NATIONAL COMMISSION TO REVIEW THE WORKING OF THE CONSTITUTION

A

Consultation Paper*

on

IMMUNITY OF LEGISLATORS : WHAT DO THE WORDS "IN RESPECT OF ANYTHING SAID OR ANY VOTE GIVEN BY HIM" IN ARTICLE

105(2) SIGNIFY?

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1. INTRODUCTION

The power, privileges and immunities of each House of Parliament and of the Members and the Committees of each House are set out in Article 105 of the Constitution. The Article comprises four clauses. Clause (1) says that "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". Clause (2) declares that "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". Clause (3), which has undergone an amendment under the Constitution 44th Amendment Act, 1978, read before the amendment as follows: "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 the House of Commons of Parliament of the United Kingdom and of its Members and Committees at the commencement of this Constitution". After the aforesaid amendment, clause (3) now reads as follows: "(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." Clause (4) reads thus: "(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."

2. Article 194 similarly sets out the powers, privileges and immunities of the House of the Legislature of a State, of its members and the committees of the House of such Legislature. The provisions of Article 194 are identical to the provisions in Article 105 in all respects. Hence, whatever is said hereinafter with respect to Article 105, applies equally to Article 194.

3. Clause (1) of Article 105 has been construed by the Supreme Court in several decisions, namely, MSM Sharma v. Shrikrishna Sinha (AIR 1959 SC 395), special reference number 1 of 64 Keshav Singh's case (AIR 1965 SC 745) and recently in PV Narasimha Rao v. State (AIR 1998 SC 2120).

4. It has been held by the Court that the freedom of speech guaranteed by clause (1) to the Members of Parliament is in addition to the freedom of speech and expression

guaranteed to the citizens of this country by Article 19(1)(a) and that the said freedom guaranteed to the Members of Parliament is not subject to the reasonable restrictions contemplated by clause (2) of Article 19. Of course the said freedom is available only within the Houses of Parliament and is "subject to the provisions of this Constitution" (which expression has been construed to mean subject to the provisions of the Constitution which regulate the procedure of Parliament, namely, Articles 118 and 121). The said right is also subject to the rules and standing orders regulating the procedure of Parliament. It has also been held that even if a Member of Parliament makes a statement in the House which is defamatory of a citizen, no action can be taken by a citizen for defamation against such member. Of course, if the member makes such an allegation or repeats the said allegation outside the House, he shall be liable to be sued for defamation or being proceeded against for libel in a criminal court.

5. Clause (2) is in two parts. The first part confers an immunity upon a Member of Parliament in respect of anything said or any vote given by him in Parliament or any committee thereof; the immunity protects him from being proceeded against in a court of law. The second part confers an immunity upon the person who publishes such proceedings by or under the authority of either House of Parliament; the publication may be of any report, paper, vote or proceedings. This immunity again is designed to confer upon the Members of Parliament an unrestricted freedom of speech and expression within the House.

6. Clause (3) speaks of powers, privileges and immunities of the Members of Parliament. The clause contemplates a law being made by Parliament defining them. Until such a law is made, it says, the powers, privileges and immunities shall be those of the House of Commons of Parliament of the UK and of its members and committees at the commencement of the Constitution. The amendment effected by 44th Amendment Act to this clause does not change this position notwithstanding the change in the language for the reason that the powers, privileges and immunities obtaining immediately before the coming into force of section 15 of the Constitution (44th) Amendment Act, 1978 are those very powers, privileges and immunities as were enjoyed by the members of the House of Commons in UK at the commencement of the Constitution.

7. Clause (4) extends the operation of clauses (1), (2) and (3) to persons who by virtue of the Constitution have the right to speak in and otherwise to take part in the proceedings of a House of Parliament or any committee thereof.

