REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 558 OF 2012

KALPANA MEHTA & ORS .... PETITIONERS

VERSUS

UNION OF INDIA & ORS ....RESPONDENTS

WITH

WRIT PETITION (CIVIL) No. 921 OF 2013

J U D G M E N T

Dr D Y CHANDRACHUD, J

This judgment has been divided into sections to facilitate analysis. They are:

A Reference to the Constitution Bench

B Submissions

C The Constitution

D Parliamentary Standing Committees

E Parliamentary privilege

A Reference to the Constitution Bench

1 Two public interest petitions instituted before this Court under Article 32 of the Constitution in 2012 and 2013 have placed into focus the process adopted for licensing vaccines[1] to prevent cervical cancer. The petitioners allege that the process of licensing was not preceded by adequate clinical trials to ensure the safety and efficacy of the vaccines. Nearly twenty four thousand adolescent girls are alleged to have been vaccinated in Gujarat and before its bifurcation, in Andhra Pradesh without following safeguards. The trials are alleged to have been conducted under the auspices of a project initiated by the Sixth respondent. The drugs are manufactured and marketed by the Seventh and Eighth respondents. Each of them produces pharmaceuticals. The petition calls into question the role of the Drugs Controller General of India and the Indian Council of Medical Research. The administration of the vaccine is alleged to have resulted in serious health disorders. Deaths were reported.

[1] Human Papillomavirus (HPV)

2 On 12 August 2014, a Bench of two judges formulated the questions which would have to be addressed in the course of the proceedings.[2] They are:

> "(i) Whether before the drug was accepted to be used as a vaccine in India, the Drugs Controller General of India and the ICMR had followed the procedure for said introduction?
>
> (ii) What is the action taken after the Parliamentary Committee had submitted the 72nd Report on 30.8.2013?
>
> (iii) What are the reasons for choosing certain places in Gujarat and Andhra Pradesh?
>
> (iv) What has actually caused the deaths and other ailments who had been administered the said vaccine?
>
> (v) Assuming this vaccine has been administered, regard being had to the nature of the vaccine, being not an ordinary one, what steps have been taken for monitoring the same by the competent authorities of the Union of India, who are concerned with the health of the nation as well as the State Governments who have an equal role in this regard?
>
> (vi) The girls who were administered the vaccine, whether proper consent has been taken from their parents/guardians, as we have been apprised at the Bar that the young girls had not reached the age of majority?
>
> (vii) What protocol is required to be observed/followed, assuming this kind of vaccination is required to be carried out?"

3 At the hearing, the petitioners relied upon the 81st Report of the Parliamentary Standing Committee dated 22 December 2014. The petitioners sought to place reliance on the Report so as to enable the Court to be apprised of the facts and to facilitate its conclusions and directions. This was objected to.

4 The issue which arose before the Court was whether a report of a Parliamentary Standing Committee can be relied upon in a public interest

[2] Writ Petition (Civil) No. 558 of 2012

litigation under Article 32 or Article 226. If it could be adverted to, then an allied issue was the extent to which reliance could be placed upon it and its probative value. The then Attorney General for India, in response to a request for assistance, submitted that reports of Parliamentary Standing Committees are at best an external aid to construction, to determine the surrounding circumstances or historical facts for understanding the mischief sought to be remedied by legislation. The Union government urged that reports of Parliamentary Standing Committees are meant to guide the functioning of its departments and are a precursor to debates in Parliament. However, those reports (it was urged) cannot be utilized in court nor can they be subject to a contest between litigating parties.

5 In an order dated 5 April 2017, a two judge Bench of this Court adverted to Articles 105 and 122 of the Constitution and observed thus:

> "69. The purpose of referring to the aforesaid Articles is that while exercising the power of judicial review or to place reliance on the report of the Parliamentary Standing Committee, the doctrine of restraint has to be applied by this Court as required under the Constitution. What is argued by the learned counsel for the petitioners is that there is no question of any kind of judicial review from this Court or attributing anything on the conduct of any of the members of the Committee, but to look at the report for understanding the controversy before us. The submission "looking at the report," as we perceive, is nothing but placing reliance thereupon. The view of a member of Parliament or a member of the Parliamentary Standing Committee who enjoys freedom of speech and expression within the constitutional parameters and the rules or regulations framed by Parliament inside Parliament or the Committee is not to be adverted to by the court in a lis."[3]

[3] Id, at pages 320-321

6 The referring order notes that when a mandamus is sought, the Court has to address the facts which are the foundation of the case and the opposition, in response. If a Court were to be called upon to peruse the report of a Parliamentary Standing Committee, a contestant to the litigation may well seek to challenge it. Such a challenge, according to the Court, in the form of "an invitation to contest" the report of a Parliamentary Committee "is likely to disturb the delicate balance that the Constitution provides between the constitutional institutions". Such a contest and adjudication would (in that view) be contrary to the privileges of Parliament which the Constitution protects. Hence according to the Court:

> "73…we are prima facie of the view that the Parliamentary Standing Committee report may not be tendered as a document to augment the stance on the factual score that a particular activity is unacceptable or erroneous. "

A substantial question involving the interpretation of the Constitution having arisen, two questions have been referred to the Constitution Bench under Article 145(3):

> "(i) Whether in a litigation filed before this Court either under Article 32 or Article 136 of the Constitution of India, the Court can refer to and place reliance upon the report of the Parliamentary Standing Committee; and
>
> (ii) Whether such a report can be looked at for the purpose of reference and, if so, can there be restrictions for the purpose of reference regard being had to the concept of parliamentary privilege and the delicate balance between the constitutional institutions that Articles 105, 121 and 122 of the Constitution conceive?."[4]

[4] Id, at page 322

B Submissions

7 Leading the submissions on behalf of the petitioners, Mr Harish Salve, learned Senior Counsel underscored the importance of three constitutional principles:

(i) Privileges of Parliament;
(ii) Comity of institutions; and
(iii) Separation of powers.

Based on them, the submission is that reference to what transpires in a co-equal constitutional institution must be circumspect and consistent with due deference to and comity between institutions. Freedom of speech and expression is implicit in the working of every institution and it is that institution alone which can regulate its own processes. In Parliament, what speakers state is controlled by the House or, as the case may be, by its Committee and a falsehood in Parliament is punishable by that institution alone. It has been urged that if what is stated in a report of a Parliamentary Standing Committee were to be impeached in a court of law, that would affect the control of the Committee and of Parliament itself. The functions performed by Parliament and by the judiciary as two co-equal branches are, it is urged, completely different. Parliamentary business is either for the purpose of enforcing accountability of the government or to enact legislation. The function of judicial institutions is adjudicatory. Courts resolve a lis on objective satisfaction and have a duty to

act judicially. Courts would not, it has been urged, receive as evidence of facts any material whose truth or integrity cannot be assailed in court.

8 On the above conceptual foundation, Mr Salve urged that the report of a Parliamentary Standing Committee can be relied upon in a judicial proceeding in two exceptional situations:

(i) Where it becomes necessary for the court to examine the legislative history of a statutory provision;

(ii) As a source from which the policy of the government, as reflected in the statements made by a Minister before the House can be discerned; and

(iii) Reports of Parliamentary Standing Committees are meant for consideration before Parliament and can only be regarded as "considered advice" to the House.

Except in the two situations enumerated above, no petition seeking a mandamus can be brought before the court on the basis of such a report for the reason that (i) No right can be founded on the recommendation of a House Committee; and (ii) Relying on such a report may result in a challenge before the court, impinging upon Parliamentary privileges.

9 Mr K K Venugopal, the learned Attorney General for India has supported the adoption of a rule of exclusion, based on the privileges of the legislature,

separation of powers and as a matter of textual interpretation of the Constitution. In his submission:

I Committees of Parliament being an essential adjunct to Parliament, and their reports being for the purpose of advising and guiding Parliament in framing laws and the executive for framing policies, it would be a breach of privilege of Parliament to judicially scrutinize and/or review these reports for any purpose whatsoever;

II The broad separation of powers, which is a part of the basic structure of the Constitution of India, would prevent Courts from subjecting the reports of Parliamentary Standing Committees to scrutiny or judicial review; and

III A conjoint reading of Articles 105 and 122 of the Constitution would establish that, expressly or by necessary implication, there is a bar on the Courts from scrutinizing or judicially reviewing the functioning or reports of the Committees of Parliament.

10 Refuting the submissions which have been urged by the Attorney General and on behalf of the pharmaceutical companies, Mr. Colin Gonsalves, learned Senior Counsel urges that there can be no objection to reliance being placed on the Report of a Parliamentary Standing Committee where (as in the present case) there is no attempt

(i) to criticize Parliament;

(ii) to summon a witness; or

(iii) to breach a privilege of the legislating body.

The Report of a Parliamentary Standing Committee is (it is urged) relied upon only for the court to seek guidance from it. The court may derive such support in whichever manner it may best regard in the interest of justice, to advance a cause which has been brought in a social action litigation. According to Mr Gonsalves, the core of the submission (urged by Mr Salve) is that because his clients object to the findings in the Report, it becomes a contentious issue. Mr Gonsalves submits that this Court should not allow what in substance is an argument for a black out against the highest court taking notice of the report in its PIL jurisdiction. The submission is that the Court need not treat any of the facts contained in the Report as conclusive except those that are permitted by Section 57 of the Indian Evidence Act 1872. No mandamus is sought that the recommendations of the Parliamentary Committee be enforced. The Court, it has been urged, will not be invited to comment upon the Report even if it were not to agree with the contents of the Report. Learned Counsel urged that the legislative function of Parliament is distinct from the oversight which it exercises over government departments. An issue of parliamentary privileges arises when the court makes a member of Parliament or of a Parliamentary Committee liable in a civil or criminal action for what is stated in Parliament. Such is not the position here. Mr Gonsalves submitted that in significant respects, our Constitution marks a historical break from the English Parliamentary tradition. India has adopted the doctrine of constitutional supremacy and not

Parliamentary sovereignty, as in the UK. Hence, cases decided under the English Common Law cannot be transplanted, without regard to context, in Indian jurisprudence on the subject. The unrestrained use of parliamentary privileges, it has been urged, stands modified in the Indian context, which is governed by constitutional supremacy. In matters involving public interest or issues of a national character, both the institutions – Parliament and the courts – must act together. As a matter of fact, Parliament has placed the Report of its Standing Committee in the public domain. It is ironical, Mr Gonsalves urges, that in the present case, it is the executive which seeks to protect itself from disclosure in the guise of parliamentary privileges. Finally, it has been urged that the public interest jurisdiction is not adversarial and constitutes a distinctly Indian phenomenon. Where the fulfilment and pursuit of a constitutional goal, national purpose or public interest is in issue, both Parliament and the judiciary will act in comity. No issue arises here in relation to the separation of powers or breach of Parliamentary privilege. On the contrary, it has been submitted that the approach of the respondents is not in accordance with the march of transparency in our law.

11 Mr Anand Grover, learned Senior Counsel submitted that if there is no dispute that a certain statement was made before Parliament or, as the case may be, a Parliamentary Standing Committee, such a statement can be relied upon as a fact of it being stated in Parliament. The truth of the statement is, in the submission of the learned Senior Counsel, another and distinct issue. The

Report is uncontentious not as regards the truth of its contents but of it having been made. The court in the exercise of its power of judicial review will not hold that an inference drawn by a Parliamentary Committee is wrong. But the court can certainly look at a statement where there is no dispute of it having been made.

12 Mr Shyam Divan and Mr Gourab Banerji, learned Senior Counsel have broadly pursued the same line of argument as the learned Attorney General for India and Mr Harish Salve.

C The Constitution

13 Articles 105, 118, 119 and 121 are comprised in Part V of the Constitution which deals with the Union and form a part of Chapter II, which deals with Parliament. Article 105 is extracted below:

> "105.(1) 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.
>
> (2) No member of Parliament shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings.
>
> (3) In other respects, the powers, privileges and immunities of each House of Parliament, and of the members and the committees of each House, shall be such as may from time to time be defined by Parliament by law, and, 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.]
>
> (4) The provisions of clauses (1), (2) and (3) shall apply in relation to persons who by virtue of this Constitution have the right to speak in, and otherwise to take part in the proceedings of, a House of Parliament or any committee thereof as they apply in relation to members of Parliament."

14 The first major principle which emerges from Article 105 is that it expects, recognizes and protects the freedom of speech in Parliament. Stated in a sentence, the principle enunciates a vital norm for the existence of democracy. Parliament represents collectively, through the representative character of its members, the voice and aspirations of the people. Free speech within the Parliament is crucial for democratic governance. It is through the fearless expression of their views that Parliamentarians pursue their commitment to those who elect them. The power of speech exacts democratic accountability from elected governments. The free flow of dialogue ensures that in framing legislation and overseeing government policies, Parliament reflects the diverse views of the electorate which an elected institution represents.

