 debars the State Legislatures [Art. 121 in case of Parliament][80] from discussing the conduct of a High Court Judge. Therefore, on a party of reasoning, one House, a part of the Legislature, cannot take any action against a High Court Judge for anything done in the discharge of his duties. The existence of a fearless and independent Judiciary being the basic foundation of the constitutional structure in India, no Legislature has power to take action under Art. 194(3) or 105(3) against a Judge for its contempt alleged to have been committed by the Judge in the discharge of his duties. The Court also held that the right of the citizens to move the judicature and the right of the advocates to assist that process must remain uncontrolled by Art. 105(3) or Art. 194(3). It is necessary to do so for enforcing the Fundamental Rights and for sustaining the Rule of Law in the country. Therefore, a House could not pass a resolution for committing a High Court Judge for contempt. The Court rejected the contention of the Assembly that it had absolute power to commit a person for its contempt and a general warrant issued by it would be conclusive and free from judicial scrutiny. The Court declared that the House of Commons enjoyed the privilege to commit a person for contempt by a non-justiciable general warrant, *as a superior court of record in the land and not as a Legislature*. Therefore, Parliament and the State Legislatures in India, which have *never been courts*, cannot claim such a privilege.

Even if the House of Commons has this privilege as a legislative organ, Parliament and the State Legislatures in India cannot still claim it because of the existence of the Fundamental Rights and the doctrine of judicial review, particularly, Art. 32, which not only empowers the Supreme Court but imposes a duty on it to enforce Fundamental Rights,[81] and Art. 226 which empowers the High

---

[Footnote 79 Contd.]

(iii) The Third question was whether it was competent for the Assembly to direct the arrest of the Judges and their production before the House for rendering explanation for its contempt.

(iv) The fourth question was whether the full bench of the Allahabad High Court was competent to pass interim orders restraining the Speaker and others, from implementing the orders of the Assembly against the Judges and the advocate.

(v) Whether a High Court Judge dealing with the petition challenging the order of a House of the State Legislature imposing punishment for contempt thereby commits contempt of the Legislature. And, also, whether in case it is held that the Judge does commit contempt in the aforesaid situation, is the Legislature competent to take proceedings against such Judge and punish him for contempt?

80. *Supra*, p. 121.

81. For discussion on Art. 32, see, *infra*, Ch. XXXIII.

Courts to enforce these rights.[82] Thus, a court can examine an unspeaking warrant of the House to ascertain whether contempt had in fact been committed.[83] The legislative order punishing a person for its contempt is not conclusive. The court can go into it. The order can be challenged, for instance, under Art. 21, one of the Fundamental Rights which is applicable to the area of a legislative privileges, on the ground that the act of the legislature is *mala fide*, capricious or perverse.[84]

The *Keshav Singh* case represents the high-water mark of legislature-judiciary conflict in a privilege matter in India. The relationship between the two institutions was brought to a very critical point. However, the Supreme Court's opinion in *Keshav Singh* seeks to achieve two objectives.[85] First and foremost it seeks to maintain judicial integrity and independence, for if a House were to claim a right to question the conduct of a judge, then judicial independence would be seriously compromised; the constitutional provisions safeguarding judicial independence largely diluted and the Rule of Law neutralized. The Constitution has sought to preserve the integrity of the judiciary, and by no stretch of imagination could this be compromised in any way. The Supreme Court has sought to promote this value through the *Keshav Singh* pronouncement. In the second place, the Court seeks to concede to the House quite a large power to commit for its contempt or breach of its privilege for, even though the judiciary can scrutinise legislative committal for its contempt, in actual practice, this would not amount to much as the courts could interfere with the legislative order only in very extreme situations.

As has already been seen, Fundamental Rights guaranteed by Arts. 19(1)(*a*) to 19(1)(*g*) do not control legislative privileges. Art. 21 also is not of much importance for the proceedings before the Committee of Privileges of a House are held under the rules of procedure made by the House under its rule-making powers and this would be considered as procedure established by law. It appears doubtful if the courts would interfere when the rules of the House specifically deny a hearing to the person charged for contempt in certain situations, *e.g*., when the contempt or breach of privilege is committed in the actual view of the House (as happened in *Keshav Singh's* case) for the rules will be applied as procedure established by law under Art. 21.

As a matter of practice, the Committee of Privileges invariably conducts an inquiry and gives the party concerned an opportunity to defend himself before it decides the matter. The charge of *mala fides* against the House is extremely difficult to substantiate and later the Allahabad High Court disposing of *Keshav*

---

82. For discussion on Art. 226, see, *infra*, Ch. VIII.

83. *Supra*, footnote 66.

84. For discussion on Art. 21, see, *infra*, Ch. XXVI.

85. For comments on this case, *see* D.C JAIN, JUDICIAL REVIEW OF PARLIAMENTARY PRIVILEGES; FUNCTIONAL RELATIONSHIP OF COURTS AND LEGISLATURES IN INDIA, 9 *JILI* 205 (1967); P.K. TRIPATHI, MR. JUSTICE GAJENDRAGADKAR AND CONSTITUTIONAL INTERPRETATION, 8 *JILI* 479, 532 (1966); D.N. BANERJEE, *SUPREME COURT ON THE CONFLICT OF JURISDICTION BETWEEN THE LEG. ASS. AND THE HIGH COURT OF U.P., AN EVALUATION (1966)*; FORRESTER, PARLIAMENTARY PRIVILEGE—AN INDIAN CONSTITUTIONAL CRISIS, 18 *Parl. Affairs* 196 (64-65); IRANI, COURT AND THE LEGISLATURES IN INDIA, 14 *International and Comparative Law Quarterly*, 950; M.P. JAIN, CONTROVERSY BETWEEN THE JUDICIARY AND THE LEGISLAUTURE, 1 *Conspectus*, 47 (1965); SEERVAI, *CONSTITUTIONAL LAW OF INDIA*, 1175-1184 (1976).

Singh's case[86] refused to infer *mala fides* in the Assembly merely from the fact that the person charged belonged to a political party different from the majority party in the House. Also, the High Court held, dismissing *Keshav Singh's* petition on merits, that whether there had been contempt of the House or not in a particular situation is a matter for the House to decide and the court would not go into the question of propriety or legality of the commitment. Nor would the court go into the question whether the facts found by the Legislature constitute its contempt or not and the court cannot sit in appeal over the decision of the House committing a person for its contempt.

The High Court, however, did go into the question whether the act of the House in the specific situation was *mala fide* or whether there was an infringement of Art. 21, and held in the negative. The sum and substance of the discussion is that although the judiciary has asserted its power to interfere with a legislative committal of a person for its contempt, yet in practice, the grounds on which the judiciary can do so are extremely narrow and restricted. In effect, therefore, it is difficult to get much of a relief from the court when a person is committed by a House for its contempt.

The Supreme Court's opinion in the *Keshav Singh* case, it was suggested by the Speakers of the State Legislatures and Lok Sabha, denied to a House the power to punish for its contempt. This, however, is not a correct view to take of the Supreme Court opinion. It does nothing of the kind. It only denies to a House a power to commit the judges for its contempt; it also denies that a House is free from all Fundamental Rights in a matter of privilege.

These are unexceptionable principles. The first is necessary to maintain the integrity of the judiciary. The second can be justified on the ground that if a law of the Legislature is not immune from the Fundamental Rights, why should an act of only one part of the Legislature claim such an immunity. But, even in this respect, as discussed above, courts have been very circumspect for the susceptibilities of the Legislatures and have held a number of Fundamental Rights inapplicable to privilege matters.