8. While interpretation of clause (1) of Article 105 has not attracted any controversy, the interpretation of clause (2) has given rise to acute controversy. The interpretation placed by the majority in the recent decision in PV Narasimha Rao v. State has indeed brought the said controversy to the fore. The majority judgment has been subjected to serious criticism from several quarters. It is therefore necessary to examine the position under this clause.

In Tejkiran Jain v. N. Sanjeeva Reddy (1970 (2) SCC 272), it was held that

"the Article confers immunity inter alia in respect of 'anything said … in Parliament'. The word 'anything' is of the widest import and is equivalent to 'everything'. The only limitation arises from the words 'in Parliament' which means during the sitting of Parliament and in the course of the business of Parliament. We are concerned only with speeches in Lok Sabha. Once it was proved that Parliament was sitting and its business was being transacted, anything said during the course of that business was immune from proceedings in any court. This immunity is not only complete but is as it should be. It is of the essence of parliamentary system of government that people's representatives should be free to express themselves without fear of legal circumstances. What they say is only subject to the discipline of the rules of Parliament, the good sense of the Members and the control of proceedings by the Speaker. The courts have no say in the matter and should really being none".

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Tejkiran Jain was a case where certain individuals had filed a suit for damages in respect of defamatory statements alleged to have been made by certain Members of Parliament on the floor of Lok Sabha during a call attention motion. Such action was held to be not maintainable.

9. In State of Karnataka v. Union of India (1977 (4) SCC 608), the court held that if any question of jurisdiction arose it has to be decided by courts in appropriate proceedings:

"Now, what learned Counsel for the plaintiff seemed to suggest was that Ministers, answerable to a Legislature were governed by a separate law which exempted them from liabilities under the ordinary law. This was never the Law in England. And, it is not so here. Our Constitution leaves no scope for such arguments, based on a confusion concerning the "powers" and "privileges" of the House of Commons mentioned in Articles 105(3) and 194(3). Our Constitution vests only legislative power in Parliament as well as in the State Legislatures. A House of Parliament or State Legislature cannot try anyone or any case directly, as a Court of Justice can, but it can proceed quasi-judicially in cases of contempt of its authority and take up motions concerning its "privileges" and "immunities" because, in doing so, it only seeks removal of obstructions to the due performance of its legislative functions. But, if any question of jurisdiction arises as to whether a matter falls here or not, it has to be decided by the ordinary courts in appropriate proceedings. For example, the jurisdiction to try a criminal offence, such as murder,

committed even within a House vests in ordinary criminal courts and not in a House of Parliament or in a State Legislature."

10. As stated hereinbefore, the interpretation of clause (2) arose again in PV Narasimha Rao v. State. The facts of this case are interesting. A chargesheet was filed against Shri PV Narasimha Rao and some others (Members of Parliament and others) under section 120B IPC and sections 7, 12, 13(2) read with section 13(1)(d)(iii) of the Prevention of Corruption Act, 1988. The substance of the charge was that PV Narasimha Rao and some others entered into a criminal conspiracy to bribe certain other accused, namely, Suraj Mandal and others (Members of Parliament), to induce them to vote against the motion of no confidence moved against Shri PV Narasimha Rao's government in Lok Sabha. Both the bribe givers and bribe takers were chargesheeted. A preliminary objection was raised on behalf of the accused before the special judge (in whose court the chargesheets were filed) contending that the jurisdiction of the court to try the accused for the aforementioned offences was barred by clause (2) of Article 105 of the Constitution inasmuch as the charges and the prospective trial is in respect of matters which relate to the privileges and immunities of the Members of Parliament. It was contended that inasmuch the foundation of the chargesheets is the allegation of acceptance of bribe by some Members of Parliament for voting against the no confidence motion, the controversy is in respect of the motive and actions of the Members of Parliament pertaining to the vote given by them in relation to the said motion. The special judge rejected the said contention. He held that the issue before him was not the voting pattern of the Members of the House but their alleged illegal acts, namely, demanding and accepting bribe for exercising their franchise in a particular manner. He held further that members of Parliament are holding a public office and accepting illegal gratification for exercising their franchise in a particular manner is an offence punishable under the P.C. Act. Certain other contentions raised by the accused were also rejected which we need not refer to at this stage. The matter was then taken to the Delhi High Court. The High Court agreed with the special judge and dismissed the revision petitions. It held, construing clauses (2) and (3) of Article 105, that to offer bribe to a Member of Parliament to influence him in his conduct as a member has been treated as a breach of privilege in England but by merely treating the commission of a criminal offence as a breach of privilege does not amount to ouster of the jurisdiction of the ordinary courts to try penal offences. The High Court held that the claim for such a privilege would amount to claiming a privilege to commit a crime which cannot be conceded. The High Court also rejected the contention that the Members of Parliament were not public servants within the meaning of the P.C. Act. Other contentions urged by the accused were also rejected. The matter was then carried to the Supreme Court. A five-judge Constitution Bench heard the matter. So far as the question whether a Member of Parliament is a 'public servant' within the meaning of the Prevention of Corruption Act is concerned, the Bench was unanimous that they are. But on the question of interpretation of clause (2) of Article 105, there was a sharp division of opinion. Two judges, S.C. Agrawal and A.S. Anand, JJ. held that "a Member of Parliament does not enjoy immunity under Article 105(2) or Article 105(3) of the Constitution from being prosecuted before a criminal court for an