15 The Constitution recognizes free speech as a fundamental right in Article 19(1)(a). A separate articulation of that right in Article 105(1) shows how important the debates and expression of view in Parliament have been viewed by the draftspersons. Article 105(1) is not a simple reiteration or for that matter, a surplusage. It embodies the fundamental value that the free and fearless exposition of critique in Parliament is the essence of democracy. Elected

members of Parliament represent the voices of the citizens. In giving expression to the concerns of citizens, Parliamentary speech enhances democracy. Article 105(1) emphasizes free speech as an institutional value, apart from it being a part of individual rights. Elected members of the legislature continue to wield that fundamental right in their individual capacity. Collectively, their expression of opinion has an institutional protection since the words which they speak are spoken within the portals of Parliament. This articulated major premise is however subject to the provisions of the Constitution and is conditioned by the procedure of Parliament embodied in its rules and standing orders. The recognition in clause (1) that there shall be freedom of speech in Parliament is effectuated by the immunity conferred on Members of Parliament against being liable in a court of law for anything said or for any vote given in Parliament or a committee. Similarly, a person who publishes a report, paper, votes or proceedings under the authority of Parliament is protected against liability in any court. In other respects – that is to say, on matters other than those falling under clause (1) and (2), Parliament has been empowered to define the powers, privileges and immunities of each of its Houses and of its members and committees. Until Parliament does so, those powers, privileges and immunities are such as existed immediately before the enforcement of the 44th amendment to the Constitution[5]. Clause (4) of Article 105 widens the scope of the protection by making it applicable "in relation to persons" who have a right to speak in or to take part in the proceedings before the House or its committees. The

[5] The Constitution (44th amendment) Act, 1978 came into force from 20 June, 1979.

protection afforded to Members of Parliament is extended to all such persons as well. Committees of the Houses of Parliament are established by and under the authority of Parliament. They represent Parliament. They are comprised within Parliament and are as much, Parliament.

16 Article 118 deals with the Rules of Procedure of Parliament:

> "118.(1) Each House of Parliament may make rules for regulating, subject to the provisions of this Constitution, its procedure and the conduct of its business.
>
> (2) Until rules are made under clause (1), the rules of procedure and standing orders in force immediately before the commencement of this Constitution with respect to the Legislature of the Dominion of India shall have effect in relation to Parliament subject to such modifications and adaptations as may be made therein by the Chairman of the Council of States or the Speaker of the House of the People, as the case may be.
>
> (3) The President, after consultation with the Chairman of the Council of States and the Speaker of the House of the People, may make rules as to the procedure with respect to joint sittings of, and communications between, the two Houses.
>
> (4) At a joint sitting of the two Houses the Speaker of the House of the People, or in his absence such person as may be determined by rules of procedure made under clause (3), shall preside."

The procedure and conduct of business of Parliament are governed by the rules made by each House. The rule making authority is subject only to the provisions of the Constitution. Until rules are framed, the procedure of Parliament was to be governed by the rules of procedure and Standing Orders which applied to the legislature of the Dominion of India immediately before the commencement of the Constitution (subject to adaptations and modifications). Rules of

procedure for joint sittings of the two Houses of Parliament and in regard to communications between them are to be framed by the President in consultation with the Chairman of the Rajya Sabha and the Speaker of the Lok Sabha.

17 Article 119 provides for regulation by law of the procedure in Parliament in relation to financial business. Article 119 provides thus:

> "119.Parliament may, for the purpose of the timely completion of financial business, regulate by law the procedure of, and the conduct of business in, each House of Parliament in relation to any financial matter or to any Bill for the appropriation of moneys out of the Consolidated Fund of India, and, if and so far as any provision of any law so made is inconsistent with any rule made by a House of Parliament under clause (1) of article 118 or with any rule or standing order having effect in relation to Parliament under clause (2) of that article, such provision shall prevail."

Article 119 thus embodies a special provision which enables Parliament to regulate the procedure for and conduct of business in each House in relation to financial matters or for appropriation of monies from the Consolidated Fund.

18 Article 122 contains a bar on courts inquiring into the validity of any proceedings of Parliament on the ground of an irregularity of procedure:

> "122.(1) The validity of any proceedings in Parliament shall not be called in question on the ground of any alleged irregularity of procedure.
>
> (2) No officer or member of Parliament in whom powers are vested by or under this Constitution for
> regulating procedure or the conduct of business, or for maintaining order, in Parliament shall be subject to the

> jurisdiction of any court in respect of the exercise by him of those powers."

Article 122 protects the proceedings in Parliament being questioned on the ground of an irregularity or procedure. In a similar vein, a Member of Parliament or an officer vested with authority under the Constitution to regulate the procedure or the conduct of business (or to maintain order) in Parliament is immune from being subject to the jurisdiction of any Court for the exercise of those powers. Those who perform the task – sometimes unenviable – of maintaining order in Parliament are also protected, to enable them to discharge their functions dispassionately.

19 The provisions contained in Chapter II of Part V are mirrored, in the case of the State Legislatures, in Chapter III of Part VI. The corresponding provisions in regard to State Legislatures are contained in Articles 194, 208, 209 and 212.

20 The fundamental principle which the Constitution embodies is in terms of its recognition of and protection to the freedom of speech in Parliament.

Freedom of speech has been entrenched by conferring an immunity against holding a Member of Parliament liable for what has been spoken in Parliament or for a vote which has been tendered. The freedom to speak is extended to other persons who have a right to speak in or take part in the proceedings of Parliament. Parliament is vested with the authority to regulate its procedures and to define its powers, privileges and immunities. The same protection which

extends to Parliamentary proceedings is extended to proceedings in or before the Committees constituted by each House. Parliament has been vested with a complete and exclusive authority to regulate its own procedure and the conduct of its business.

21 While making the above provisions, the Constitution has carefully engrafted provisions to ensure institutional comity between Parliament and the judiciary. Under Article 121, the conduct of a Judge of the Supreme Court or of a High Court in the discharge of duties cannot be discussed in Parliament (except upon a motion for removal). Article 211 makes a similar provision in regard to the state legislatures.

D Parliamentary Standing Committees

22 Parliamentary Committees exist both in the Westminster form of government in the United Kingdom as well in the Houses of Parliament in India. In the UK, Select Committees have emerged as instruments through which Parliament scrutinizes the policies and actions of government and enforces accountability of government and its officers. Select committees are composed of specifically nominated members of Parliament and exercise the authority which the House delegates to them. The role of select committees has been set

forth in **Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament**[6] :

> "Select committees are appointed by the House to perform a wide range of functions on the House's behalf. Most notably they have become over recent years the principal mechanism by which the House discharges its responsibilities for the scrutiny of government policy and actions. Increasingly this scrutiny work has become the most widely recognized and public means by which Parliament holds government Ministers and their departments to account."

The scope of deliberations or inquiries before a Select Committee is defined in the order by which the committee is appointed. When a Bill is referred to a Select Committee, the Bill constitutes the order of reference[7]. Select committees are a microcosm of the House. During the course of their work, Select Committees rely upon documentary and oral evidence[8]:

> "Once received by the committee as evidence, papers prepared for a committee become its property and may not be published without the express authority of the committee. Some committees have agreed to a resolution at the beginning of an inquiry authorizing witnesses to publish their own evidence."

Evidence which has been collected during the course of an inquiry is published with the report of the committee[9]:

> "It is usual practice of committees to publish the evidence which they have taken during the course of an inquiry with the report to which the evidence is relevant. In the case of longer inquiries, the evidence may be separately published during the course of the inquiry. In such cases, however, that evidence may be published again with the report. Additionally,

[6] Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament, (Lexis Nexis, 24th edn., 2011), 37.
[7] Id, at pages 805-806.
[8] Erskine May, at page 818.
[9] Erskine May, at page 825.

> committees may take evidence with no intention of producing a subsequent report and publish it without comment."

A Select committee decides when to publish any report which it has agreed[10].

Article 105 of the Indian Constitution recognizes committees of the Houses of Parliament. Rules of Procedure of the Lok Sabha and the Rajya Sabha framed under Article 118(1) of the Constitution *inter alia* provide for the organization and working of these committees[11].

23 The rules governing procedure and the conduct of business in the Rajya Sabha provide for the constitution of the committees of the House. Chapter IX of the Rules contains provisions relating to legislation. Provisions have been made for Bills which originate in the Rajya Sabha and for those which originate in the Lok Sabha and are transmitted to the Rajya Sabha. Under Rule 72, members of a Select Committee for a Bill are appointed by the Rajya Sabha when a motion that the Bill be referred to a Select Committee is made. Rule 84 empowers the Select Committee to require the attendance of witnesses or the production of papers or records. The Select Committee can hear expert evidence and representatives of special interests affected by the measure. Documents submitted to the Committee cannot be withdrawn or altered without its knowledge and approval. The Select Committee, under Rule 85, is empowered to decide upon its procedure and the nature of questions which it

[10] Erskine May, at page 838

[11] Rules of Procedure and Conduct of Business in Lok Sabha, (Lok Sabha Secretariat, 15th edn., April 2014). Rules of Procedure and Conduct of Business in the Council of States (Rajya Sabha), (published by the Secretary General, 9th edn., August 2016).

may address to a witness called before it. Rule 86 provides for the printing and publication of evidence and empowers the Committee to direct that the evidence or a summary be laid on the table. Evidence tendered before the Select Committee can only be published after it has been laid on the table. The Select Committee prepares its report on the Bill referred to it, under Rule 90. Under Rule 91, the report of the Select Committee on a Bill, together with minutes of dissent, is presented to the Rajya Sabha by the Chairperson of the Committee. Under Rule 92, the Secretary General must print every report of a Select Committee. The report together with the Bill proposed by the Select Committee has to be published in the Gazette. The rules contemplate the procedure to be followed in the Rajya Sabha for debating and discussing the report and for considering amendments, leading up to the eventual passage of the Bill. In a manner similar to reference of Bills originating in the Rajya Sabha to Select Committees, Bills which are transmitted from the Lok Sabha to the Rajya Sabha may be referred to a Select Committee under Rule 125, if a motion for that purpose is carried.

24 Chapter XXII of the Rules contains provisions in regard to Department related Parliamentary Standing Committees. Rule 268 stipulates that there shall be Parliamentary Standing Committees related to Ministries/Departments. The Third schedule elucidates the name of each Committee and the Ministries/Departments which fall within its purview. Under Rule 269, each such Committee is to consist of not more than 31 members: 10 to be nominated by

the Chairperson from the Members of the Rajya Sabha and 21 to be nominated by the Speaker from the Members of the Lok Sabha. Rule 270 specifies the functions of the Standing Committees:

> "270. Functions
>
> Each of the Standing Committees shall have the following functions, namely:-
>
> (a) to consider the Demands for Grants of the related Ministries/Departments and report thereon. The report shall not suggest anything of the nature of cut motions;
> (b) to examine Bills, pertaining to the related Ministries/ Departments, referred to the Committee by the Chairman or the Speaker, as the case may be, and report thereon;
> (c) to consider the annual reports of the Ministries/Departments and report thereon; and
> (d) to consider national basic long-term policy documents presented to the Houses, if referred to the Committee by the Chairman or the Speaker, as the case may be, and report thereon:
>
> Provided that the Standing Committees shall not consider matters of day-to-day administration of the related Ministries/Departments."

Rule 274 envisages that the report of the Standing Committee "shall be based on broad consensus" though a member may record a dissent. The report of the Committee is presented to the Houses of Parliament. Under Rule 275, provisions applicable to Select Committees on Bills apply *mutatis mutandis* to the Standing Committees. Rule 277 indicates that the report of a Standing Committee is to have persuasive value and is treated as advice to the House:

> "**277. Reports to have persuasive value**
>
> The report of a Standing Committee shall have persuasive value and shall be treated as considered advice given by the Committee."

Department related Parliamentary Standing Committees are Committees of the Houses of Parliament. The Committees can regulate their procedure for requiring the attendance of persons and for the production of documents. The Committees can hear experts or special interests. These Committees ensure parliamentary oversight of the work of the ministries/departments of government. As a part of that function, each Committee considers demands for grants, examines Bills which are referred to it, considers the annual reports of the ministry/department and submits reports on national long-term policy documents, when they have been referred for consideration. The reports of these Committees are published and presented to the Houses of Parliament. They have a persuasive value and are advice given by the Committee to Parliament.

25 Besides the Department related Standing Committees, there is a General Purposes Committee (Chapter XXIII) whose function is to consider and advise on matters governing the affairs of the House, referred by the Chairperson. Chapter XXIV provides for the constitution of a Committee on Ethics to oversee

“the moral and ethical conduct” of members, prepare a code of conduct, examine cases of alleged breach and to tender advise to members on questions involving ethical standards.

E Parliamentary privilege

E.1 UK Decisions

26 In the UK, a body of law has evolved around the immunity which is afforded to conduct within or in relation to statements made to Parliament against civil or criminal liability in a court of law. The common law also affords protection against the validity of a report of a Select Committee being challenged in a court.

27 Article 9 of the Bill of Rights, 1689 declares that:

> "..That the freedom of speech and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament…"

Construed strictly, the expression "out of Parliament" will effectively squelch any discussion of the proceedings of Parliament, outside it. This would compromise to the need for debate and discussion on matters of governance in a democracy. Hence, there has been an effort to bring a sense of balance: a balance which will ensure free speech within Parliament but will allow a free expression of views among citizens. Both are essential to the health of democracy.

Article 9 has provided the foundation for a line of judicial precedent in the English Courts. In 1884, the principle was formulated In **Bradlaugh** v **Gossett**[12]:

> "The House of Commons is not subject to the control of Her Majesty's Courts in its administration of that part of the Statute law which has relation to its internal procedure only. What is said or done within its walls cannot be inquired into a court of law. A resolution of the House of Commons cannot change the law of the land. But a court of law has no right to inquire into the propriety of a resolution of the House restraining a member from doing within the walls of the House itself something which by the general law of the land he had a right to do."

In **Dingle** v **Associated Newspapers Ltd**[13], the above formulation was held to constitute "a clear affirmation of the exclusive right of Parliament to regulate its own internal proceedings". Applying that principle, the Queen's Bench Division ruled that the report of a Select Committee of the House of Commons could not be impugned outside Parliament. This principle was applied in **Church of Scientology of California** v **Johnson-Smith**[14], when an action for libel was brought against a Member of Parliament for a statement made during the course of a television interview. In order to refute the defendants' plea of fair comment, the plaintiff sought to prove malice by leading evidence of what had taken place in Parliament. Rejecting such an attempt, the court adverted to the following statement of principle in **Blackstone**:

> "The whole of the law and custom of Parliament has its origin from this one maxim, "that whatever matter arises concerning either House of Parliament ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere."