Under Art. 21, courts can scrutinise the legislative action on the ground of *mala fides* or perversity, but these grounds are very difficult to substantiate. The courts are very reluctant to interfere with the internal working of the Legislatures.[87] It appears difficult to argue that even such an extreme ground should not be available to challenge a legislative action. There may be an exceptional case in which a House has exercised its powers not to uphold its dignity but with an ulterior motive, and if it can be established then the courts should be able to say so. After all, a House is a politically oriented organ; it is fragmented in various political parties and there is a possibility, howsoever remote, that the power of the House may be used by the majority party for political aggrandizement.

As the law relating to legislative privileges stands today, a House has power to decide whether or not its contempt has been committed; courts would not interfere with its internal working, or when it imposes a punishment short of imprisonment; in case of imprisonment, courts would interfere only in case of *mala fides* or perversity. On the whole, powers of the House are so broad as to even

---

86. *Keshav Singh v. Speaker, Legislative Assembly,* AIR 1965 All. 349; see, *supra,* footnote 58.
87. *Supra,* p. 127.

enable it to enforce its own views regarding its privileges. The courts have exhibited an extreme reluctance to interfere with the proceedings of a House in privilege issues. The review power claimed by the Supreme Court in *Keshav Singh* is extremely restrictive and it would be extremely difficult in practice to get much of a relief from the courts in case of committal by a House for its contempt.

Even in the *Keshav Singh* case, the Allahabad High Court considering the petition on merits, after the Supreme Court's opinion, threw it out and refused to interfere with the judgment of the House.[88] The High Court rejected the argument that the facts found by the Assembly against the petitioner did not amount to contempt of the Assembly. The court refused to go into the question of the "correctness, propriety or legality of the commitment". The court observed :

> "This court cannot, in a petition under Art. 226 of the Constitution, sit in appeal over the decision of the Legislative Assembly committing the petitioner, for its contempt. The Legislative Assembly is the master of its own procedure and is the sole judge of the question whether its contempt has been committed or not".[89]

The High Court ruled that neither there was violation of Art. 21 nor of natural justice because the legislature had formulated the rules of procedure to investigate complaints of breach of privileges.

The petitioner had also argued that his committal by the Assembly was *mala fide* as the Assembly was dominated by the Congress party which was hostile to the Socialist Party of which the petitioner was a leading member. The High Court refused to infer *mala fides* from these facts. There was nothing on the record to establish *mala fides* on the part of the Assembly in committing the petitioner. "The mere fact that the person committed for contempt belongs to the party other than the majority party in the Legislature is no indication of the fact that the Assembly acted *mala fide*."[90]

The above observation shows how reluctant the courts are to impute *mala fides* to the Legislative Assembly in the matter of committal by it of a person for its contempt. Reference may also be made in this connection to *Searchlight I.*[91] In that case, an allegation of *mala fides* was raised by the petitioner against the Committee of Privileges. The Supreme Court ruled that the charge was not made out. The Court observed on this point.[92]

> "The Committee of Privileges ordinarily includes members of all parties represented in the House and it is difficult to expect that the Committee, as a body, will be actuated by any *mala fide* intention against the petitioner. Further the business of the Committee is only to make a report to the House and the ultimate decision will be that of the House itself. In the circumstances, the allegation of bad faith cannot be readily accepted".

The Courts have taken the view that as a House has power to initiate proceedings for breach of its privileges, it must be left free to determine whether in fact breach of its privileges has occurred or not. The courts have thus refused to give

---

88. *Supra*, footnote 86.
89. *Supra*, footnote 86 at 355.
90. *Ibid*, at 356.
91. *Supra*, footnote 50.
92. AIR 1959 SC at 412.

any relief at the inquiry stage in a privilege matter by the Privileges Committee of a House.[1]

The Courts do not like to interfere with the proceedings of the House, or the Committee of Privileges in the matter of adjudication whether the privilege of the House has been infringed. Thus, in *Searchlight I*,[2] the Committee of Privileges, Bihar Legislative Assembly, served a notice on the petitioner calling upon him to show cause why appropriate action should not be recommended against him for breach of privilege of the Speaker and the Assembly. The petitioner came to the Supreme Court under Art. 32 seeking a writ of prohibition against the committee restraining it to proceed further in the matter. The Court rejected the petition holding that it was for the House to decide on the advice of the Committee of Privileges whether there was a breach of privilege or not in the circumstances of the case.

Again, in *Subramanian*,[3] the Madras High Court refused to issue a writ of prohibition against the Committee of Privileges. In pursuance of a resolution passed by the Assembly, the Speaker had issued a notice to Subramanian to show cause why he should not be held to have committed contempt of the House. Subramanian filed a petition in the High Court under Art. 226 for the issue of a writ of prohibition restraining the Speaker from proceeding further in the matter. Refusing to interfere in the matter at this stage saying that the court was concerned, "purely and simply, with a notice to the petitioner to show cause..." "[I] it is clearly premature, and even impossible, to judge now, upon the matter of the alleged contempt itself."[4] The petitioner was asking the court to issue prohibition restraining the Speaker from proceeding further virtually on the "ground of absence of an *ab initio* jurisdiction". This was merely the state of assumption of jurisdiction. Therefore, the court refused to issue the writ as Art. 194(3) [or Art. 105(3)] invests the Speaker empowered by a resolution of the legislature, "with the right to call upon a third party, like the petitioner, to show cause why he should not be held to have committed a breach of the privilege of the Legislature, by way of contempt."[5] A writ of prohibition need not be issued to stifle the very exercise of that jurisdiction.[6]

There have been frequent conflicts between the courts and the legislatures in the matter of privileges. This has happened much more frequently in the case of the State Legislatures rather than in the case of Houses of Parliament. These cases are taken note of in the discussion under Art. 194.[7] One or two cases may however be mentioned here to illustrate the point.

In *Tej Kumar Jain*, a suit for damages was filed in the Delhi High Court against some members of Lok Sabha for remarks made by them on the floor of the House against Sankaracharya, but the court dismissed the suit. Thereafter, an appeal was filed in the Supreme Court against the High Court decision. A notice of lodgement of the appeal was sent to the concerned members and the Speaker

---

1. *Jagdish Gandhi v. Legislative Council*, AIR 1966 All. 291. *L.N. Phukan v. Mohendra Mohan*, AIR 1965 Ass. 75.
2. *M.S.M. Sharma v. S.K. Sinha*, AIR 1959 SC 395 : 1959 Supp (1) SCR 806; *supra*, footnote 50.
3. *C. Subramanian v. Speaker, Madras Legislative Assembly*, AIR 1969 Mad. 10.
4. *Ibid*, at 12.
5. *Ibid*, at 13.
6. For Writ of Prohibition, see, *infra*, Ch. VIII.
7. *See, infra*, Ch. VI, Sec. H.

advising them to appear before the Supreme Court either in person or by an advocate. At this stage, a question of privilege was raised in the House and the matter was debated in Aug., 1969. The Speaker advised the members concerned not to appear before the Supreme Court otherwise they may themselves be guilty of breach of privilege of the House. Later while delivering its decision in the case, the Court explained the position. The Court stated that as the suit for damages was for Rs. 26,000, an appeal lay to the Supreme Court under Art. 133 on the High Court granting a certificate for the purpose.[8] The appellant has to take out a notice of lodgement of appeal to inform the respondents so that they may take action considered appropriate or necessary. Thereafter, the Court could proceed to hear the appeal. "The notice which is issued is not a summons to appear before the Court. It is only an intimation of the fact of the lodgement of the appeal. It is for the party informed to choose whether to appear or not".[9]

A summons is different from such a notice. If a summons is issued to a defendant and he does not appear, the Court may proceed *ex parte* and may even regard the plaintiff's claim to be admitted. This consequence does not flow in case of notice of lodgement of appeal.[10]

After this clarification, the matter was discussed again by the House. The Speaker then ruled that whether the Court issued a summons or a notice, it made no difference, as ultimately the privileges of the House were involved.