offence involving offer or acceptance of bribe for the purpose of speaking or by giving his vote in Parliament or in any committees thereof". On the other hand, S.P. Barucha and Rajendra Babu, JJ. held that while bribe-givers (who are Members of Parliament) cannot invoke the immunity conferred by clause (2) of Article 105, the bribe-takers (Members of Parliament) can invoke that immunity if they have actually spoken or voted in the House pursuant to the bribe taken by them; if however a Member of Parliament takes a bribe for speaking or voting in the House in a particular manner but does not so speak or vote, the immunity cannot be invoked by him. This conclusion was arrived at on the construction of the words "in respect of" occurring in the said clause. The learned judges held that the said words were of wide amplitude and therefore the integral connection between the bribe taking and the vote in the House cannot be dissected or separated. G.N. Ray, J. agreed with Barucha and Rajendra Babu, JJ. on this question.

11. The learned judges differed on one more question which was raised before them viz. who is the authority competent to grant sanction required by section 19 of the Prevention of Corruption Act? S.C. Agrawal and A.S. Anand, JJ. held that even though the Members of Parliament are public servants within the meaning of section 2© of the Prevention of Corruption Act, 1988, no authority is specified as on today as the authority competent to remove a Member of Parliament and to grant sanction for his prosecution under section 19(1) of the said Act. But, the learned judges held, that does not mean that the Members of Parliament cannot be proceeded against under the said Act. They held that until the law is amended suitably, the prosecuting agency shall, before filing a chargesheet in respect of offences under sections 7, 10, 11, 13 and 15 of the P.C. Act against a Member of Parliament in a criminal court, obtain the permission of the Chairman of the Rajya Sabha/Speaker of the Lok Sabha, as the case may be. On the other hand, S.P. Bharucha and Rajendra Babu, JJ. held that since there is no authority competent to grant sanction under section 19 of the P.C. Act, they cannot be prosecuted for offences under sections 7, 10, 11 and 13 of the said Act. The learned judges expressed the hope that Parliament will address itself to the task of removing the said lacuna with due expedition. G.N. Ray, J. does not appear to have expressed himself on this question.

12. Before the said question is examined further, it would be appropriate to examine the position obtaining in other democracies in this behalf.