[12] (1884) 12 Q.B.D. 271
[13] (1960) 2 Q.B. 405
[14] (1972) 1 Q.B. 522

Reiterating that principle, the court held:

> "…what is said or done in the House in the course of any proceedings there cannot be examined outside Parliament for the purpose of supporting a cause of action even though the cause of action itself arises out of something done outside the House."

The decision involved a libel action brought against a Member of Parliament for a statement made outside. The court rejected an attempt to rely upon what was stated in Parliament to establish a case of malice against the defendant.

28 In **Pepper (Inspector of Taxes)** v **Hart**[15], Lord Browne-Wilkinson held for the House of Lords that there was a valid reason to relax the conventional rule of exclusion under which reference to Parliamentary material, as an aid to statutory construction, was not permissible. The learned Law Lord held:

> "In my judgment, subject to the questions of the privileges of the House of Commons, reference to Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases references in court to Parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words."

Holding that such a relaxation would not involve the court criticizing what has been said in Parliament since the court was only giving effect to the words used by the Minister, the court held that the exclusionary rule should be relaxed to permit reference to Parliamentary materials where:

> "(a) legislation is ambiguous or obscure, or leads to an absurdity; (b) the material relied upon consists of one or more

[15] (1992) 3 W.L.R. 1032

> statements by a Minister or other promoter of the Bill together if necessary with such other Parliamentary material as is necessary to understand such statements and their effect; (c) the statements relied upon are clear."

29 The decision of the Privy Council in **Richard William Prebble** v **Television New Zealand ("Prebble")**[16] arose from a case where, in a television programme transmitted by the defendant, allegations were levelled against the Government of New Zealand, involving the sale of state owned assets to the private sector while the plaintiff was the Minister of the department. In his justification, the defendant alleged that the plaintiff had made statements in the House calculated to mislead. Lord Browne-Wilkinson held that the defendant was precluded from questioning a statement made by the plaintiff before the House of Parliament. The principle was formulated thus:

> "In addition to article 9 itself, there is a long line of authority which supports a wider principle, of which article 9 is merely one manifestation, viz. that the courts and Parliament are both astute to recognize their respective constitutional roles. So far as the courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges: Burdett v. Abbot (1811) 14 East 1; Stockdale v. Hansard (1839) 9 Ad. & EI. 1; Bradlaugh v. Gossett (1884) 12 Q.B.D. 271; Pickin v. British Railways Board (1974) A.C. 765; Pepper v. Hart (1993) A.C. 593. As Blackstone said in his Commentaries on the Laws of England, 17th ed. (1830), vol. 1, p.163:
>
> > 'the whole of the law and custom of Parliament has its origin from this one maxim, 'that whatever matter arises concerning either House of Parliament, ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere."

[16] (1994) 3 W.L.R. 970

The Privy Council held that cross-examination based on the Hansard was impermissible.

In the course of its decision in **Prebble**, the Privy Council adverted to an Australian judgment of the **New South Wales Supreme Court** in **Reg.** v **Murphy ("Murphy")**[17] which had allowed a witness to be cross examined on the basis of evidence given to a Select Committee on the ground that Article 9 did not prohibit cross-examination to show that the statement of the witness before the committee was false. In order to overcome the situation created by the decision, the Australian legislature enacted the Parliamentary Privileges, Act 1987. Section 16(3) introduced the following provisions:

> "(3) In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of: (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament; (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament."

In **Prebble**, the Privy Council held that Section 16(3) contains "what, in the opinion of their lordships, is the true principle to be applied". The Privy Council held that the Australian view in **Murphy** was not correct, so far as the rest of the Commonwealth is concerned, because it was in conflict with a long line of

[17](1986) 64 A.L.R. 498

authority that courts will not allow any challenge to what is said or done in Parliament.

The Defamation Act, 1996 (UK) contained a provision in Section 13 under which an individual litigant in a defamation case could waive Parliamentary privilege. The report of the Joint Committee observed that the provision "undermined the basis of privilege: freedom of speech was the privilege of the House as a whole and not of the individual Member in his or her own right, although an individual Member could assert and rely on it." The waiver provision was deleted on the ground that the privilege belongs to the House and not to an individual member. The impact of the provisions of Section 13 of the Defamation Act, 1996 was dealt with in a 2011 decision of the House of Lords in **Hamilton** v **Al Fayed ("Hamilton")**[18]. The defendant had alleged that as a Member of Parliament, the plaintiff had accepted cash from him for asking questions on his behalf in the House of Commons. The plaintiff commenced an action for defamation against the defendant, waiving his parliamentary privileges pursuant to Section 13 of the Defamation Act, 1996. Lord Browne-Wilkinson dwelt on parliamentary privileges, which prohibit the court from questioning whether a witness before Parliament had misled it. The House of Lords held that any attempt to cross-examine the defendant to the effect that he had lied to a Parliamentary committee when he had stated that he had paid money for questions would have infringed parliamentary privileges. However, under Section 13, the plaintiff

[18] (2001) 1 A.C. 395

could waive his own protection from Parliamentary privilege. The consequence was thus:

> "The privileges of the House are just that. They all belong to the House and not to the individual. They exist to enable the House to perform its functions. Thus section 13(1) accurately refers, not to the privileges of the individual MP, but to "the protection of any enactment or rule of law" which prevents the questioning of procedures in Parliament. The individual MP enjoys the protection of parliamentary privileges. If he waives such protection, then under section 13(2) any questioning of parliamentary proceedings (even by challenging "findings…made about his conduct") is not to be treated as a breach of the privileges of Parliament."

The effect of Section 13 was that if a Member of Parliament waived the protection, an assail of proceedings before Parliament would not be regarded as a breach of privilege.

30 The decision in **Hamilton** is significant for explaining precisely the relationship between parliamentary privilege and proceedings in a Court which seek to challenge the truth or propriety of anything done in parliamentary proceedings. As the Court holds:

> "The normal impact of parliamentary privilege is to prevent the court from entertaining any evidence, cross-examination or submissions which challenge the veracity or propriety of anything done in the course of parliamentary proceedings. Thus, it is not permissible to challenge by cross-examination in a later action the veracity of evidence given to a parliamentary committee."

But for the provisions of Section 13, evidence by **Hamilton** that he had not received money for questions would come into conflict with the evidence tendered by AI Fayed which was accepted by the Parliamentary Committees.

Hence it would have been impermissible to cross-examine Al Fayed to the effect that he had falsely stated before the Parliamentary Committees that he had paid money for questions. Such a consequence was obviated by the waiver provisions of Section 13.

31 In **Toussaint** v **Attorney General of Saint Vincent and the Grenadines ("Toussaint")**[19], the Privy Council dealt with a case where a claim was brought against the government by an individual claiming that the acquisition of his land was unlawful. In support, he referred to a speech of the Prime Minister in Parliament and a transcript taken from the video-tape of a televised debate. The submission was that the true reason for the acquisition of the land, as evident from the speech of the Prime Minister, was political. Adverting to **Prebble**, Lord Mance, speaking for the Privy Council, noted that there were three principles involved: the need to ensure the free exercise of powers by the legislature on behalf of the electors; the need to protect the interest of justice; and the interest of justice in ensuring that all relevant evidence is available to the courts. The Privy Council held that it was permissible to rely upon the speech of the Prime Minister though the attempt was to demonstrate an improper exercise of power for extraneous purposes. As Lord Mance observed:

> "In such cases, the minister's statement is relied upon to explain the conduct occurring outside Parliament, and the policy and motivation leading to it. This is unobjectionable although the aim and effect is to show that such conduct involved the improper exercise of a power "for an alien purpose or in a wholly unreasonable manner": *Pepper v Hart,* per Lord

[19] (2007) 1 W.L.R. 2825

> Browne-Wilkinson at p 639 A. The Joint Committee expressed the view that Parliament should welcome this development, on the basis that "Both parliamentary scrutiny and judicial review have important roles, separate and distinct, in a modern democratic society" (para 50) and on the basis that "The contrary view would have bizarre consequences", hampering challenges to the "legality of executive decisions… by ring-fencing what ministers said in Parliament, and making "ministerial decisions announced in Parliament…less readily open to examination than other ministerial decisions": para 51. The Joint Committee observed, pertinently, that
>
> > "That would be an ironic consequence of article 9. Intended to protect the integrity of the legislature from the executive and the courts, article 9 would become a source of protection of the executive from the courts.""

The Prime Minister's statement in the House was "relied on for what it says, rather than questioned or challenged". This was permissible.

32 **Toussaint** is an important stage in the development of the law. A statement made in Parliament by a Minister could be relied upon, not just to explain the history of a law. Where there is a challenge to the exercise of governmental authority on the ground that it is actuated by extraneous reasons, a statement by a Minister in Parliament could be used in court in regard to conduct outside Parliament. The challenge is not to a statement made in Parliament but to governmental action outside. The statement would be relevant to question an abuse of power by government.

33 In **Regina (Bradley and Others)** v **Secretary of State for Work and Pensions (Attorney General intervening)**[20], the Court of Appeal visited the statement in **Prebble** that Section 16(3) of the Parliamentary Privileges Act, 1987 in Australia declared the true effect of Article 9 of the Bill of Rights and that Section 16(3) contained "the true principle to be applied" in the case. Holding that the dictum in **Prebble** appears to be too wide, it was held:

> "…But paragraph (c), if read literally, is extremely wide. It would seem to rule out reliance on or a challenge to a ministerial statement itself on judicial review of the decision embodied in that statement (which was permitted in R v Secretary of State for the Home Department, Ex p Brind [1991] 1 AC 696, and to which no objection has been raised in the present case), or to resolve an ambiguity in legislation (Pepper v Hart [1993] AC 593), or to assist in establishing the policy objectives of an enactment (Wilson v First County Trust Ltd (No 2) [2004] 1 AC 816). It would also prohibit reliance on report of the Joint Committee on Human Rights, which, as Mr Lewis's submissions rightly state, have been cited in a number of appellate cases in this jurisdiction: a very recent example is R v F [2007] QB 960 para 11. As Lord Nicholls of Birkenhead observed in Wilson's case [2004] 1 AC 816, para 60:
>
> > "there are occasions when courts may properly have regard to ministerial and other statements made in Parliament without in any way 'questioning' what has been said in Parliament, without giving rise to difficulties inherent in treating such statements as indicative of the will of Parliament, and without in any other way encroaching upon parliamentary privilege by interfering in matters properly for consideration and regulation by Parliament alone."
>
> I therefore do not treat the text of paragraph(c) of the Australian statute as being a rule of English law."

The report of a Select Committee, it was observed, is a written document published after a draft report has been placed before and approved by the

[20](2007) EWHC 242 (Admin)

Committee. Hence, it was unlikely that the use of such a report in the submissions of a party in civil litigation would have inhibited the Committee from expressing its view. The freedom of speech in Parliament principle would not be affected, since there would be no inhibition of that freedom.

34 The decision of the Administrative Court in the UK in **Office of Government Commerce** v **Information Commissioner (Attorney General intervening)**[21] involved a case where a department of government had carried out reviews into an identity card programme. The case involved a claim for the disclosure of information. The Court observed that the law of parliamentary privilege is based on two principles: the need for free speech in Parliament and separation of powers between the legislature and the judiciary:

> "...the law of parliamentary privilege is essentially based on two principles. The first is the need to avoid any risk of interference with free speech in Parliament. The second is the principle of the separation of powers, which in our constitution is restricted to the judicial function of government and requires the executive and the legislature to abstain from interference with the judicial function, and conversely requires the judiciary not to interfere with or to criticise the proceedings of the legislature. These basic principles lead to the requirement of mutual respect by the courts for the proceedings and decisions of the legislature and by the legislature (and the executive) for the proceedings and decisions of the courts.
>
> Conflicts between Parliament and the courts are to be avoided. The above principles lead to the conclusion that the courts cannot consider allegations of impropriety or inadequacy or lack of accuracy in the proceedings of Parliament. Such allegations are for Parliament to address, if it thinks fit, and if an allegation is well founded any sanction is for Parliament to determine. The proceedings of Parliament include

[21](2009) 3 W.L.R. 627

> parliamentary questions and answers. These are not matters for the courts to consider."

Yet, the Court also noticed the limitation of the above principles, when proceedings in Parliament are relied upon simply as relevant historical facts or to determine whether the legislation is incompatible with the European Convention for the Protection of Human Rights which was embodied in the Human Rights Act 1998 ("HRA") in the UK. In that context the Court observed:

> "However, it is also important to recognise the limitations of these principles. There is no reason why the courts should not receive evidence of the proceedings of Parliament when they are simply relevant historical facts or events; no "questioning" arises in such a case… Similarly, it is of the essence of the judicial function that the courts should determine issues of law arising from legislation and delegated legislation. Thus, there can be no suggestion of a breach of parliamentary privilege if the courts decide that legislation is incompatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms: by enacting the Human Rights Act 1998…"

The Court held that the conclusions of the report of a Committee that had led to legislation could well be relied upon since the purpose of the reference is either historical or made with a view to ascertaining the mischief at which the legislation was aimed. If the evidence given to a Committee is uncontentious – the parties being in agreement that it is true and accurate - there could be no objection to it being taken into account. What the Tribunal could not do was to refer to contentious evidence given to a Parliamentary Committee or the finding of the Committee on an issue which the Tribunal had to determine.

35 The decision indicates a calibrated approach to Parliamentary privilege consistent with the enactment of the HRA. The doctrine of incompatibility envisages a role for courts in the UK to assess the consistency of the provisions of law with reference to the standards of the European Convention. Parliamentary supremacy does not allow the court to strike down legislation. Yet the emergence of standards under the HRA has allowed for a distinct adjudicatory role: to determine the compatibility of domestic law with reference to European Convention standards, adopted by the HRA. To hold that this has not altered the role of courts vis-à-vis Parliamentary legislation would be to miss a significant constitutional development.