This shows how jealously the House seeks to defend its own privileges and to be the final judge thereof and does not brook any judicial interference in this respect. In the States, the Houses have often asserted that they are the sole judge of their privileges. For example, in *Keshav Singh*, to which a reference has already been made, when hearing was being held before the Supreme Court on the presidential reference under Art. 143, the Assembly, whose claim to the privilege was *sub-judice*, did not want to submit to the Court's jurisdiction on the plea that the House, and not the Court, is the final judge of its own privileges. The U.P. Legislative Assembly made it clear to the Supreme Court that by appearing in the hearing on the reference, the House was not submitting to the Jurisdiction of the Court in respect of the area of controversy and that it was not submitting "its powers, privileges and immunities" for the opinion and decision of the Supreme Court. The House asserted that it was the sole and exclusive judge of its own powers, privileges and immunities and its decisions were not examinable by any other court or body; and whatever the Court may say would not preclude the House from deciding for itself the points referred to the Court under reference. The House maintained : "It is the privilege of the House to construe the relevant provisions of Art. 194(3) and determine for itself what its powers privileges and immunities are".

(a) When the question arises whether a recognised and established privilege of the House has been breached or not in the context of the specific factual situation, it is for the House to decide the question. The courts do not interfere with such a decision of the House except in the rare case of *mala fides* etc.

---

8. See, *infra*, Ch. IV, Sec. C(iv) for Appellate Jurisdiction of the Supreme Court.
9. AIR 1970 SC at 1575.
10. *Ibid.*

(b) But when the question is whether a privilege exists or not, then it appears that it is a matter for the courts to decide, for a privilege is claimed by a House under a constitutional provision. It is the constitutional function of the Supreme Court and the High Courts to interpret constitutional provisions.[11] No legislature can claim any such power.

(c) A House cannot claim an entirely new privilege even in Britain, this position is recognised. India is different from Britain as in India legislative privileges flow from the written Constitution, whereas in Britain, the same flow from common law.

(d) In Britain, the rule that the House is the final judge of its privileges arose when the House of Commons was locked in a struggle with an arbitrary Monarch, and had little confidence in the judges who then held office during the Crown's pleasure. That period was very different from the present position prevailing in India when legislative privileges are claimed mostly against the people, especially, the press. A democratic House functioning under a written Constitution cannot claim uncontrolled power to be a judge in its own cause.

(e) In a written Constitution, the interpretation of the Constitution is ultimately in the hands of the courts. In Britain, the House of Commons always files a return in the court whenever committal by it is in question.[12] While the House has not relinquished expressly its claims to be the sole judge of the extent of its privileges, in practice, judicial rulings on these matters are treated as binding.[13]

(f) A democratic legislature and an independent judiciary are two pillars of a democratic system. Both have to function in co-operative spirit to further the cause of Rule of Law in the country.

(v) CODIFICATION OF PRIVILEGES

In the wake of *Keshav Singh's* case, two rather inconsistent ideas were brought into bold relief. On the one hand, the Speakers wanted the Constitution to be amended so as to concede an absolute power to a House to commit any one for its contempt. On the other hand, there arose a demand for codification of legislative privileges.

As to the first, considering the matter dispassionately there is hardly any justification for changing the *status quo* in favour of the Legislatures. The ambit of their power to commit for contempt is quite broad, and their functioning has not been hampered in the past in the absence of any broader power. The U.S. Congress does not enjoy any such power; a case of contempt of a House is

---

11. See, Ch. XL, *infra*, under "Constitutional Interpretation".
12. ENID CAMPBELL, *PARLIAMENTARY PRIVILEGES IN AUSTRALIA*, 9 (1966).
13. *Ibid*, 6.

tried by the courts under ordinary law, but this has not obstructed the Congress in its working.[14]

The demand for absolute power to commit a person for breach of privilege of a House raises several significant questions. In a democratic country having Rule of Law, should any forum, howsoever august it may be, have an unrestricted power to infringe the rights and liberties of the common man? Why should a popularly elected democratic legislature be hyper-sensitive to public criticism? When a law made by the legislature as a whole is subject to judicial review, why should not an act of only one House (which is only a part of the Legislature) be exempt from judicial review?

A legislative privilege is usually exercised against a member of the public.

While the case for enlarging the powers of the Houses has not been substantiated, there are a few very serious objections against doing so. In a democracy, no forum, howsoever august, should have an unrestricted power to infringe people's freedom. The comparison between courts and legislatures in this regard is not to the point. It is the judiciary's traditional function to protect people's rights. While the courts *are non-political*, a legislature *is essentially a political body*, being fragmented into a number of political parties; and may at times be tempted to act on political considerations. One could even raise the spectre of an intolerant majority in a House becoming oppressive and using the power of the House to commit for its contempt to stifle criticism of the government.

The democratic process of government is based on freedom of speech and expression and no House needs to be oversensitive to public criticism. Legislative privileges adversely affect the rights of the people and, therefore, such privileges must be kept within a very narrow bound. If a House could order the arrest of a High Court Judge, it could as well order the arrest of a Supreme Court Judge, or of a Central Minister, on the allegation of its contempt and one can only imagine the results when the Centre and the States are controlled by different, often antagonistic, political parties. The House of Commons invokes its penal power very sparingly, and when it does so, it rarely goes beyond admonishing the offending persons.

On the other hand, a strong case has been made out for codifying legislative privileges, especially the circumstances which constitute contempt of the House. This area at present suffers from too much ambiguity and lacks precision and articulation. The press has often complained against the exercise of penal powers by the legislatures, and it has been particularly insistent on the codification of privileges as too often it has to bear the brunt of legislative displeasure.[15]

---

14. *Marshall v. Gordon*, 243 U.S. 521 (1917).

The House has been conceded the power of 'self-preservation', i.e. "the right to prevent acts which, in and of themselves, inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is an inherent legislative power to compel in order that legislative functions may be performed". *Ibid.* at 542. Undoubtedly, the scope of legislative privileges in the U.S. is extremely limited and scope of judicial review much broader than in the U.K. or India.

15. According to the Press Commission, some of the privilege cases disclose oversensitiveness on the part of the legislatures to even honest criticism, *Report*, 425-431. The Press Council has stated that the present undefined state of the law of privileges has placed the press in an unenviable position in the matter of comments on the proceedings of the legislatures; *Second Annual Report*; 28 (1967).

Also see, *First Press Commission Report*, I, 421 (1954); *Report of the Second Press Commission*, I, 53.

Keshav Singh's case itself represents a conflict between the citizen's freedom of speech and legislative privileges. Often members of the Legislatures use their freedom of speech to make allegations on the floor of the House against outsiders who have no remedy to vindicate their reputation. An outsider cannot refute the allegations on the floor of the House, nor can he bring a court action against the member concerned.[16] The point is that while the rights and privileges of the M.P.s are important and should be upheld, the rights of the ordinary citizens should also be safeguarded. To some extent, legislative privileges are an anachronism in a democratic society.

Another trend is to use privilege motions by members of the opposition as a technique for achieving the political purpose of harassing the Ministers and damaging their image in the public eyes. Motions for breach of privilege are raised on the technical ground that a particular Minister has given wrong information to the House and has thus sought to mislead it.[17] Though most of these motions are thrown out by the House, the discussion usually assumes a political complexion and becomes a matter of trial of strength between the ruling and the opposition parties. Privilege motions are also moved at times against officials on the ground that they behaved disrespectfully towards members of the House. There thus exists a lot of flexibility, vagueness and uncertainty regarding what actually constitutes, and new grounds are invoked every day for alleging, a breach of privilege or contempt of the House.

Theoretically, codification of privileges appears to offer several advantages: it will make things certain and one can know surely and exactly what the privileges of the Houses are in India. Codification in the area is advocated to remove ambiguity so that the press is not unduly stifled in saying what it thinks needs to be said. In a democracy, free discussion should be the norm, and its restriction only an exception.