Wheeler v **The Office of the Prime Minister**[22] was a case where there was a challenge to a decision brought by the government to give notice of the intention of the UK to participate in the Council Framework Decision on the European arrest warrants. It was claimed that the government was precluded from issuing a notification of its intention without holding a referendum. Holding that the plea would breach Parliamentary privilege the Court held:

> "…In substance, however, the claim is that, unless the House of Commons organises its business in a particular way, and arranges for a vote in a particular form, the courts must intervene and either grant a declaration or issue an order prohibiting the government from taking certain steps unless and until there is such a vote. In my judgment, that would involve the courts impermissibly straying from the legal into the political realm."

[22](2014) EWHC 3815 (Admin)

The plea, the Court ruled, would amount to the Court questioning things done in Parliament and instead of facilitating the role of Parliament, the Court would be usurping it.

In **Wilson** v **First County Trust Ltd**[23] the House of Lords observed that the Human Rights Act 1998 had obligated the Court to exercise a new role in respect of primary legislation. Courts were required to evaluate the effect of domestic legislation upon rights conferred by the European Convention and where necessary; to make a declaration of incompatibility. While doing so, the Court would primarily construe the legislation in question. Yet, the practical effect of a statutory provision may require the court to look outside the statute. The court would be justified in looking at additional background information to understand the practical impact of a statutory measure on a Convention right and decide upon the proportionality of a statutory provision. In that context, the Court held:

> "This additional background material may be found in published documents, such as a government white paper. If relevant information is provided by a minister or, indeed, any other member of either House in the course of a debate on a Bill, the courts must also be able to take this into account. The courts, similarly, must be able to have regard to information contained in explanatory notes prepared by the relevant government department and published with a Bill. The courts would be failing in the due discharge of the new role assigned to them by Parliament if they were to exclude from consideration relevant background information whose only source was a ministerial statement in Parliament or an explanatory note prepared by his department while the Bill was proceeding through Parliament. By having regard to such material, the court would not be "questioning" proceedings in

[23](2004) 1 AC 816

> Parliament or intruding improperly into the legislative process or ascribing to Parliament the views expressed by a minister. The court would merely be placing itself in a better position to understand the legislation.
>
> To that limited extent there may be occasion for the courts, when conducting the statutory "compatibility" exercise, to have regard to matters stated in Parliament. It is a consequence flowing from the Human Rights Act. The constitutionally unexceptionable nature of this consequence receives some confirmation from the view expressed in the unanimous report of the parliamentary Joint Committee on Parliamentary Privilege (1999) (HL Paper 43-I, HC 214-I), p 28, para 86, that it is difficult to see how there could be any objection to the court taking account of something said in Parliament when there is no suggestion the statement was inspired by improper motives or was untrue or misleading and there is no question of legal liability."

Recourse to such background information would enable the court to better understand the law and would not amount to a breach of parliamentary privilege.

36 The decision of the Privy Council in **Owen Robert Jennings** v **Roger Edward Wyndham Buchanan**[24] arose from the Court of Appeal in New Zealand. The judgment recognises that while the protection conferred by Article 9 of the Bill of Rights should not be whittled away, yet as the Joint Committee on Parliamentary privileges (Chaired by Lord Nicholls of Birkenhead) observed, freedom to discuss parliamentary proceedings is necessary in a democracy:

> "Freedom for the public and the media to discuss parliamentary proceedings outside Parliament is as essential to a healthy democracy as the freedom of members to discuss what they choose within Parliament."

[24](2004) UKPC 36

Media reporting of Parliamentary proceedings, the Court held, has been an important instrument of public debate. Hence the freedom of the Members of Parliament to discuss freely within its portals must be weighed with the freedom of the public to discuss and debate matters of concern to them:

> "As it is, parliamentary proceedings are televised and recorded. They are transcribed in *Hansard.* They are reported in the press, sometimes less fully than parliamentarians would wish. They form a staple of current affairs and news programmes on the radio and television. They inform and stimulate public debate. All this is highly desirable, since the legislature is representative of the whole nation. Thus, as the Joint Committee observed in its executive summary (page 1):
>
> > "This legal immunity is comprehensive and absolute. Article 9 should therefore be confined to activities justifying such a high degree of protection, and its boundaries should be clear.""

These observations reflect a concern to define the boundaries of the immunities under Article 9 in clear terms. While recognizing the absolute nature of the immunity, its boundaries must "be confined to activities justifying such a high degree of protection". The right of Members of Parliament to speak their minds in Parliament without incurring a liability is absolute. However, that right is not infringed if a member, having spoken and in so doing defamed another person, thereafter chooses to repeat his statement outside Parliament. In such circumstances, the privilege may be qualified. While it is necessary that the legislature and the courts do not intrude into the spheres reserved to the other, a reference to Parliamentary records to prove that certain words were in fact uttered is not prohibited.

> "In a case such as the present, however, reference is made to the parliamentary record only to prove the historical fact that

> certain words were uttered. The claim is founded on the later extra-parliamentary statement. The propriety of the member's behaviour as a parliamentarian will not be in issue. Nor will his state of mind, motive or intention when saying what he did in Parliament."

37 The evolution of the law in the UK indicates the manner in which the protection under Article 9 of the Bill of Rights has been transformed. There are essentially three principles which underlie the debate. The first is the importance of the freedom of speech in Parliament. The absolute protection which is afforded to what is done or spoken by a Member of Parliament in Parliament is an emanation of the need to protect freedom of speech in Parliament. The second principle which is at work is the separation of powers between Parliament and the courts. This principle recognizes that liability for a falsehood spoken in Parliament lies within the exclusive control of Parliament. A Member of Parliament cannot be held to account in a court of law for anything which is said or spoken in Parliament. A speech in Parliament would not attract either a civil or criminal liability enforceable in a court of law. The third principle emphasises that debates in Parliament have a public element. Public debate is the essence of and a barometer to the health of democracy. Though the privilege which attaches to a speech in Parliament is absolute, the immunity extends to those activities within Parliament, which justify a high degree of protection. As Parliamentary proceedings have come to be widely reported, published and televised, the common law has come to recognize that a mere reference to or production of a record of what has been stated in Parliament does not infringe Article 9 of the Bill of Rights. In other words, a reference to

Parliamentary record to prove a historical fact that certain words were spoken is not prohibited. What is impermissible is to question the truthfulness or veracity of what was stated before Parliament in any forum including a court, outside Parliament. Nor can a Member of Parliament be cross-examined in a proceeding before the court with reference to what was stated in Parliament. The validity of an Act of Parliament or of the proceedings of a Parliamentary Committee cannot be questioned in a court in the UK. The enactment of the Human Rights Act has led to a recognition that in testing whether a statutory provision is incompatible with a Convention right, it may become necessary for the court to adjudge the practical effects of a law. To do so, the court may legitimately have reference to background material which elucidates the rationale for the law, the social purpose which it has sought to achieve and the proportionality of its imposition. In order to understand the facets of the law which bear upon rights protected under the European Convention, the court may justifiably seek recourse to statements of ministers, policy documents and white papers to find meaning in the words of the statute. The law in the UK has hence developed to recognize that free speech in Parliament and separation of powers must be placed in a scale of interpretation that is cognizant of the need to protect the democratic rights of citizens.

E.2 India

38 The law in India has witnessed a marked degree of evolution. Indian jurisprudence on the subject has recognized the importance of the freedom of

speech in Parliament, the principle of separation of powers and the concomitant protection afforded to members from being held liable for what is spoken in Parliament. Principles grounded in the common law in the UK have not remained just in the realm of common law. The Constitution, in recognizing many of those principles imparts sanctity to them in a manner which only the text of a fundamental written charter for governance can provide. Separation of powers is part of the basic structure. Our precedent on the subject notices the qualitative difference between Parliamentary democracy in the UK and in India. The fundamental difference arises from the supremacy of the Indian Constitution which subjects all constitutional authorities to the mandate of a written Constitution.

39 The *locus classicus* on the subject of parliamentary privileges is the seven-judge Bench decision **in Re: Powers, Privileges and Immunities of State Legislatures**[25]. It was argued before this Court that the privilege of the House to construe Article 194(3) and to determine the width of the privileges, powers and immunities enables the House to determine questions relating to the existence and extent of its powers and privileges, unfettered by the views of the Supreme Court. Chief Justice Gajendragadkar, held that it was necessary to determine whether even in the matter of privileges, the Constitution confers on the House a sole and exclusive jurisdiction. The decision recognizes that while in the UK, Parliament is sovereign, the Indian Constitution creates a

[25]Special Reference No. 1 of 1964: (1965) 1 SCR 413

federal structure and the supremacy of the Constitution is fundamental to preserving the delicate balance of power between constituent units:

> "38. …it is necessary to bear in mind one fundamental feature of a federal constitution. In England, Parliament is sovereign; and in the words of Dicey, the three distinguishing features of the principle of Parliamentary Sovereignty are that Parliament has the right to make or unmake any law whatever; that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament, and that the right or power of Parliament extends to every part of the Queen's dominions. On the other hand, the essential characteristic of federalism is "the distribution of limited executive, legislative and judicial authority among bodies which are co-ordinate with and independent of each other". The supremacy of the Constitution is fundamental to the existence of a federal State in order to prevent either the legislatures of the federal unit or those of the member States from destroying or impairing that delicate balance of power which satisfied the particular requirements of States which are desirous of union, but not prepared to merge their individuality in a unity. This supremacy of the constitution is protected by the authority of an independent judicial body to act as the interpreter of a scheme of distribution of powers. Nor is any change possible in the constitution by the ordinary process of federal or State legislation. Thus the dominant characteristic of the British Constitution cannot be claimed by a federal constitution like ours".

While the legislatures in our country have plenary powers, they function within the limits of a written Constitution. As a result, the sovereignty which Parliament can claim in the UK cannot be claimed by any legislature in India "in the literal absolute sense".

40 The immunity conferred on Members of Parliament from liability to "any proceedings in any court in respect of anything said or any vote given by him in Parliament" (Article 105(2)) was deliberated upon in a judgment of the

Constitution Bench in **P V Narasimha Rao** v **State (CBI/SPE)**[26]. Justice G N Ray agreed with the view of Justice S P Bharucha on the scope of the immunity under clauses (2) and (3) of Article 105. The judgment of Justice Bharucha (for himself and Justice S Rajendra Babu) thus represents the view of the majority. The minority view was of Justices S C Agrawal and Dr A S Anand. In construing the scope of the immunity conferred by Article 105(2), Justice Bharucha adverted to judgments delivered by courts in the United Kingdom (including those of the Privy Council noted earlier[27]). Interpreting Article 105(2), Justice Bharucha observed thus:

> "133. Broadly interpreted, as we think it should be, Article 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."

In that case, the charge in a criminal prosecution for offences under Section 120B of the Penal Code and the Prevention of Corruption Act, 1988 was that there was a criminal conspiracy between alleged bribe givers and bribe takers (who were members of the legislature) to defeat a motion of no confidence by obtaining illegal gratification in pursuance of which bribes were given and accepted. The charge did not refer to the votes that the alleged bribe takers had actually cast upon the no confidence motion. Nevertheless, the majority held that the expression "in respect of" in Article 105(2) must perceive a 'broad meaning'. The alleged conspiracy and agreement had nexus in respect of those

[26] (1998) 4 SCC 626
[27] Bradlaugh v Gosset: (1884) 12 QBD 271: 53 LJQB 290; Prebble v Television New Zealand Ltd: (1994) 3 AII ER 407, PC; R v Currie: (1992)

votes, and the proposed inquiry in the criminal proceedings was in regard to its motivation. The submission of the Attorney General for India that the protection under Article 105(2) is limited to court proceedings and to a speech that is given or a vote that is cast was not accepted by the Constitution Bench for the following reasons:

> "136**.** It is difficult to agree with the learned Attorney General that though the words "in respect of" must receive a broad meaning, the protection under Article 105(2) is limited to court proceedings that impugn the speech that is given or the vote that is cast or arises thereout or that the object of the protection would be fully satisfied thereby. The object of the protection is to enable Members to speak their mind in Parliament and vote in the same way, freed of the fear of being made answerable on that account in a court of law. It is not enough that Members should be protected against civil action and criminal proceedings, the cause of action of which is their speech or their vote. 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. It is for that reason that a Member is not "liable to any proceedings in any court in respect of anything said or any vote given by him". Article 105(2) does not say, which it would have if the learned Attorney General were right, that a Member is not liable for what he has said or how he has voted. While imputing no such motive to the present prosecution, it is not difficult to envisage a Member who has made a speech or cast a vote that is not to the liking of the powers that be being troubled by a prosecution alleging that he had been party to an agreement and conspiracy to achieve a certain result in Parliament and had been paid a bribe."[28]

The view of the minority was that the offence of bribery is made out against a bribe taker either upon taking or agreeing to take money for a promise to act in a certain manner. Following this logic, Justice SC Agrawal held that the criminal

[28]Id, at pages 729-730

liability of a Member of Parliament who accepts a bribe for speaking or giving a vote in Parliament arises independent of the making of the speech or the giving of the vote and hence is not a liability "in respect of anything said or any vote given" in Parliament. The correctness of the view in the judgment of the majority does not fall for consideration in the present case. Should it become necessary in an appropriate case in future, a larger bench may have to consider the issue.

41 The judgment of the Constitution Bench in **Raja Ram Pal** v **Hon'ble Speaker, Lok Sabha**[29], has a significant bearing on the issues which arise in the present reference. Chief Justice YK Sabharwal, delivering the leading opinion on behalf of three judges dealt with the ambit of Article 105 in relation to the expulsion of a member and the extent to which such a decision of the Houses of Parliament is amenable to judicial review. The judgment notices that "parliamentary democracy in India is qualitatively distinct" from the UK. In defining the nature and extent of judicial review in such cases, Chief Justice Sabharwal observed that it is the jurisdiction of the court to examine whether a particular privilege claimed by the legislature is actually available to it:

> "62**.** In view of the above clear enunciation of law by Constitution Benches of this Court in case after case, there ought not be any doubt left that whenever Parliament, or for that matter any State Legislature, claims any power or privilege in terms of the provisions contained in Article 105(3), or Article 194(3), as the case may be, it is the Court which has the authority and the jurisdiction to examine, on grievance being brought before it, to find out if the particular power or privilege that has been claimed or asserted by the legislature is one that was contemplated by the said constitutional provisions or, to

[29] (2007) 3 SCC 184

> put it simply, if it was such a power or privilege as can be said to have been vested in the House of Commons of the Parliament of the United Kingdom as on the date of commencement of the Constitution of India so as to become available to the Indian Legislatures."[30]

While Parliament has the power to expel a member for a contempt committed, the doctrine of "exclusive cognizance" adopted in the UK has no application in India which is governed by a written Constitution. Though Parliament is possessed of a plentitude of powers, it is subject to terms of legislative competence and to the restrictions imposed by fundamental rights. Article 21 is attracted when the liberty of a Member of Parliament is threatened by imprisonment in execution of a parliamentary privilege. Fundamental rights can be invoked both by a member and by a non-member when faced by the exercise of parliamentary privilege. Drawing the distinction between the UK and India, Chief Justice Sabharwal observed:

> "363. That the English cases laying down the principle of exclusive cognizance of Parliament, including *Bradlaugh* [(1884) 12 QBD 271: 53 LJQB 290: 50 LT 620], arise out of a jurisdiction controlled by the constitutional principle of sovereignty of Parliament cannot be lost sight of. In contrast, the system of governance in India is founded on the norm of supremacy of the Constitution which is fundamental to the existence of the Federal State."[31]

Consequently, proceedings which are tainted as a result of a substantive illegality or unconstitutionality (as opposed to a mere irregularity) would not be protected from judicial review. The doctrine of exclusive cognizance was evolved in England as incidental to a system of governance based on

[30] Id, at page 259
[31] Id, at page 348

parliamentary sovereignty. This has no application to India, where none of the organs created by the Constitution is sovereign, and each is subject to the checks and controls provided by the Constitution.

The decision in **Raja Ram Pal** holds that Article 122(1) embodies the twin test of legality and constitutionality. This Court has categorically rejected the position that the exercise of powers by the legislature is not amenable to judicial review:

> "389. …there is no scope for a general rule that the exercise of powers by the legislature is not amenable to judicial review. This is neither the letter nor the spirit of our Constitution. We find no reason not to accept that the scope for judicial review in matters concerning parliamentary proceedings is limited and restricted. In fact, this has been done by express prescription in the constitutional provisions, including the one contained in Article 122(1). But our scrutiny cannot stop, as earlier held, merely on the privilege being found, especially when breach of other constitutional provisions has been alleged."[32]

The Court will not exercise its power of judicial review where there is merely an irregularity of procedure, in view of the provisions of Article 122(1). But judicial review is not "inhibited in any manner" where there is a gross illegality or a violation of constitutional provisions. While summarizing the conclusions of the judgment, Chief Justice Sabharwal emphasized the need for constitutional comity, since Parliament being a coordinate constitutional institution. The expediency and necessity for the exercise of the power of privilege are for the legislature to determine. Yet, judicial review is not excluded for the purpose of determining whether the legislature has trespassed on the fundamental rights

[32] Id, at page 360

of its citizens. Among the conclusions in the judgment, of relevance to the present case, are the following:

> "431. …(k) There is no basis to the claim of bar of exclusive cognizance or absolute immunity to the parliamentary proceedings in Article 105(3) of the Constitution;
> (l) The manner of enforcement of privilege by the legislature can result in judicial scrutiny, though subject to the restrictions contained in the other constitutional provisions, for example Article 122 or 212; and
> (m) Article 122(1) and Article 212(1) displace the broad doctrine of exclusive cognizance of the legislature in England of exclusive cognizance of internal proceedings of the House rendering irrelevant the case-law that emanated from courts in that jurisdiction; inasmuch as the same has no application to the system of governance provided by the Constitution of India;."[33]

42 The decision in **Raja Ram Pal** has been adverted to in the subsequent judgment of the Constitution Bench in **Amarinder Singh** v **Special Committee, Punjab Vidhan Sabha**[34]**.** Chief Justice Balakrishnan, speaking for the Constitution Bench, held that all the privileges which have been claimed by the House of Commons cannot be claimed automatically by legislative bodies in India. Legislatures in India do not have the power of self-composition which is available to the House of Commons. Indian legislatures are governed by a written Constitution.

43 The limits of comparative law must weigh in the analysis in this area of constitutional law, when the Court is confronted by a copious attempt, during the course of submissions, to find meaning in the nature and extent of

[33] Id, at page 372
[34] (2010) 6 SCC 113

parliamentary privilege in India from decided cases in the UK. The fundamental difference between the two systems lies in the fact that parliamentary sovereignty in the Westminster form of government in the UK has given way, in the Indian Constitution, to constitutional supremacy. Constitutional supremacy mandates that every institution of governance is subject to the norms embodied in the constitutional text. The Constitution does not allow for the existence of absolute power in the institutions which it creates. Judicial review as a part of the basic features of the Constitution is intended to ensure that every institution acts within its bounds and limits. The fundamental rights guaranteed to citizens are an assurance of liberty and a recognition of the autonomy which inheres in every person. Hence, judicial scrutiny of the exercise of parliamentary privileges is not excluded where a fundamental right is violated or a gross illegality occurs. In recognizing the position of Parliament as a coordinate institution created by the Constitution, judicial review acknowledges that Parliament can decide the expediency of asserting its privileges in a given case. The Court will not supplant such an assertion or intercede merely on the basis of an irregularity of procedure. But where a violation of a constitutional prescription is shown, judicial review cannot be ousted.

F Separation of powers: a nuanced modern doctrine

44 The submission of the Attorney General is that the carefully structured dividing lines between the judicial, executive and legislative wings of the state

would be obliterated if the court were to scrutinize or judicially review reports of parliamentary committees. The principle of separation, it has been submitted, interdicts the courts from scrutinizing or reviewing reports of parliamentary committees. Judicial review may well result in a conflict between the two institutions of the State and is hence – according to the submission – best eschewed.

45 Separation of powers between the legislature, the executive and the judiciary covers a large swathe of constitutional history spanning the writings of **Montesquieu** and **Blackstone,** to the work of **Dicey** and **Jennings**. **Gerangelos (2009)** laments that in the UK, parliamentary sovereignty has prevented the principle of separation from emerging as a judicially enforceable standard[35]:

> "Britain's unwritten constitution and the influence of Diceyan orthodoxy, emphasising parliamentary sovereignty and a fusion of powers which did not countenance judicial invalidation of legislative action, has meant that the separation of powers has not become a source of judicially-enforceable constitutional limitations. The precise status of the doctrine has varied from time to time and the extent to which the doctrine nevertheless provides some restraint on legislative interference with judicial process cannot be determined with precision. It can be said, however, that constitutional entrenchment of the separation doctrine has not been part of the Westminster constitution tradition; a tradition which has not, in any event, placed much store by written constitutions with their accompanying legalism and rigidities. The prevailing influence from that quarter has been the maintenance of judicial independence in terms of *institutional* independence through the protection of tenure and remuneration, and afforded statutory protection in the Act of

[35] Peter A Gerangelos, THE SEPARATION OF POWERS AND LEGISLATIVE INTERFERENCE IN JUDICIAL PROCESS, CONSTITUTIONAL PRINCIPLES AND LIMITATIONS (Hart Publishing, 2009).

> Settlement in 1701, as opposed to the protection of judicial power in a functional sense."

The impact of the doctrine is seen best in terms of the institutional independence of the judiciary from other organs of the state. The doctrine is stated to have been overshadowed in the UK "by the more dominant constitutional principles of parliamentary sovereignty and the rule of law". For instance, in the UK, Ministers of Crown are both part of the executive and members of the Parliament. Until the Constitutional Reform Act, 2005 the Lord Chancellor was a member of the Cabinet and was eligible to sit as a judge in the Appellate Committee of the House of Lords. The Judicial Committee of the House of Lords was the highest court, even though the House constituted the Upper House of the legislature. In the enforcement of parliamentary privileges, the House exercises judicial functions. Delegated legislation enables the executive to exercise legislative functions.

46 Many contemporary scholars have differed on the normative importance of the doctrine of separation. One view is that while a distinct legislature, executive and judiciary can be identified as a matter of practice, this is not a mandate of the unwritten Constitution. The statement that there is a separation is construed to be descriptive and not normative[36]. On the other hand, other scholars regard the doctrine as "a fundamental underlying constitutional principle which informs the whole British constitutional structure"[37]. Yet, even

[36] See A Tomkins, PUBLIC LAW (Oxford University Press, 2003) 37 (as cited by Gerangelos at page 274).
[37] E Barendt, 'Separating of Powers and Constitutional Government' [1995] Public Law 599 at 599-60,

scholars who emphasise the importance of the separation of powers in the UK acknowledge that the Constitution does not strictly observe such a separation. Courts in the UK do not possess a direct power of judicial review to invalidate legislation though, with the enactment of the Human Rights Act, the doctrine of incompatibility has become an entrenched feature of the law. **Gerangelos** (supra) states that "the most that can be said is that the separation of powers does play an influential role as a constitutional principle, but as a non-binding one".[38] He cites Professor Robert Stevens[39]:

> "In modern Britain the concept of the separation of powers is cloudy and the notion of the independence of the judiciary remains primarily a term of constitutional rhetoric. Certainly its penumbra, and perhaps even its core, are vague. No general theory exists, although practically the English have developed surprisingly effective informal systems for the separation of powers; although it should never be forgotten that the system of responsible government is based on a co-mingling of the executive with the legislature. The political culture of the United Kingdom, however, provides protections for the independence of the judiciary, which are missing in law."

The importance of the principle of separation essentially lies in the independence of the judiciary. The protections in the Act of Settlement 1701 have now been reinforced in the Constitutional Reform Act, 2005. Though the supremacy of Parliament is one of the fundamental features in the UK and the unwritten Constitution does not mandate a strict separation of powers, it would be difficult to regard a state which has no control on legislative supremacy as a

C Munro, Studies in Constitutional Law, 2nd edn (London, Butterworths, 1999) at 304,
TRS Allan, Law Liberty and Justice, The Legal Foundations of British Constitutionalism (Oxford, Clarendon Press, 1993) chs 3 and 8, and TRS Allan, Constitutional Justice, A Liberal Theory of the Rule of Law (Oxford, Oxford University Press, 2001)

[38] Peter A Gerangelos, THE SEPARATION OF POWERS AND LEGISLATIVE INTERFERENCE IN JUDICIAL PROCESS, CONSTITUTIONAL PRINCIPLES AND LIMITATIONS (Hart Publishing, 2009)

[39] R Stevens, 'A Loss of Innocence?: Judicial Independence and the Separation of powers' (1999) 19 OXFORD JOURNAL OF LEGAL STUDIES 365.

constitutional state founded on the rule of law[40]. Consequently, where the rule of law and constitutionalism govern society there may yet be fundamental principles inhering in the nature of the polity, which can be enforced by the judiciary even against Parliament, in the absence of a written Constitution[41]. In other words, even in the context of an unwritten Constitution, the law has a certain internal morality as a part of which it embodies fundamental notions of justice and fairness.

47 The interpretation of the doctrine of separation of powers has evolved from being a "one branch – one function approach"[42] with limited exceptions, to a concept which involves an integration of the 'division of work' and 'checks and balances'[43]. The primary aim of the doctrine today is to ensure the accountability of each wing of the State, while ensuring concerted action in respect of the functions of each organ for good governance in a democracy. The doctrine of separation of power has developed to fulfill the changing needs of society and its growing necessities. Many of these considerations are significantly different from those which were prevalent when **Montesquieu** originally formulated the doctrine.

48 In 1967, MJC Vile in his book titled '**Constitutionalism and the**

[40] Allan, Law Liberty and Justice (supra note 36)
[41] Gerangelos, at page 277.
[42] Aileen Kavanagh, The Constitutional Separation of Powers, Chapter 11 in David Dyzenhaus and Malcolm Thorburn (eds.) PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW, (Oxford University Press, 2016) 221 (hereinafter, "Philosophical Foundations of Constitutional Law").
[43] See MJC Vile, CONSTITUTIONALISM AND THE SEPARATION OF POWERS (Oxford University Press, 1967).