JUSTICE SUBBA RAO in *Searchlight* I[18] has strongly pleaded for codification of privileges 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 privileges of the House of Commons at the risk of being called before the bar of the Legislature."

The clear emphasis of Art. 105(3), as well as of Art. 194(3), is on the legislature defining its privileges through law. The framers of the Constitution were anxious to confer plenary powers on the Houses in India in this respect. They felt that legislative privileges should be definitised not in a hurry but after giving some thought to the matter. The power was thus left to the Legislatures to define their privileges through their own legislation. The supporters of codification argue that if legislative power to punish for contempt of the House is carefully defined in respect of such matters as grounds constituting contempt, procedure and persons against whom such power may be exercised, it will be a safeguard against any misuse of power and will promote the Rule of Law.

---

16. *Lok Sabha Deb*., Feb. 15, 1968; *Tej Kiran Jain, supra*.

17. The Speaker of the Lok Sabha has ruled that the mere fact that a minister has made an incorrect statement does not constitute a breach of privilege. A breach of privilege arises only when he makes a statement in the House which he knows to be false.
12 *Privileges Digest* 8 (1967). *Also see*, XXVI *Privileges Digest*, 8, 18 (1981).

18. *Supra*, Sec. L(iii).

While codification of legislative privileges, especially of the circumstances which constitute contempt of a House, is eminently desirable from the point of view of the press and the people, it has a few snags from the point of view of the Legislatures. It will place restriction on the power of a House to deal with privilege matters in the way it likes and it would lose its present-day flexibility of approach. It will be difficult to define all situations when questions of contempt of a House or breach of its privilege may occur as new situations arise every day.

While the legislative privileges at present are not subject to many Fundamental Rights, a statute enacted to define them would be subject to judicial review with respect to its compatibility with the Fundamental Rights.[19] While, at present, by and large, the courts are excluded from the area of legislative privileges, the law defining the same would inevitably draw the courts into picture as questions of statutory interpretation will have to be decided by them.

Under Art. 19(1)(*a*), read with Art. 19(2), no restriction can be imposed on the freedom of speech and expression with respect to 'contempt of the legislature', as in Art. 19(2) while the term 'contempt of courts' occurs, the term 'contempt of legislature' is missing. The difficulty can be got round by making 'contempt of legislature' a criminal offence, but to do so would be to bring the courts into the picture as they would try and punish the crime. To make a Legislature itself a judge in the privilege cases, it appears necessary to amend Art. 19(2) and add 'contempt of the legislature' therein.[20]

Because of these factors, Parliament and the State Legislatures are extremely reluctant to codify their privileges and the prospect of codification is thus extremely dim. Short of codification, an effort may be made to definitise privileges through declaratory resolutions. This course of action would remove some uncertainty from the area while at the same time the Houses would not lose their flexibility of approach. It is also necessary that the Houses use their penal powers with restraint and circumspection and review and tighten up their rules of procedure so as to discourage unsubstantial privilege motions from being moved, and also to guarantee adequate procedural safeguards to those against whom privilege cases are enquired into. This much each House owes to itself and to the public.

In this connection, it may be illuminating to take note of some developments in Britain in the area of parliamentary privileges. In 1965, the whole range of parliamentary privileges, their need, justification, present form and scope, was brought under examination by a Select Committee of the House of Commons which reported in 1967.[21]

The Committee's approach was to remove the uncertainty from the area of parliamentary privileges and also to balance the interests of the citizen and the Press with those of the House, its members and officers. It recommended abolition of

---

19. The Supreme Court has asserted in *Searchlight* I that a law defining legislative privileges would be subject to the Fundamental Rights and such a law contravening any Fundamental Right would be void to the extent of such contravention. See, *supra.*
A similar assertion has been made by the Supreme Court in its advisory opinion in *Keshar Singh, supra.* Also, *C. Subramanian v. Speaker, Madras Legislative Assembly,* AIR 1969 Mad. 10, 12.

20. *Infra*, for a discussion on Art. 19(1)(*a*), Ch. XXIV.

21. SILLS, Report of the Select Committee on Parliamentary Privileges, 31 *Mod. L.R.* 435 (1968).

obsolete and out of date rules, such as, immunity of members from civil arrest[22] and old resolutions of the House prohibiting reporting of its proceedings.[23] It suggested relaxation of the rules against reporting of proceedingsbefore parliamentary committees about which the general principle should be that the proceedings should be open and reportable unless the public interest clearly requires otherwise. It also suggested a restricted use of its penal jurisdiction by the House to punish for its contempt.[24]

The Committee accepted that "there is justice in the criticism that some members have in the recent past been over-sensitive to criticism and ever ready to invoke the penal jurisdiction of the House in respect of matters of relative triviality or which could as effectively be dealt with by the exercise of remedies open to the ordinary citizen,"[25] yet the Committee rejected the suggestion that the "categories of contempt" be codified, since "new forms of obstruction, new functions and new duties may all contribute to new forms of contempt," and the House should not be inhibited in its power to deal with them. However, the committee suggested that the House should give effect to the basic principles regarding its contempt by adopting by resolution a set of rules as guidance for the future exercise of its penal jurisdiction so that much of the uncertainty and confusion of the present day could be removed.

As regards investigation of complaints of contempt, the Committee suggested that the person against whom a complaint is being investigated should be entitled as of right to attend proceedings of the Privilege Committee, to be represented by a lawyer, to call witnesses, and be paid for legal aid, if necessary. The Committee further suggested that the House should have power to impose imprisonment for a fixed term and to impose fines because in certain cases admonition may be less, and imprisonment may be more, than what the needs of the case may call for and in case of corporations, fines are the only form of punishment which can be imposed.

In the light of the above, it may be worthwhile for a Parliamentary Committee to study the privileges of the Legislatures in India and formulate some norms and guidelines for being followed by the various Houses in this area.[26]

M. SUPREMACY OF THE INDIAN PARLIAMENT

SUPREMACY OF BRITISH PARLIAMENT

The keystone, the dominant characteristic, of the British Constitution is the doctrine of 'sovereignty' or 'supremacy' of Parliament. This means that Parlia-

---

22. *Supra,* p. 130.
23. *Supra,* pp. 134, 135.
24. *Report,* at ix and x.
25. In order to curtail the exercise of its privilege jurisdiction, the House of Commons decided on 6 February, 1978, to follow the rule "that its penal jurisdiction should be exercised (a) in any event as sparingly as possible, and (b) only when the House is satisfied that to exercise it is essential in order to provide *reasonable protection for* the House, its members or its officers, from such improper obstruction or attempt or threat of obstruction as is *causing* or *is likely to cause substantial interference* with the performance of their respective functions."
See, Committee of Privileges, *First Report,* H.C. (U.K.) 376 (1977-78); XXV *Jl. of Parl. Inf.* 227 (1979).
26. For further comments on this aspect, see, Jain, *PARLIMENTARY PRIVILEGES & THE PRESS,* 102-112.

ment has the 'right to make or unmake any law whatever;' that it can "legally legislate on any topic whatever which, in the judgment of Parliament, is a fit subject for legislation," that no person or body in Britain has a right to override or set aside a law of Parliament, that courts have no jurisdiction to declare an Act of Parliament void, *ultra vires* or 'unconstitutional', and that there is "no power which, under the English Constitution, can come into rivalry with the legislative sovereignty of Parliament."[27] Parliament is not regarded as a delegate of the people and it is not legally bound by any mandate. The British Constitution is not written and there is nothing like a fundamental law of the country. Therefore, the power of Parliament to legislate is legally unrestricted, and it can change even a constitutional principle by the same ordinary process as it enacts an ordinary law.

Politically, however, Britain has a responsible government with an elected House of Commons which reflects contemporary public opinion, social morality or consciousness. Parliament does not therefore ordinarily do anything which a large number of people oppose.[28] But from a legal, and not political, point of view there is no fetter or restraint on the British Parliament to make any law. Whatever Parliament enacts as law is law and its validity is not subject to any higher principles or morality, national or international law.