Separation of Powers'[44] defined the 'pure doctrine' of separation of powers thus:

> "[a] 'pure doctrine' of the separation of powers might be formulated in the following way: It is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislature, the executive, and the judiciary. To each of these three branches, there is a corresponding identifiable function of government, legislative, executive, or judicial. Each branch of the government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch. In this way, each of the branches will be a check to the others and no single group of people will be able to control the machinery of the State."[45]

This definition becomes important to facilitate an understanding of the reconstructed and modern view on separation of powers vis-à-vis its traditional understanding. Vile essentially proposes that 'division of labor' and 'checks and balances' are intrinsic to the theory of separation of powers. In his view, a scheme of checks and balances would involve a degree of mutual supervision among the branches of government, and may therefore result in a certain amount of interference by one branch into the functions and tasks of the other.[46] Aileen Kavanagh, has presented a scholarly analysis of separation of powers in a chapter titled '**The Constitutional Separation of Powers**'.[47] She concurs with the view expressed by MJC Vile that separation of powers includes two

[44] Id.
[45] Id, at page 13
[46] See, MJC Vile, CONSTITUTIONALISM AND THE SEPARATION OF POWERS (Oxford University Press, 1967).
[47] Aileen Kavanagh, The Constitutional Separation of Powers, Chapter 11 in David Dyzenhaus and Malcolm Thorburn (eds.) PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW, (Oxford University Press, 2016) 221.

components, that of 'division of labour' and 'checks and balances'. These two components are strengthened by the deep-rooted ethos of coordinated institutional effort and joint activity between branches of the government in the interest of good governance.[48] Instead of an isolated compartmentalization of branches of government, she highlights the necessary independence, interdependence, interaction and interconnection between these branches in a complex interactive setting.[49] Kavanagh acknowledges that in view of the stronghold of the pure doctrine over our understanding of separation of powers, the idea of a collective enterprise between the branches of the government for the purpose of governing may seem jarring. However, she argues that this idea of "branches being both independent and interdependent-distinct but interconnected-also has some pedigree in canonical literature."[50] Kavanagh thus opines that the tasks of law-making, law-applying and law-executing are collaborative in nature, necessitating co-operation between the branches of the government in furtherance of the common objective of good governance. Kavanagh explains this as follows:

> "In some contexts, the interaction between the branches will be supervisory, where the goal is to check, review and hold the other to account. At other times, the interaction will be a form of cooperative engagement where the branches have to support each other's role in the joint endeavor."[51]

[48] See, D Kyritsis, 'What is Good about Legal Conventionalism?' (2008) 14 LEGAL THEORY 135, 154 (as cited in Philosophical Foundations of Constitutional Law, at page 235).
[49] Id.
[50] Philosophical Foundations of Constitutional Law, at page 236.
[51] K Malleson, 'The Rehabilitation of Separation of Powers in UK' in L. de Groot-van Leeuwen and W Rombouts, SEPARATION OF POWERS IN THEORY AND PRACTICE: AN INTERNATIONAL PERSPECTIVE (Nijmegen: Wolf Publishing, 2010) 99-122, 115 (as cited in Philosophical Foundations of Constitutional Law, at page 237).

Jeremy Waldron has dealt with the relationships among officials or institutions in a State. He proposes that separation of powers is not just a principle involving the division of labour and the distribution of power but also includes inter-institutional relationships between the three branches when carrying out their distinct roles as part of a joint enterprise. This is in order to facilitate, what Waldron called the 'Principle of Institutional Settlement'.[52] Further, inter-institutional comity, which is the respect that one branch of the state owes to another, is also a significant factor, which calls for collaboration among branches of the government to ensure that general public values such as welfare, autonomy, transparency, efficiency and fairness are protected and secured for the benefit of citizens.[53]

Thus, in a comparative international context, authors have accepted separation of powers to widely include two elements: 'division of labour' and 'checks and balances'. The recent literature on the subject matter encourages inter-institutional assistance and aid towards the joint enterprise of good governance. The current view on the doctrine of separation of powers also seeks to incorporate mutual supervision, interdependence and coordination because the ultimate aim of the different branches of the government, through their distinct functions is to ensure good governance and to serve public interest, which is essential in the background of growing social and economic interests in a

[52] J Waldron, 'Authority for Officials' in L. Meyer, S. Paulson and T. Pogge (eds), RIGHTS, CULTURE, AND THE LAW: THEMES FROM THE LEGAL AND POLITICAL PHILOSOPHY OF JOSEPH RAZ (Oxford University Press, 2003) 45-70.

[53] See, J King, 'Institutional Approaches to Judicial Restraint' (2008) 28 OXFORD JOURNAL OF LEGAL STUDIES 409, 428; See also, Buckley v. Attorney General [1950] Irish Reports 67, 80 (per O'Bryne J) (as cited in Philosophical Foundations of Constitutional Law, at page 235).

welfare state. This stands in contrast with the former and original interpretation of the doctrine, which sought to compartmentalize and isolate the different branches of the government from one another, with limited permissible exceptions.

49 **Eoin Carolan's** book titled '**The New Separation of Powers' (2009)** reflects an attempt to reshape the traditional doctrine of separation, to make it relevant to the practical realities of modern government. He notes that while the tripartite separation of powers between the legislature, executive and judiciary had "conceptual simplicity with an impeccable academic pedigree"[54], the doctrine has obvious limitations in the sense that it does not satisfactorily explain the emergence and growth of the modern administrative State we see today. The author contends that an institutional theory like the separation of powers can no longer be accepted in its original form if it cannot account for this 'significant tranche of government activity'. Among the characteristics of the modern administrative State is that public power is exercised in a decentralized manner and on an ever-growing discretionary basis.[55]

The shared growth of administrative powers of the bureaucracy in the modern state defies the tripartite division. Therefore, a realistic modern application of the theory is necessary. The modern system of government has grown in ways previously thought unfathomable, and now encompasses a breadth and

[54] Eoin Carolan, THE NEW SEPARATION OF POWERS- A THEORY FOR THE MODERN STATE (Oxford University Press, 2009) 253.
[55] Id.

diversity previously unseen. Government today is characterized by the increase in powers of its agencies and the rapid growth of organizations which can neither be classified as exclusively public or private bodies. These modern systems of government and the existence and rapid rise of supranational organizations defy the traditional three- way division of powers. Administrative bodies are not defined by a uniform design, and exercise institutional fluidity in a manner which has come to characterize the administrative state's organizational complexity: In a single instance, they exercise powers and perform functions that might have been formerly classified as executive, judicial or legislative in nature.[56] In this view, the modern State is distinctly different from **Locke's** seventeenth century Model and **Montesquieu's** eighteenth century ideas:

> "The state is now dirigiste, discretionary, and broadly dispersed."[57]

50 Carolan thus proposes that to be suitable, a theory of institutional justice must be rooted in the principle of non-arbitrariness. He believes that a more suitable approach of classification of institutions would be not by functions, but by constituencies, and the sole constituency in this legal framework is the individual citizen. Carolan's proposed model places emphasis on the exercise of power on the basis of inter-institutional dialogue which ensures that a communicative process has taken place[58]. Carolan describes his model thus:

[56] Eoin Carolan, The Problems with the Theory of Separation of Powers', SSRN, (2011) 26.
[57] Supra note 53, 256
[58] Supra note 53, 132

> "The prescribed institutional structure operates by inter-organ mingling instead of separation. Individual decisions are delivered at the end of a multi institutional process, the central concern of which is to organize, structure, manage, and—crucially—ensure the input of all relevant institutional interests. On this model, the government and the courts are presented as providing an orienting framework within which administrative decision-making will occur. These first-order organs function at the level of macro-social organization, adopting general measures which are expected to advance their constituent social interest. The government specifies the actions it feels are required (or requested) to enhance the position of the collective. The courts, for their part, insist on the process precautions necessary to secure individual protection. Issues of informational efficacy and non-arbitrariness combine to ensure, however, that these provisions are not particularized."[65]

While the autonomy of the administration is respected as a vital institutional process, corrective measures are required where an institution has strayed outside the range of permissible outcomes. He speaks of a collaborative process of exercising power, with the judiciary acting as a restraining influence on the arbitrary exercise of authority.

51 While the Indian Constitution has been held to have recognized the doctrine of separation of powers, it does not adopt a rigid separation. In **Ram Jawaya Kapur** v **State of Punjab**[59], this Court held:

> "12. …The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another."

[59] (1955) 2 SCR 225

Reduced to its core, separation entails that one organ or institution of the state cannot usurp the powers of another.

In **Re: Powers, Privileges and Immunities of State Legislatures**[60], this Court held that whether or not the Constitution brings about a "distinct and rigid separation of powers", judicial review is an inseparable part of the judicial function. Whether legislative authority has extended beyond its constitutional boundaries or the fundamental rights have been contravened cannot be decided by the legislature, but is a matter entrusted exclusively to judicial decision.

In **Kesavananda Bharati** v **State of Kerala**[61], separation of powers was regarded as a feature of the basic structure of the Indian Constitution. Chief Justice Sikri held:

> "292. The learned Attorney-General said that every provision of the Constitution is essential; otherwise it would not have been put in the Constitution. This is true. But this does not place every provision of the Constitution in the same position. The true position is that every provision of the Constitution can be amended provided in the result the basic foundation and structure of the constitution remains the same. The basic structure may be said to consist of the following features:
>
> *(1)* Supremacy of the Constitution;
> (2) Republican and Democratic form of Government;
> *(3)* Secular character of the Constitution;
> *(4)* **Separation of powers between the legislature, the executive and the judiciary;**
> *(5)* Federal character of the Constitution."[62]

[60] (1965) 1 SCR 413
[61] (1973) 4 SCC 225
[62] Id, at page 366

Justices Shelat and Grover emphasized the doctrine of separation as a part of the checks and balances envisaged by the Constitution:

> "577. …There is ample evidence in the Constitution itself to indicate that it creates a system of checks and balances by reason of which powers are so distributed that none of the three organs it sets up can become so pre-dominant as to disable the others from exercising and discharging powers and functions entrusted to them. Though the Constitution does not lay down the principle of separation of powers in all its rigidity as is the case in the United States Constitution yet it envisages such a separation to a degree…"[63]

In **Indira Nehru Gandhi** v **Raj Narain**[64], Justice YV Chandrachud held that while the Constitution does not embody a rigid separation of governmental powers, a judicial function cannot be usurped by the legislature:

> "689. …the exercise by the legislature of what is purely and indubitably a judicial function is impossible to sustain in the context even of our cooperative federalism which contains no rigid distribution of powers but which provides a system of salutary checks and balances."[65]

The 39th amendment of the Constitution did precisely that and was held to violate the basic structure.

In **I R Coelho** v **State of Tamil Nadu**[66], the Court underlined the functional complementarity between equality, the rule of law, judicial review and separation of powers:

> "129**.** Equality, rule of law, judicial review and separation of powers form parts of the basic structure of the Constitution. Each of these concepts are intimately connected. There can be no rule of law, if there is no equality before the law. These

[63] Id, at page 452.
[64] (1975) Suppl SCC 1
[65] Id, at page 261.
[66] (2007) 2 SCC 1

> would be meaningless if the violation was not subject to the judicial review. All these would be redundant if the legislative, executive and judicial powers are vested in one organ. Therefore, the duty to decide whether the limits have been transgressed has been placed on the judiciary."[67]

A Constitution Bench of this Court in **State of Tamil Nadu** v **State of Kerala**[68] ruled on the importance of separation as an entrenched constitutional principle. The court held:

> "126.1. Even without express provision of the separation of powers, the doctrine of separation of powers is an entrenched principle in the Constitution of India. The doctrine of separation of powers informs the Indian constitutional structure and it is an essential constituent of rule of law. In other words, the doctrine of separation of power though not expressly engrafted in the Constitution, its sweep, operation and visibility are apparent from the scheme of Indian Constitution. Constitution has made demarcation, without drawing formal lines between the three organs—legislature, executive and judiciary. In that sense, even in the absence of express provision for separation of powers, the separation of powers between the legislature, executive and judiciary is not different from the Constitutions of the countries which contain express provision for separation of power."[69]

52 The doctrine of separation restrains the legislature from declaring a judgment of a court to be void and of no effect. However, in the exercise of its law making authority, a legislature possessed of legislative competence can enact validating law which remedies a defect pointed out in a judgment of a court. While the legislature cannot ordain that a decision rendered by the court is invalid, it may by enacting a law, take away the basis of the judgment such

[67] Id, at page 105
[68] (2014) 12 SCC 696
[69] Id, at page 771

that the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances.[70]

53 In **State of UP** v **Jeet S Bisht**[71], the Court held that the doctrine of separation of powers limits the "active jurisdiction" of each branch of government. However, even when the active jurisdiction of an organ of the State is not challenged, the doctrine allows for methods to be used to prod and communicate to an institution either its shortfalls or excesses in discharging its duty. The court recognized that fundamentally, the purpose of the doctrine is to act as a scheme of checks and balances over the activities of other organs. The Court noted that the modern concept of separation of powers subscribes to the understanding that it should not only demarcate the area of functioning of various organs of the State, but should also, to some extent, define the minimum content in that delineated area of functioning.

Justice SB Sinha addressed the need for the doctrine to evolve, as administrative bodies are involved in the dispensation of socio-economic entitlements:

> "83. If we notice the evolution of separation of powers doctrine, traditionally the checks and balances dimension was only associated with governmental excesses and violations. But in today's world of positive rights and justifiable social and economic entitlements, hybrid administrative bodies, private functionaries discharging public functions, we have to perform

[70] I.N. Saksena v. State of MP (1976) 4 SCC 750; Indian Aluminium Co. v. State of Kerala (1996) 7 SCC 637; S.S Bola and Others v. B.D Sardana & Others (1997) 8 SCC 522; Shri Prithvi Cotton Mills Ltd. v. Broach Borough Municipality (1969) 2 SCC 283; Supreme Court Advocates-on-Record-Association and Ors. v. Union of India (2016) 5 SCC 1

[71] (2007) 6 SCC 586

> the oversight function with more urgency and enlarge the field of checks and balances to include governmental inaction. Otherwise we envisage the country getting transformed into a state of repose. Social engineering as well as institutional engineering therefore forms part of this obligation."[72]

54 The constitutional validity of the Members of Parliament Local Area Development ("MPLAD") Scheme, which allocates funds to MPs for development work in their constituencies was considered by a Constitution Bench of this Court in **Bhim Singh** v **Union of India**[73]. The challenge was that by entrusting funds to MPs, the Scheme vests governmental functions in legislators and violates the separation of powers. The Court held that while the concept of separation of powers is not found explicitly in a particular constitutional provision, it "is inherent in the polity the Constitution has adopted". The Constitution Bench perceived that there is a link between separation and the need to ensure accountability of each branch of government. While the Constitution does not prohibit overlapping functions, what it prohibits is the exercise of functions by a branch in a way which "results in wresting away of the regime of constitutional accountability." The Court held that by allowing funds to be allocated to Members of Parliament for addressing the development needs of their constituencies, the MPLAD Scheme does not breach the doctrine of separation of powers. The administration of the scheme was adequately supervised by district authorities.

[72] Id, at page 619
[73] (2010) 5 SCC 538

55 In **Supreme Court Advocates-on-Record Association** v **Union of India**[74], Justice Madan B Lokur observed that separation of powers does not envisage that each of the three organs of the State – the legislature, executive and judiciary - work in a silo. The learned judge held:

> "678. There is quite clearly an entire host of parliamentary and legislative checks placed on the judiciary whereby its administrative functioning can be and is controlled, but these do not necessarily violate the theory of separation of powers or infringe the independence of the judiciary as far as decision-making is concerned. As has been repeatedly held, the theory of separation of powers is not rigidly implemented in our Constitution, but if there is an overlap in the form of a check with reference to an essential or a basic function or element of one organ of State as against another, a constitutional issue does arise. It is in this context that the 99th Constitution Amendment Act has to be viewed—whether it impacts on a basic or an essential element of the independence of the judiciary, namely, its decisional independence."[75]

56 In **State of West Bengal** v **Committee for Protection of Democratic Rights, West Bengal**[76], this Court held that the doctrine of separation of powers could not be invoked to limit the Court's power to exercise judicial review, in a case where fundamental rights are sought to be breached or abrogated on the ground that exercise of the power would impinge upon the doctrine.

57 In a more recent decision of a Bench of two learned judges of this Court in **Common Cause** v **Union of India**[77], the Court construed the provisions of

[74] (2016) 5 SCC 1
[75] Id, at page 583
[76] (2010) 3 SCC 571
[77] (2017) 7 SCC 158

the Lokpal and Lokayuktas Act, 2013 under which a multi-member selection committee for the appointment of the Lokpal is to consist, among others, of the Leader of the Opposition. A Bill for amending the provisions of the Act was referred to a parliamentary committee which proposed the inclusion of the leader of the largest opposition party in the Lok Sabha as a member, in lieu of the Leader of the Opposition in the selection committee. The grievance of the petitioners was that despite the enactment of the law, its provisions had not been implemented. It was urged that even if there is no recognized Leader of the Opposition in the Lok Sabha, the leader of the single largest opposition party should be inducted as a part of the Selection Committee. Justice Ranjan Gogoi speaking for this Court held thus:

> "18. There can be no manner of doubt that the parliamentary wisdom of seeking changes in an existing law by means of an amendment lies within the exclusive domain of the legislature and it is not the province of the Court to express any opinion on the exercise of the legislative prerogative in this regard. The framing of the Amendment Bill; reference of the same to the Parliamentary Standing Committee; the consideration thereof by the said Committee; the report prepared along with further steps that are required to be taken and the time-frame thereof are essential legislative functions which should not be ordinarily subjected to interference or intervention of the Court. The constitutional doctrine of separation of powers and the demarcation of the respective jurisdiction of the Executive, the Legislature and the Judiciary under the constitutional framework would lead the Court to the conclusion that the exercise of the amendment of the Act, which is presently underway, must be allowed to be completed without any intervention of the Court. Any other view and any interference, at this juncture, would negate the basic constitutional principle that the legislature is supreme in the sphere of law-making. Reading down a statute to make it workable in a situation where an exercise of amendment of the law is pending, will not be justified either. A perception, however strong, of the imminent need of the law engrafted in the Act and its beneficial effects on the citizenry of a democratic country, by itself, will

> not permit the Court to overstep its jurisdiction. Judicial discipline must caution the Court against such an approach."[78]

58 While assessing the impact of the separation of powers upon the present controversy, certain precepts must be formulated. Separation of powers between the legislature, the executive and the judiciary is a basic feature of the Constitution. As a foundational principle which is comprised within the basic structure, it lies beyond the reach of the constituent power to amend. It cannot be substituted or abrogated. While recognizing this position, decided cases indicate that the Indian Constitution does not adopt a separation of powers in the strict sense. Textbook examples of exceptions to the doctrine include the power of the executive to frame subordinate legislation, the power of the legislature to punish for contempt of its privileges and the authority entrusted to the Supreme Court and High Courts to regulate their own procedures by framing rules. In making subordinate legislation, the executive is entrusted by the legislature to make delegated legislation, subject to its control. The rule making power of the higher judiciary has trappings of a legislative character. The power of the legislature to punish for contempt of its privileges has a judicial character. These exceptions indicate that the separation doctrine has not been adopted in the strict form in our Constitution. But the importance of the doctrine lies in its postulate that the essential functions entrusted to one organ of the state cannot be exercised by the other. By standing against the usurpation of constitutional powers entrusted to other organs, separation of powers supports the rule of law

[78] Id, at page 173

and guards against authoritarian excesses. Parliament and the State Legislatures legislate. The executive frames policies and administers the law. The judiciary decides and adjudicates upon disputes in the course of which facts are proved and the law is applied. The distinction between the legislative function and judicial functions is enhanced by the basic structure doctrine. The legislature is constitutionally entrusted with the power to legislate. Courts are not entrusted with the power to enact law. Yet, in a constitutional democracy which is founded on the supremacy of the Constitution, it is an accepted principle of jurisprudence that the judiciary has the authority to test the validity of legislation. Legislation can be invalidated where the enacting legislature lacks legislative competence or where there is a violation of fundamental rights. A law which is constitutionally *ultra vires* can be declared to be so in the exercise of the power of judicial review. Judicial review is indeed also a part of the basic features of the Constitution. Entrustment to the judiciary of the power to test the validity of law is an established constitutional principle which co-exists with the separation of powers. Where a law is held to be *ultra vires* there is no breach of parliamentary privileges for the simple reason that all institutions created by the Constitution are subject to constitutional limitations. The legislature, it is well settled, cannot simply declare that the judgment of a court is invalid or that it stands nullified. If the legislature were permitted to do so, it would travel beyond the boundaries of constitutional entrustment. While the separation of powers prevents the legislature from issuing a mere declaration that a judgment is erroneous or invalid, the law-making body is entitled to enact a law which

remedies the defects which have been pointed out by the court. Enactment of a law which takes away the basis of the judgment (as opposed to merely invalidating it) is permissible and does not constitute a violation of the separation doctrine. That indeed is the basis on which validating legislation is permitted.

59 This discussion leads to the conclusion that while the separation of powers, as a principle, constitutes the cornerstone of our democratic Constitution, its application in the actual governance of the polity is nuanced. The nuances of the doctrine recognize that while the essential functions of one organ of the state cannot be taken over by the other and that a sense of institutional comity must guide the work of the legislature, executive and judiciary, the practical problems which arise in the unfolding of democracy can be resolved through robust constitutional cultures and mechanisms. The separation doctrine cannot be reduced to its descriptive content, bereft of its normative features. Evidently, it has both normative and descriptive features. In applying it to the Indian Constitution, the significant precept to be borne in mind is that no institution of governance lies above the Constitution. No entrustment of power is absolute.

G A functional relationship

60 What then does the above analysis tell us about the functional relationship of the work which is done by parliamentary committees and the role

of the court as an adjudicator of disputes? In assessing the issue, it must be remembered, that parliamentary committees owe their existence to Parliament. They report to Parliament. They comprise of the members of Parliament. Their work consists of tendering advice to the legislature. A parliamentary committee does not decide a *lis* between contesting disputants nor does it perform an adjudicatory function. A committee appointed by the House can undoubtedly receive evidence, including expert evidence, both oral and documentary. A Select Committee may be appointed by the House to scrutinize a Bill. When the committee performs its task, its report is subject to further discussion and debate in the House in the course of which the legislative body would decide as to whether the Bill should be enacted into law. The validity of the advice which is tendered by a parliamentary committee in framing its recommendations for legislation cannot be subject to a challenge before a court of law. The advice tendered is, after all, what it purports to be: it is advice to the legislating body. The correctness of or the expediency or justification for the advice is a matter to be considered by the legislature and by it alone.

61 Department related standing committees are constituted by Parliament to oversee the functioning of ministries/departments of government. It is through the work of these committees that Parliament exacts the accountability of the executive. It is through the work of these committees that Parliament is able to assess as to whether the laws which it has framed are being implemented in

letter and spirit and to determine the efficacy of government policies in meeting the problems of the day.

62 The contents of the report of a parliamentary committee may have a bearing on diverse perspectives. It is necessary to elucidate them in order to determine whether, and if so to what extent, they can form the subject matter of consideration in the course of adjudication in a court. Some of these perspectives are enumerated below:

(i) The report of a parliamentary committee may contain a statement of position by government on matters of policy;

(ii) The report may allude to statements made by persons who have deposed before the Committee;

(iii) The report may contain inferences of fact including on the performance of government in implementing policies and legislation;

(iv) The report may contain findings of misdemeanor implicating a breach of duty by public officials or private individuals or an evasion of law; or

(v) The report may shed light on the purpose of a law, the social problem which the legislature had in view and the manner in which it was sought to be remedied.

63 The use of parliamentary history as an aid to statutory construction is an area which poses the fewest problems. In understanding the true meaning of the words used by the legislature, the court may have regard to the reasons

which have led to the enactment of the law, the problems which were sought to be remedied and the object and purpose of the law. For understanding this, the court may seek recourse to background parliamentary material associated with the framing of the law. In his seminal work on the Interpretation of Statutes, **Justice G P Singh** notes that the traditional rule of exclusion in English Courts has over a period of time been departed from in India as well to permit the court to have access to the historical background in which the law was enacted. **Justice G P Singh**[79] notes:

> "The Supreme Court, speaking generally, to begin with, enunciated the rule of exclusion of Parliamentary history in the way it was traditionally enunciated by the English Courts, but on many an occasion, the court used this aid in resolving questions of construction. The court has now veered to the view[80] that legislative history within circumspect limits may be consulted by courts in resolving ambiguities. But the courts still sometimes, like the English courts, make a distinction between use of a material for finding the mischief dealt with by the Act and its use for finding the meaning of the Act. As submitted earlier this distinction is unrealistic and has now been abandoned by the House of Lords."

64 Reports of parliamentary committees may contain a statement of position by government on matters of policy. There is no reason in principle to exclude recourse by a court to the report of the committee at least as a reflection of the fact that such a statement was made before the committee. Similarly, that a statement was made before the committee - as a historical fact - may be taken note of by the court in a situation where the making of the statement itself is not a contentious issue.

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[79] Justice G P Singh, PRINCIPLES OF STATUTORY INTERPRETATION (14th edn.) 253.
[80] Kesavananda Bharati v. State of Kerala 1973 (4) SCC 225; Tata Power Co. Ltd. v. Reliance Energy Ltd (2009) 16 SCC 659; Namit Sharma v. Union of India (2013) 1 SCC 745.

65 In matters involving public interest which come up before the court, a grievance is often made of the violation of the fundamental rights of persons who by reason of poverty, ignorance or marginalized status are unable to seek access to justice. Public interest litigation has been perceived as social action litigation because a relaxation of the rules of standing has enabled constitutional courts to reach out to those who have suffered discrimination and prejudice. Whatever be the source of such discrimination – the feudal and patriarchal structures of Indian society being among them – public interest litigation has enabled courts to develop flexible tools of decision making and pursue innovative remedies. The writ of continuing mandamus is one of them. In the process, the violation of the fundamental rights of those groups of citizens who may not be able to seek access to justice is sought to be remedied. Public interest litigation has emerged as a powerful tool to provide justice to the marginalized. In matters involving issues of public interest, courts have been called upon to scrutinize the failure of the state or its agencies to implement law and to provide social welfare benefits to those for whom they are envisaged under legislation. Courts have intervened to ensure the structural probity of the system of democratic governance. Executive power has been made accountable to the guarantee against arbitrariness (Article 14) and to fundamental liberties (principally Articles 19 and 21).

66 Committees of Parliament attached to ministries/departments of the government perform the function of holding government accountable to

implement its policies and its duties under legislation. The performance of governmental agencies may form the subject matter of such a report. In other cases, the deficiencies of the legislative framework in remedying social wrongs may be the subject of an evaluation by a parliamentary committee. The work of a parliamentary committee may traverse the area of social welfare either in terms of the extent to which existing legislation is being effectively implemented or in highlighting the lacunae in its framework. There is no reason in principle why the wide jurisdiction of the High Courts under Article 226 or of this Court under Article 32 should be exercised in a manner oblivious to the enormous work which is carried out by parliamentary committees in the field. The work of the committee is to secure alacrity on the part of the government in alleviating deprivations of social justice and in securing efficient and accountable governance. When courts enter upon issues of public interest and adjudicate upon them, they do not discharge a function which is adversarial. The constitutional function of adjudication in matters of public interest is in step with the role of parliamentary committees which is to secure accountability, transparency and responsiveness in government. In such areas, the doctrine of separation does not militate against the court relying upon the report of a parliamentary committee. The court does not adjudge the validity of the report nor for that matter does it embark upon a scrutiny into its correctness. There is a functional complementarity between the purpose of the investigation by the parliamentary committee and the adjudication by the court. To deprive the court of the valuable insight of a parliamentary committee would amount to excluding

an important source of information from the purview of the court. To do so on the supposed hypothesis that it would amount to a breach of parliamentary privilege would be to miss the wood for the trees. Once the report of the parliamentary committee has been published it lies in the public domain. Once Parliament has placed it in the public domain, there is an irony about the executive relying on parliamentary privilege. There is no reason or justification to exclude it from the purview of the material to which the court seeks recourse to understand the problem with which it is required to deal. The court must look at the report with a robust common sense, conscious of the fact that it is not called upon to determine the validity of the report which constitutes advice tendered to Parliament. The extent to which the court would rely upon a report must necessarily vary from case to case and no absolute rule can be laid down in that regard.