Britain has no doctrine of unconstitutionality of parliamentary legislation and a law enacted by Parliament cannot be questioned or challenged in a court on any ground. The function of the courts is primarily to interpret the law enacted by Parliament and apply it to the factual situations coming before them for adjudication. The courts are not to scrutinise a law with reference to any fundamental norm, although, in the process of statutory interpretation, the courts do bring in certain concepts of their own and interpret the law accordingly. When the courts are faced with several alternative interpretations of a statutory provision, they would adopt the view which appears to them to be fair and just and it may be that, at times, the judicially-adopted alternative may not accord with what Parliament wanted to enact. While the courts do not enjoy the power to declare an Act of Parliament to be invalid they certainly have the power to interpret the same[29]

EFFECT OF EUROPEAN COMMUNITY LAW

It may however be observed that the entry of Britain in the European Common Market has somewhat compromised the traditional concept of sovereignty of

---

27. DICEY: *LAW AND THE CONSTITUTION*, 39-40, 70 (1965); JENNINGS, *LAW AND THE CONSTITUTION*, 57, 144 (1959); HEUSTON, *ESSAYS IN CONSTITUTIONAL LAW*, 1 (1964); SCHWARTZ, *AMERICAN CONSTITUTIONAL LAW*, 49 (1965); WADE and PHILLIPS, *op. cit*., 65-83; DE SMITH, *CONSTITUTIONAL & ADMINISTRATIVE LAW*, 63-93 (1977).

28. In the modern state there exist organized interest groups reflecting the views of every trade, profession or business. This has led to the practice of prior consultation before a measure is introduced in Parliament. Neither Government nor Parliament can disregard organised public opinion in promoting legislation and thus the political supremacy of Parliament, distinct from its legal omni-competence, as a law making organ, has become more and more unreal. All legislation is a compromise of conflicting interests. JENNINGS observes, "Parliament passes many laws which many people do not want. But it never passes any law which any substantial section of the population violently dislikes."
JENNINGS, *op. cit*., 148. *Also*, DE SMITH, *op. cit*., 90; WADE, *INTRODUCTION TO DICEY'S LAW OF THE CONSTITUTION*, lxvii, ixx.

29. JENNINGS. *PARLIAMENT*, 1-12 (1970); KEIR and LAWSON, *CASES IN CONST. LAW*, 1 (1979); CF. GRAY, 'SOVEREIGNTY OF PARLIAMENT TO-DAY, 10 *Univ. of Toronto L*.J., 54 (1053-54).
Also see *infra*, Ch. XL.

Parliament. The British Parliament has enacted the European Communities Act, 1972, making European Community Law automatically applicable in Britain even in the face of any law to the contrary. "The general effect of the European Communities Act is to override *existing* domestic law sofar as is inconsistent therewith, and to impose a presumption of interpretation that *future* statute law is to be read subject to Community Law for the time being in force. Parliament is expected to refrain from passing legislation inconsistent with Community Law."[30]

POSITION IN INDIA

The Indian Parliament differs from its British counterpart in a substantial manner. Politically speaking, the Indian and British Parliaments are both subject to similar restraints as both have parliamentary form of government. But, legally speaking, whereas the power of the British Parliament is undefined that of the Indian Parliament is defined, fettered and restrained. India's Constitution is written; it is the fundamental law of the land; its provisions are enforceable by the courts and it cannot be changed in the ordinary legislative process. The Indian Parliament has therefore to function within the constraints of the Constitution from which its legislative powers emanate.

By Art. 245(1), the legislative power of Parliament has been specifically made 'subject to the provisions of the Constitution'.[31] The fundamental law contains many rules and restrictions which Parliament has to observe in its working. For example, there are restrictions regarding the subjects on which Parliament can legislate, and a law made beyond the assigned subjects is bad;[32] there are Fundamental Rights guaranteed to the people of India, and a law made in contravention thereof is unconstitutional.[33]

Parliament exercises sovereign power to enact laws. No outside power or authority can issue a direction to enact a particular piece of legislation.[34]

The doctrine of parliamentary sovereignty as it obtains in England does not prevail here except to the extent and in the fields provided by the Constitution. The entire scheme of the Constitution is such that it ensures the sovereignty and integrity of the country as a republic and the democratic way of life by parliamentary institutions based on free and fair elections.[35]

Parliament may delegate legislative power up to a point and beyond that limit, delegation will not be valid;[36] constitutional provisions guaranteeing freedom of trade and commerce also impose some restrictions on the parliamentary legislative power.[37] In addition, parliamentary taxing power is subjected to a few more

---

30. O. HOOD PHILLIPS, *CONST. & ADM. LAW*, 72 (1987).
In several cases, the British courts have ruled that Community law prevails over the local statutes made by the British Parliament. See, for example, *Garland British Rail Engineering Ltd.*, [1983] 2 AC 751; *McCarthys v. Smith*, [1979] I.C.R. 785.

31. *Infra*, Ch. X.

32. *Infra*, Ch. X.

33. Art. 13(2); Part V, *infra*, Chs. XX to XXXIII.

34. *Union of India v. Prakash P. Hinduja*, (2003) 6 SCC 195 : AIR 2003 SC 2612.

35. *People's Union for Civil Liberties v. Union of India*, (2003) 4 SCC 399 : AIR 2003 SC 2363.

36. *See*. Sec. N., *infra.*

37. Arts. 301-307; *infra*, Ch. XV.

restrictions, *e.g.*, under Art. 289, property and income of a State are exempt from Union taxation.[38]

The Indian Parliament is the creature of the Constitution. Therefore, a parliamentary law to be valid must conform in all respects with the Constitution. It is for the courts to decide whether an enactment is constitutional or not and they have the power to declare a parliamentary enactment void if it is inconsistent with a provision of the Constitution. The courts would refuse to give effect to any unconstitutional law.[39] There are procedures laid down in the Constitution through which courts may be invited to scrutinise legislation and ascertain if a constitutional restriction has been transgressed by Parliament in enacting a law.[40]

Contrasting the British Parliament with a legislature like the Indian Parliament, DICEY called the former as "sovereign" and the latter as "subordinate" or non-sovereign.[41] These terms are misleading as they create a false impression that the Indian Parliament is subordinate to some external authority or that India is not yet an independent country. A much better way to characterise the constitutional position of the Indian Parliament is to say that it is "sovereign within its powers".[42] Though its freedom of action is controlled by the Constitution, yet within the sphere and limits allowed to it, its powers are plenary, and it may pass laws of any sort.

Parliament has been assigned a place of importance in the governmental structure of the country. It is the source of all central legislation because legislative power of the Union has been assigned to it. If parliamentary legislation does not infringe any constitutional limit, then the function of the courts is only to interpret and apply the law; courts cannot then go into the policy or wisdom of legislation. The courts cannot declare a statute unconstitutional simply on the ground of unjust or harsh provisions, or because it is supposed to violate natural, social or political rights of citizens unless it can be shown that such injustice is prohibited, or such rights are protected, by the Constitution.