67 There may, however, be contentious matters in the report of a parliamentary committee in regard to which the court will tread with circumspection. For instance, the report of the committee may contain a finding of misdemeanor involving either officials of the government or private individuals bearing on a violation of law. If the issue before the court for adjudication is whether there has in fact been a breach of duty or a violation of law by a public official or a private interest, the court would have to deal with it independently and arrive at its own conclusions based on the material before it. Obviously in such a case the finding by a Parliamentary Committee cannot

constitute substantive evidence before the court. The parliamentary committee is not called upon to decide a *lis* or dispute involving contesting parties and when an occasion to do so arises before the court, it has to make its determination based on the material which is admissible before it. An individual whose conduct has been commented upon in the report of a parliamentary committee cannot be held guilty of a violation on the basis of that finding. In **Jyoti Harshad Mehta** v **The Custodian**[81], this Court held that a report of the Janakiraman committee could not have been used as evidence by the Special Court. The court held:

> "57. It is an accepted fact that the reports of the Janakiraman Committee, the Joint Parliamentary Committee and the Inter-Disciplinary Group (IDG) are admissible only for the purpose of tracing the legal history of the Act alone. The contents of the report should not have been used by the learned Judge of the Special Court as evidence."[82]

68 Section 57 of the Indian Evidence Act 1872 speaks of facts of which the court must take judicial notice. Section 57 is comprised in Part II (titled 'On proof'). Chapter III deals with facts which need not be proved. Section 57(4) provides as follows:

> "57. Facts of which Court must take judicial notice – The Court shall take judicial notice of the following facts:-
>
> ***
>
> (4). The course of proceeding of Parliament of the United Kingdom, of the Constituent Assembly of India, of Parliament and of the legislatures established under any law for the time being in force in a Province or in the State."

[81] (2009) 10 SCC 564
[82] Id, at page 582

In **The Sole Trustee, Lok Shikshana Trust** v **The Commissioner of Income Tax, Mysore**[83], a three judge Bench of this Court, while construing Section 57(4) made a distinction between the fact that a particular statement is made in Parliament and the correctness of what is stated on a question of fact. The former could be relied upon. However, the truth of a disputable question of fact would have to be independently proved before the court. Justice HR Khanna observed thus:

> "33. We find that Section 57, sub-section (4) of the Evidence Act not only enables but enjoins courts to take judicial notice of the course of proceedings in Parliament assuming, of course, that it is relevant. It is true that the correctness of what is stated, on a question of fact, in the course of parliamentary proceedings, can only be proved by somebody who had direct knowledge of the fact stated. There is, however, a distinction between the fact that a particular statement giving the purpose of an enactment was made in Parliament, of which judicial notice can be taken as part of the proceedings, and the truth of a disputable matter of fact stated in the course of proceedings, which has to be proved aliunde, that is to say, apart from the fact that a statement about it was made in the course of proceedings in Parliament (see: Rt. Hon'ble Jerald Lord Strickland v. Carmelo Mifud Bonnici [AIR 1935 PC 34 : 153 IC 1] ; the Englishman Ltd. v. Lajpat Rai, ILR 37 Cal 760: 6 IC 81: 14 CWN 945."[84]

A statement made by the Finance Minister while proposing amendment could, it was held, be taken judicial notice of. Judicial notice would be taken of the fact that "such a statement of the reason was given in the course of such a speech".

[83] (1976) 1 SCC 254
[84] Id, at page 272

In **Onkar Nath** v **The Delhi Administration**[85], another Bench of three judges elaborated upon Section 57(4). Justice YV Chandrachud, speaking for the Court, held thus:

> "6. One of the points urged before us is whether the courts below were justified in taking judicial notice of the fact that on the date when the appellants delivered their speeches a railway strike was imminent and that such a strike was in fact launched on May 8, 1974. Section 56 of the Evidence Act provides that no fact of which the Court will take judicial notice need be proved. Section 57 enumerates facts of which the Court "shall" take judicial notice and states that on all matters of public history, literature, science or art the Court may resort for its aid to appropriate books or documents of reference. The list of facts mentioned in Section 57 of which the Court can take judicial notice is not exhaustive and indeed the purpose of the section is to provide that the Court *shall* take judicial notice of certain facts rather than exhaust the category of facts of which the Court may in appropriate cases take judicial notice. Recognition of facts without formal proof is a matter of expediency and no one has ever questioned the need and wisdom of accepting the existence of matters which are unquestionably within public knowledge. (See Taylor, 11th Edn., pp. 3-12; Wigmore, Section 2571, footnote; Stephen's Digest, notes to Article 58; *Whitley Stokes' Anglo-Indian Codes*, Vol. II, p. 887.) Shutting the judicial eye to the existence of such facts and matters is in a sense an insult to commonsense and would tend to reduce the judicial process to a meaningless and wasteful ritual. No court therefore insists on formal proof, by evidence, of notorious facts of history, past or present. The date of poll, the passing away of a man of eminence and events that have rocked the nation need no proof and are judicially noticed. Judicial notice, in such matters, takes the place of proof and is of equal force."[86]

In **Baburao Alias P B Samant** v **Union of India**[87], the court observed thus**:**

> "31. The Lok Sabha Debates and the Rajya Sabha Debates are the journals or the reports of the two Houses of Parliament which are printed and published by them. The court has to take judicial notice of the proceedings of both the Houses of

[85] (1977) 2 SCC 611
[86] Id, at page 614
[87] 1988 (Supp.) SCC 401

> Parliament and is expected to treat the proceedings of the two Houses of Parliament as proved on the production of the copies of the journals or the reports
> containing proceedings of the two Houses of Parliament which are published by them."[88]

These observations were in the context, specifically, of the provisions of the Evidence Act, including Section 57(4). The court held that the production of debates of the Lok Sabha and Rajya Sabha containing the proceedings of the two Houses of Parliament, relating to the period between the time when the resolutions were moved in each of the two Houses and the time when the resolutions were duly adopted amounted to proof of the resolutions. The court was required to take judicial notice under Section 57.

H Conclusion

69 The issue which has been referred to the Constitution Bench is whether the report of a Parliamentary Standing Committee can be relied upon in a proceeding under Article 32 or Article 136 of the Constitution. Allied to this is whether parliamentary privileges and the doctrine of separation of powers (shades of which find expression in the often-used phrase 'the delicate balance') impose restraints on the ability of the court to seek recourse to parliamentary reports.

[88] Id, at page 414

70 In finding an answer to the questions in reference, this Court must of necessity travel from a literal and perhaps superficial approach, to an understanding of the essence of what the Constitution seeks to achieve. At one level, our Constitution has overseen the transfer of political power from a colonial regime to a regime under law of a democratic republic. Legitimizing the transfer of political power is one, but only one facet of the Constitution. To focus upon it alone is to miss a significant element of the constitutional vision. That vision is of about achieving a social transformation. This transformation which the Constitution seeks to achieve is by placing the individual at the forefront of its endeavours. Crucial to that transformation is the need to reverse the philosophy of the colonial regime, which was founded on the subordination of the individual to the state. Liberty, freedom, dignity and autonomy have meaning because it is to the individual to whom the Constitution holds out an assurance of protecting fundamental human rights. The Constitution is about empowerment. The democratic transformation to which it aspires places the individual at the core of the concerns of governance. For a colonial regime, individuals were subordinate to the law. Individuals were subject to the authority of the state and their well-being was governed by the acceptance of a destiny wedded to its power. Those assumptions which lay at the foundation of colonial rule have undergone a fundamental transformation for a nation of individuals governed by the Constitution. The Constitution recognises their rights and entitlements. Empowerment of individuals through the enforcement of their rights is the essence of the constitutional purpose. Hence, in understanding the

issues which have arisen before the Court in the present reference, it is well to remind ourselves that since the Constitution is about transformation and its vision is about empowerment, our reading of precepts drawn from a colonial past, including parliamentary privilege, must be subjected to a nuance that facilitates the assertion of rights and access to justice. We no longer live in a political culture based on the subordination of individuals to the authority of the State. Our interpretation of the Constitution must reflect a keen sense of awareness of the basic change which the Constitution has made to the polity and to its governance.

71 A distinguished South African Judge, Albie Sachs has spoken of the importance of understanding the value of constitutional transformation. In his book titled '**The Strange Alchemy of Life and Law**'[89], explaining the role of the constitutional court, Sachs has this to say:

> "It is difficult to analyse the impact that court decisions have on actual historical events. It may well be that the publicity given to the case, and the evidence and arguments presented had more impact on public life than did the actual decision. Yet any amount of forensic combat, however bitter and prolonged, is better than a single bullet. Submitting the harsh conflicts of our times to legal scrutiny – conducted transparently and in the light of internationally accepted values of fairness and justice – was a telling rebuttal of mercenarism and violence, whether from or against the State. It responded in a practical way to the immediate issues, and at the same time induced governments, judiciaries, and law enforcement agencies in three countries to engage with each other and carefully consider their powers and responsibilities under the international law. It reaffirmed to the South African public that **we were living in a constitutional democracy in which all exercises of power were subject to constitutional control**. It said something important about the kind of country in which

[89] Justice Albie Sachs, The Strange Alchemy of Life and Law (Oxford University Press 2009) pages 32-33.

> we lived and about the importance of principled and reasoned debate. It underlined that **we had moved from a culture of authority and submission to the law, to one of justification and rights under the law**." (emphasis supplied)

72 In India, no less than in South Africa it is important to realise that citizens live in a constitutional democracy in which every exercise of power is subject to constitutional control. Every institution of the State is subject to the Constitution. None lies above it. The most important feature of Sachs' vision relevant to our Constitution is that Indian society must move "from the culture of authority and submission to the law, to one of justification and rights under the law".

73 Once we place the fulfilment of individual rights and human freedoms at the forefront of constitutional discourse, the resolution of the present case presents no difficulty. Individuals access courts to remedy injustice. As institutions which are committed to the performance of a duty to facilitate the realisation of human freedom, High Courts as well as this Court are under a bounden obligation to seek and pursue all information on the causes of injustice. Where the work which has been performed by a coordinate constitutional institution – in this case a Parliamentary Committee, throws light on the nature of the injustice or its causes and effects, constitutional theory which has to aid justice cannot lead us to hold that the court must act oblivious to the content of the report. History and contemporary events across the world are a reminder that black-outs of information are used as a willing ally to

totalitarian excesses of power. They have no place in a democracy. Placing reliance on the report of a Parliamentary Committee does not infringe parliamentary privilege. No Member of Parliament is sought to be made liable for what has been said or for a vote tendered in the course of a debate. The correctness or validity of the report of a Parliamentary Committee is not a matter which can be agitated before the Court nor does the Court exercise such a function. Where an issue of fact becomes contentious, it undoubtedly has to be proved before a court independently on the basis of the material on the record. In other words, where a fact referred to in the report of the Parliamentary Committee is contentious, the court has to arrive at its own finding on the basis of the material adduced before it.

74 Parliamentary Committees are an intrinsic part of the process by which the elected legislature in a democracy exacts accountability on the part of the government. Department related Parliamentary Standing Committees undertake the meticulous exercise of scrutinizing the implementation of law, including welfare legislation and the performance of the departments of the State. The purpose of law is to promote order for the benefit of the citizen and to protect rights and entitlements guaranteed by the Constitution and by statute. Access to justice as a means of securing fundamental freedoms and realizing socio-economic entitlements is complementary to the work of other organs of the State. The modern doctrine of separation of powers has moved away from a ‘one organ – one function’ approach, to a more realistic perspective which

recognizes the complementarity in the work which is performed by institutions of governance. Judicial review is founded on the need to ensure accountable governance in the administration of law as an instrument of realizing the rights guaranteed by the Constitution. If the function of judicial review in facilitating the realization of socio-economic rights is construed in the context of the modern notion of separation of powers, there is no real conflict between the independence of the judicial process and its reliance on published reports of Parliamentary Committees. Ultimately it is for the court in each case to determine the relevance of a report to the case at hand and the extent to which reliance can be placed upon it to facilitate access to justice. Reports of Parliamentary Committees become part of the published record of the State. As a matter of principle, there is no reason or justification to exclude them from the purview of the judicial process, for purposes such as understanding the historical background of a law, the nature of the problem, the causes of a social evil and the remedies which may provide answers to intractable problems of governance. The court will in the facts of a case determine when a matter which is contentious between the parties would have to be adjudicated upon independently on the basis of the evidence adduced in accordance with law.

In the circumstances, the reference is answered by holding that:

(i) As a matter of principle, there is no reason why reliance upon the report of a Parliamentary Standing Committee cannot be placed in proceedings under Article 32 or Article 136 of the Constitution;

(ii) Once the report of a Parliamentary Committee has been published, reference to it in the course of judicial proceedings will not constitute a breach of parliamentary privilege;

(iii) The validity of the report of a Parliamentary Committee cannot be called into question in the court. No Member of Parliament or person can be made liable for what is stated in the course of the proceedings before a Parliamentary Committee or for a vote tendered or given; and

(iv) When a matter before the court assumes a contentious character, a finding of fact by the court must be premised on the evidence adduced in the judicial proceeding as explained in paragraphs 67 and 73.

75 The issues framed for reference are accordingly answered.

76 The proceedings may now be placed before the Hon'ble Chief Justice for assignment of the case for disposal.

…….....J
[A K SIKRI]

…….....J
[Dr D Y CHANDRACHUD]

New Delhi;
May 9, 2018.