A Court does not declare an Act void because in its opinion it is opposed to the spirit supposed to pervade the Constitution but not so expressed in words. Legislative power is restricted only by the Constitution and not by any promise which the government may have undertaken, Parliament is fully competent to legislate no matter whether it would be contrary to the guarantee given, or any obligation undertaken, by the government.[43]

It is difficult on any general principles to limit the omnipotence of the sovereign legislative power by judicial interposition except in so far as the Constitution gives that authority.[44] It will thus be correct to say that within the permissible limits, the Indian Parliament is as omni-competent as the British Parliament. If no fetter is to be found in the Constitution itself, Parliament is competent to make a law even if it is contrary to the guarantee given, or obligation undertaken, by the government.[45]

---

38. Ch. XI, *infra.*
39. Ch. XL, *Infra.*
40. Chs. IV and VIII, *infra.*
41. DICEY, *op. cit.*, 87-137.
42. *See* JENNINGS, *CONSTITUTIONAL LAWS OF THE COMMONWEALTH,* Vol I, 49 (1957).
43. *Umeg Singh v. State of Bombay,* AIR 1955 SC 540 : (1955) 2 SCR 164.
44. MAHAJAN, J., in the *Gopalan* case, AIR 1950 SC 27, 80 : 1950 SCR 88.
45. *Umeg Singh v. State of Bombay*, AIR 1955 SC 540 : (1955) 2 SCR 164; *State of Kerala v. Gwalior Rayon Silk Mfg. Co.,* (1973) 2 SCC 713 : AIR 1973 SC 2734; *also,* IRANI, COURTS AND LEGISLATURES IN INDIA, 14 *Int. and Comp. L.Q.*, 950 (1965).

Article 245(2) specifically provides that no law made by Parliament is to be invalid on the ground of its extra-territorial operation.[46] Nor is there any restriction on its power to amend, delete or obliterate a statute, or to give it prospective or retrospective effect,[47] or even to levy a tax retrospectively,[48] except in so far as it is banned by Fundamental Rights like Arts. 20(1), 14 or 19 (1)(g).[49] A tax law not contravening a constitutional prohibition, such as, Art. 14, cannot be declared invalid merely because it imposes double taxation,[50] or that it is confiscatory or expropriatory in nature, as such a power is "incidental to the power to levy the tax."[51]

If a law is struck down by the courts as being invalid for an infirmity, Parliament can cure the same by passing another law by removing the infirmity in question.[52] A law cannot however overrule a court decision.[53] As is discussed later, the courts have developed certain techniques by which they can by-pass the question of adjudicating the constitutionality of statutes.[54]

A law passed by Parliament can neither be invalidated on the ground of non-application of mind nor that of *mala fides. Mala fides* or ulterior motives attributed to Parliament in making a law within its competence can never make such law unconstitutional. The Supreme Court has observed: "The legislature, as a body, cannot be accused of having passed a law for an extraneous purpose... Even assuming that the executive, in a given case, has an ulterior motive in moving a legislation, that motive cannot render the passing of the law *mala fide.* This kind of 'transferred malice' is unknown in the field of legislation."[55]

While the courts can declare a statute unconstitutional when it transgresses constitutional limits, they do not enquire into the propriety of exercising the legislature power. It is assumed that the legislative discretion has been properly exercised. The courts do not scrutinise the motives of the legislature in passing a

---

46. *Infra,* Ch. X.

47. See, *Rashid Ahmed v. State of Uttar Pradesh,* AIR 1979 SC 592 : (1979) 1 SCC 596; *K. Nagaraj v. State of Andhra Pradesh,* AIR 1985 SC 550 : (1985) 1 SCC 523; *Dahiben v. Vasanji Kevalbhai,* (1995) Supp. (2) SCC 295 : AIR 1995 SC 1215; *State of Tamil Nadu v. Arooram Sugar Ltd.,* AIR 1997 SC 1815 : (1997) 1 SCC 326.

48. *India v. Madan Gopal,* AIR 1954 SC 158 : 1954 SCR 541; *Udai Ram Sharma v. Union of India,* AIR 1968 SC 1138.

49. For a discussion on these Articles, *see,* Fundamental Rights, Chs. XXV, XXI and XXIV, *infra.*

50. *Avinder Singh v. State of Punjab,* AIR 1979 SC 321, *Govt. of A.P. v. Hindustan Machine Tools,* AIR 1975 SC 2037.

51. *Sundarajan and Co. v. State of Madras,* AIR 1956 Mad. 298, at 300. But, *see,* under Art. 14, *infra,* Ch. XXI.

52. *Rai Ramkrishna v. State of Bihar,* AIR 1963 SC 1667; *Jaora Sugar Mills v. State of Madhya Pradesh,* AIR 1966 SC 416; *Shri Prithvi Cotton Mills Ltd. v. Broach Borough Municipality,* AIR 1970 SC 192; *Tirath Ram v. State of Uttar Pradesh,* AIR 1973 SC 405 : (1973) 3 SCC 585; *M/s Hindustan Gum & Chemicals Ltd. v. State of Haryana,* AIR 1985 SC 1683 : (1985) 4 SCC 124 : AIR 1992 SC 522. Also see, Ch. XL, *infra.*

53. *In re the Cauvery Water Disputes Tribunal,* 1992 AIR SCW 119 : AIR 1992 SC 522; *infra,* Ch. XIV, Sec. E; *G.C. Kanungo v. State of Orissa,* AIR 1995 SC 1655 : (1995) 5 SCC 96; *S.R. Bhagwat v. State of Mysore,* AIR 1996 SC 188 : (1995) 6 SCC 16.
For further discussion on this point, see, Ch. XL, *infra.*

54. *Infra,* under 'Constitutional Interpretation', Ch. XL.

55. *K. Nagaraj, supra,* footnote 47, at 566. Also, *G.C. Kanungo v. State of Orissa,* AIR 1995 SC 1655 : (1995) 5 SCC 96.
For discussion on the concepts of "non-application of mind" and "*mala fides", see,* JAIN, *A TREATISE OF ADM. LAW,* I, Ch. XIX, 890-928, 959-963; *CASES & MATERIALS ON INDIAN ADMN. LAW,* III, 2306-16; 2068-2135. Also, *infra,* Ch. XL.

statute.[56] The propriety, expediency and necessity of a legislative act are for the determination of the legislative authority concerned and are not for determination by the courts.[57]

COMPARISON WITH AMERICAN CONSTITUTION

In this respect the Indian Parliament corresponds with the American Congress. Each country has a written Constitution which is the fundamental law of the land. Each is a federation and in each Fundamental Rights have been guaranteed to the people. Thus, the American Congress, like the Indian Parliament, cannot enact a law which is against the Bill of Rights or which contravenes the scheme of distribution of powers or other constitutional provisions. The written Constitution is supreme and, therefore, a law made by the Congress, in order to be valid, must be in conformity with its provisions. If it is not so, the courts will intervene and declare the law to be unconstitutional and void. In practice, however, it is only rarely that the courts in India or the U.S.A. would hold a statutory provision to be unconstitutional.

N. DELEGATION OF LEGISLATIVE POWER

This topic falls more appropriately under Administrative Law. Here the topic is discussed in bare outlines.

NECESSITY

In every democratic country, in modern times, relatively only a small part of the total legislative output is enacted by the legislature. A large bulk of legislation is issued as delegated legislation, in the form of rules, regulations or bye-laws. These are made by various administrative authorities under powers conferred on them by the legislature. In such a case, the authority acts as the delegate of, and within the framework of the power conferred by, the Legislature. In India, as elsewhere, the mechanism of delegated legislation is used extensively. Practically, every statute passed by Parliament or a State Legislature confers rule-making power on the government or on some other administrative agency.

Many reasons have contributed to this development. The role of the state has undergone a change over time. The *laissez-faire* state of the 19th century has given place to the welfare state. Vast technological developments have taken place. This has enormously increased the work of government necessitating a mass of legislation. Consequently, legislatures are faced with a great load of work as they have on the anvil many more bills than what they can conveniently dispose of.

To save its time, the legislature concentrates on defining the essential principles and policies in the legislation and leaves the task of enunciation of details to the administration. Besides, many socio-economic schemes undertaken by government are very technical and complicated; the Legislature is hardly competent to work out their details and so the matter has necessarily to be left to the professional administrators.

The mechanism of delegated legislation permits a certain amount of flexibility and elasticity in the area of legislation. It is much easier to make necessary ad-

---

56. *Gurudevdatta VKSSS Maryadit v. State of Maharashtra*, AIR 2001 SC at 1986-87 : (2001) 4 SCC 534.

57. *T. Venkata Reddy v. State of Andhra Pradesh*, AIR 1985 SC 724, 731 : (1985) 3 SCC 198.

justments in delegated legislation if circumstances so demand, than to secure an amendment of the statute through the legislature. Moreover, many serious situations arise frequently like labour disputes precipitating strikes and lockouts, internal commotion and external aggression, epidemics and floods. To meet such situations, it becomes necessary to keep the government armed with powers, including those of legislation, so that it may take effective action without loss of time.[58]

LIMITS

An important question to consider in this area is whether under the Indian Constitution, there is any limit on the power of Parliament, or a State Legislature, to delegate its legislative power to the executive. No such question arises in Britain because of the doctrine of 'Sovereignty of Parliament.'[59] As the British Parliament can pass any legislation it thinks necessary and proper, it can delegate any amount of its law-making power. The position in the U.S.A. is different. The Congress functions under a written Constitution and so its powers are not uncontrolled. Also, the doctrine of Separation of Powers which operates there stands in the way of a mix up of legislative and executive powers.[60] But realities of the situation have asserted themselves and delegated legislation has come into vogue. The American courts have evolved the principle that the Congress can delegate legislative powers to the executive subject to the stipulation that it lays down the policies and establishes standards while leaving to the administrative authorities the making of subordinate rules within the prescribed limits.

The operation of this principle may be illustrated by reference to two cases, one, in which delegation was held bad and the other where it was held good. In *Panama Refining Co. v. Ryan*,[61] the Supreme Court held the delegation invalid because "the Congress has declared no policy, has established no standards, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited." In *Yakus v. U.S.*,[62] on the other hand, the Supreme Court held the delegation valid because the Congress had prescribed sufficiently definite standards to guide the discretion of the delegate. The pivot around which the whole delegation problem hinges in the U.S.A. is whether the 'legislative standard' is to be found in the delegating statute. In practice, however, it does not amount to much of a restriction on the Congress for, many a time, courts have held even 'vague' and 'general' standards to be sufficient to uphold delegations. A practical utility of the rule, however, is that courts have the last word and can declare the delegation excessive or unwarranted if they *feel* it to be so in a statute. In Britain, the last word rests with Parliament and not with the courts.

In India, on the question of delegation of its legislative power by a legislature to the executive, the position is very much similar to that in the U.S. A. The prevailing

---

58. WADE PHILLIPS, *op. cit.*, 29, 605-612; *REPORT OF THE COMMITTEE ON MINISTERS' POWERS*, (1931); H.W.R. WADE, *ADMINISTRATIVE LAW*, 847-893 (1988). JAIN & JAIN, *PRINCIPLES OF ADMINISTRATIVE LAW*, 25-101 (1979); JAIN, *A TREATISE ON ADM. LAW*, I, Ch. IV (1996); JAIN, *INDIAN ADM. LAW-CASES & MATERIALS, I*, Ch. III (1994). This book is cited herein after as *CASES I*.

59. *Supra*, Sec. M.

60. *Infra*, Ch. III, Sec. E.

61. 293 US 388, *CASES*, I, 30.

62. 321 US 414; *CASES*, I, 35.

principle is that essential powers of legislation, namely, the function of laying down legislative policy in respect of a measure and its formulation as a rule of conduct, cannot be delegated. The legislature must declare the policy of the law and the legal principles which are to control any given cases and must provide a standard to guide the officials or the body in power to execute the law.[63]

The application of this principle to concrete fact situations can be illustrated with reference to some cases on both sides. In *Raj Narain v. Chairman, Patna Administration Committee*,[64] was involved Section 3(1)(*f*) of the Patna Administration Act which authorised the Bihar Government to "extend to Patna, provisions of any section of" Bihar and Orissa Municipal Act, 1922, "subject to such restrictions and modifications" as the government might think fit. The government picked out the section relating to the assessment of taxes from the Act and applied it to Patna in a modified form. The Supreme Court held Section 3(1)(*f*) valid subject to the stipulation that when a Section of an Act was selected for application, whether it was modified or not, it must be done so as not to effect any change of policy in the Act regarded as a whole. The notification in question was held invalid as it effected a radical change in the policy of the Act which was that no municipality competent to tax could be thrust upon a locality without giving its inhabitants a chance of being heard and objecting to it. This policy, the Court held, could not be changed by the delegated authority.[65]

In *Devi Das Gopal Krishan v. State of Punjab*,[66] a provision enabling the government to lavy sales tax at such rates as it deemed fit was held bad, but another provision enabling government to levy sales tax at rate not exceeding 2% was held valid.

The Minimum Wages Act has been enacted with a view to provide for fixing minimum wages in employments mentioned in a schedule annexed to the Act. Section 27 authorises the State Government to add to this schedule any other employment in respect of which the government thinks that the minimum wages should be fixed. The provision contains no principle on which the government is to select the industries for applying the Act. Yet, the Supreme Court held Section 27 valid in *Edward Mills v. Ajmer*[67] saying that the legislative policy was apparent on the face of the enactment, which was fixation of minimum wages with a view to obviate the chance of exploitation of labour in such industries where by reason of unorganised labour, or want of proper arrangements for effective regulation of wages, or for other causes, the wages of the labourers were very low. It is interesting to note that the test for selecting industries to be included in the schedule, which the Court propounded, was nowhere mentioned in the Act but was formulated by the Court itself to uphold the Act.[68]

---

63. In re *Delhi Laws Act* case, AIR 1951 SC 332 : 1951 SCR 747 ; *CASES*, I, 39; *Gwalior Rayon Mills v. Asstt. Commr. of Sales Tax*, AIR 1974 SC 1660 : (1974) 4 SCC 98; JAIN, *CASES*, I, 48.

64. AIR 1954 SC 569; *CASES*, I, 101.

65. Also see, *Lachmi Narain v. Union of India*, AIR 1976 SC 714 : (1976) 2 SCC 953; *Ramesh Birch v. Union of India*, AIR 1990 SC 560 : 1989 Supp (1) SCC 430.

66. AIR 1967 SC 1895 : (1967) 3 SCR 557; *CASES*, 95; *Also, V. Nagappa v. Iron Ore Mines Cess Commr*., AIR 1973 SC 1374 : (1973) 2 SCC 1.

67. AIR 1955 SC 25, 32 : (1955) 1 SCR 735; *CASES*, I, 106.

68. The same principle has been applied in *Mohmed Ali v. Union of India*, AIR 1964 SC 980; *CASES*, I, 117; *Jalan Trading Co. v. Mill Mazdoor Union*, (1966) Labour L.J., 546; *CASES*, I, 118.

In *Bhatnagars & Co. v. Union of India*,[69] Section 3(1)(*a*) of the Imports and Exports (Control) Act, 1947, which authorises the Central Government to prohibit or restrict the import or export of goods of any specified description, was held valid. Curiously, however, the Supreme Court found the policy not in the Act itself but in its predecessor which was no longer operative. The Act states no policy, but it is an extremely important piece of legislation by which the whole of India's foreign trade is regulated. In its anxiety, therefore, to uphold the Act, the Court took recourse to the fiction of finding the policy in the repealed Act. Through this process, though the Act was saved, yet the efficacy of the principle requiring a delegating statute to contain a policy was very much diluted.

In *Banarsi Das v. State of Madhya Pradesh*,[70] a provision enabling the government to levy a tax on those items which the Act had exempted was held valid. It was argued against the provision that it was a matter of policy as to what goods should be taxed or exempted from taxation which the legislature alone could decide and not leave it to a delegate. The Court, however, stated that it was not unconstitutional for the legislature to leave it to the executive to determine details relating to the working of taxation laws, such as the selection of persons on whom the tax is to be levied, the rates at which it is to be charged in respect of different classes of goods and the like.

As regards delegation of legislative power on municipal bodies, the courts take a very liberal view. Broad delegations of powers to them have been upheld, the ground being that they are representative bodies. For instance, in *G.B. Modi v. Ahmedabad Municipality*,[71] the Supreme Court has upheld a provision conferring power on municipal corporations to levy tax on lands and buildings even though no maximum rate at which the corporation could tax was fixed. In welfare legislation, too, the courts favour a wider delegation of legislative power.[72]

Some statutes which directly established bodies corporate e.g. Major Port Trusts Act, 1963 confers power on the Central Government to issue binding directions to the Board of Trustees. It has been held that such a power does not extend to amend the regulations made by Port Authorities when statute itself confers powers on the Port authorities to make regulation relating to specified matters. The rule making power of the Central Government under Section 111 is to be exercised by the Central Government only in regard to the administration of the Port Trusts and such power must be construed strictly.[73]

CONCLUSION ON DELEGATION

It is no use multiplying cases on delegation of legislative power, as the topic is discussed more extensively and elaborately in the area of Administrative Law.[74] It is sufficient to state here that delegated legislation has come to stay. It is rec-

---

69. AIR 1957 SC 478 : 1957 SCR 701; *CASES*, I, 59.
70. AIR 1958 SC 909 : 1959 SCR 427; *CASES*, I, 70.
71. AIR 1971 SC 2100. *Also see*, *Avinder Singh v. State of Punjab*, AIR 1979 SC 321; *Corporation of Calcutta v. Liberty Cinema*, AIR 1965 SC 1107; *CASES*, I, 124; *Municipal Corporation of Delhi v. Birla Cotton Spinning and Weaving Mills*, AIR 1968 SC 1232 : (1968) 3 SCR 251; *CASES*, I, 132.
72. *Registrar, Co-op. Societies v. K. Kunjabmu*, AIR 1980 SC 350, 352 : (1980) 1 SCC 340; *CASES*, I, 77.
73. *A. Manoharan v. Union of India*, (2008) 3 SCC 641 : (2008) 2 SCALE 616.
74. See JAIN & JAIN, *op. cit*., 29-55. Also, JAIN, *A TREATISE ON ADM. LAW*, Ch. IV; JAIN, *INDIAN ADM. LAW, CASES & MATERIALS*, Ch. III (1994).

ognised on all hands that the modern complex socio-economic problems cannot be met adequately without resorting to delegated legislation. The courts invariably reiterate the principle that the power delegated should not be unguided and uncontrolled and that the Legislature must lay down legislative policy and principles subject to which the delegate is to exercise its power.[75]

But it is only rarely that a statutory provision is declared invalid on the ground of excessive delegation,[76] and the judicial insistence on policy is more symbolic than real or effective. Usually, the courts lean in favour of the validity of the delegating legislation, and have upheld very broad delegations. Instead of looking at the legislation with a critical eye to find out the 'policy', the courts have adopted a liberal attitude and have at times themselves supplied or articulated the policy if one is not discernible on the face of the statute.[77] Even broad delegations of taxing power have been upheld.[78] For long, in democratic countries, taxation has been regarded a close preserve of the legislature, but by conceding broad delegations even in this area legislative responsibility has been eroded to some extent.

While it is inevitable that legislatures be allowed to delegate legislative powers on the executive,[79] and that is perhaps the only way in which modern complex socio-economic problems can be tackled successfully, yet the important consideration should not be lost sight of that if the delegate is given too broad power, he may use it in a way not contemplated by the legislature. The reason behind the judical insistence that the Legislature should state the policy while delegating legislative power is the anxiety that the delegate be kept within limits, that the delegate should function only to further the policy of the legislature and not supplant or modify it himself which will amount to usurping the function of the legislature. To effectuate this idea, it is necessary that, as far as possible, the legislature states the policy in clear and articulate terms so that it may be easy for the courts to ascertain whether the delegate is acting within, or exceeding, the scope of authority conferred on him. If the legislature uses very wide language to delegate power then it becomes difficult to control the delegate.

CONTROL OF DELEGATED LEGISLATION

The practice of the Legislature delegating to the Executive power to make rules or regulations, though inevitable in a modern state, nevertheless, is open to a few serious objections. It entails, to some extent, an abandonment of its legislative function by the Legislature. The so-called details which are left to executive determination are often matters of principle. Many a time, the legislature delegates powers without mentioning clearly the standards subject to which those

---

75. *See, Gwalior Rayon, supra*, note 88; See also *Consumer Action Group v. Tamil Nadu,* (2000) 7 SCC 425, 438 : AIR 2000 SC 3060.
Also see, *The Quarry Owners Association v. State of Bihar,* AIR 2000 SC 2870 : (2000) 8 SCC 655.

76. *Harakchand v. Union of India,* AIR 1970 SC 1453 : (1969) 2 SCC 166, is one example of a delegation being held excessive; and so invalid, *Cases,* I, 97.

77. *Bhatnagars, supra*, note 69.

78. *See, N.C.J. Mills Co. v. Asstt. Collector, Central Excise*, AIR 1971 SC 454.

79. The Supreme Court has reiterated the inevitable need of delegated legislation in *Tata Iron & Steel Co. v. Workmen,* AIR 1972 SC 1917 : (1972) 2 SCC 383.

powers are to be exercised; sometimes standards mentioned are extremely vague and, thus, for all practical purposes, executive assumes uncontrolled and unguided power. In practice, the Legislature is not in a position to supervise effectively the use of delegated powers by the delegate. Sometimes, delegation is indulged in such broad and general terms that the courts become helpless to afford any relief against harsh or unreasonable executive action.

The system of delegated legislation adds considerably to the powers of the executive and correspondingly weakens the status of the legislature. Lastly, promulgation of rules by the executive lacks that publicity, discussion and consideration which usually accompany the passage of legislation through the legislature in a democratic country, and thus is lost that safeguard of liberty which depends upon the law-making power being exercised by the elected representatives of the people who will be affected by the laws that are made. Self-government is endangered when the representatives of the public do not effectively control the making of the laws which the people must obey. The basic problem in the area of delegated legislation therefore is that of controlling the delegate in exercising its legislative powers.

The most effective method to control delegated legislation is through the doctrine of *ultra vires* which means that a court can declare delegated legislation *ultra vires* if it falls outside the limits of the power to make delegated legislation which may have been conferred on the delegate. Delegated legislation is thus subject to judicial control.[80]

Another method of exercising this control is through the delegating legislature itself and for this purpose legislatures have established committees on subordinate legislation. Each House of Parliament has such a committee.[81] This is in recognition of the fact that as the legislature delegates power on the Administration, it is for it to ensure that the power is exercised properly. But this matter falls more appropriately within the area of Administrative Law rather than under the Constitutional Law.[82]

---

80. *Kunj Behari Lal v. State of Himachal Pradesh,* AIR 2000 SC 1069 : (2000) 3 SCC 40.
For detailed discussion on the doctrine of *ultra vires,* see, JAIN, *TREATISE, I, infra,* footnote 82, Ch. V, 93-135; Jain, *Cases,* I, Ch. IV.

81. For details see, JAIN and JAIN, *op. cit.*, 69-79; M P. JAIN, PARLIAMENTARY CONTROL OF DELEGATED LEGISLATION, 1964 *Public Law*, 33, 152.
Also see : *The Quarry Owners Ass. v. State of Bihar,* AIR 2000 SC 2870 : (2000) 8 SCC 655.

82. *See,* M.P. JAIN, *EVOLVING INDIAN ADMINISTRATIVE LAW,* 8-43 (1983); JAIN, *A TREATISE OF ADMINISTRATIVE LAW,* I, Ch. VI, 142-150; JAIN, *CASES & MATERIALS ON INDIAN ADMINISTRATIVE LAW,* Ch. IV.