2. POSITION IN U.K.

13. The House of Commons had passed a resolution on May 2, 1695 resolving that "the offer of money or other advantage to any Member of Parliament for the promoting of any matter whatsoever pending or to be transacted in Parliament is high crime and misdemeanor and tends to the subversion of the English Constitution." In the 1970s, a Royal Commission on Standards of Conduct in Public Life chaired by Lord Salmon was constituted to examine this question. The Commission submitted its report in July, 1976 pointing out that "neither the statutory nor the common law applies to the bribery or attempted bribery of a Member of Parliament in respect of his parliamentary activities." While stating that corrupt transactions involving a Member of Parliament in respect of matters that had nothing to do with his parliamentary activities would be caught by the ordinary criminal law, they recommended, in the light of the nature of the duties of a Member of Parliament that "Parliament should consider bringing corruption, bribery and attempted bribery of a Member of Parliament acting in his parliamentary capacity within the ambit of the criminal law". Indeed, during the course of debate, Lord Salmon stated: "to my mind, equality before the law is one of the pillars of freedom to say that immunity from criminal proceedings against anyone who attempts to bribe a Member of Parliament and any Member of Parliament who accepts the bribe, stems from the Bill of rights is possibly a serious mistake … now this (Bill of rights) is a charter for freedom of speech in the House; it is not a charter for corruption".

14. The Committee on Standards in Public Life chaired by Lord Nolan in its first report submitted in May, 1995, opined that while undoubtedly the Members of Parliament who accepted bribes in connection with their parliamentary duties would be committing common law offences, there is a doubt whether the courts or the Parliament have jurisdiction in such cases. The committee recommended that the matter be examined further by the Law Commission. Pursuant to the said recommendation, it appears, the UK Law Commission issued a consultation paper (No.145) entitled "Clarification of the Law relating to the Bribery of Members of Parliament" in December, 1996. The Select Committee on Standards and Privileges has been invited by the Law Commission to consider the following four broad options:

1) To rely solely on parliamentary privileges to deal with acquisitions of the bribery by Members of Parliament.

2) Subject Members of Parliament to the present corruption statutes in full.

3) Distinguish between conduct which should be dealt with by the criminal law and that which should be left to Parliament itself and

4) Making proceedings subject to the approval of the relevant Houses of Parliament.

15. Mention must be made of the decision of a single judge Buckley J. in R v. Currie where the learned judge expressed the opinion that the claim of immunity in respect of cases of corruption by Members of Parliament is "an unacceptable proposition at the present time".

3. POSITION IN AUSTRALIA

16. As far back as 1875, the Supreme Court of New South Wales held that an attempt to bribe a Member of a Legislative Assembly in order to influence his vote was a criminal offence triable by common law. The said decision was approved by the High Court of Australia in R v. Boston, (1923) 33 CIR 386. In fact, section 73A of the Crimes Act, 1914 makes it an offence for Members of Australian Parliament to accept a bribe. Similarly a person who seeks to bribe a Member of Parliament is equally guilty of an offence.

4. POSITION IN CANADA

17. The law in Canada is similar to the law in Australia. Section 108 of the Criminal Code in Canada makes it an offence either to offer or to accept a bribe by a provincial or a federal Member of Parliament.

In other Commonwealth countries too, the position appears to be the same.

5. POSITION IN USA

18. Two decisions of the US Supreme Court have considered this question, namely, US v. Brewster, (1972) 33 Lawyers Edition 2d 507 and US v. Helstoski, (1979) 61 Lawyers Edition 2d 12. In Brewster, a majority of six judges led by Burger C.J. held that the speech or debate clause contained in Article 1(6) of the US Constitution protects the Members of Congress from inquiry into legislative acts or into the motivation for their actual performance of legislative acts but that it does not protect them from other activities they undertake that are political rather then legislative in nature and that taking a bribe for the purpose of having one's official conduct influenced is not part of any legislative process or function and further that the speech or debate clause did not prevent indictment and prosecution of Brewster for accepting bribes. Three judges, Brennan, White and Douglas, JJ., however, dissented and held that Brewster cannot be prosecuted in a criminal court. The judges in minority held that the trial of the crimes with which Brewster is charged calls for an examination of the motives behind his legislative acts and hence prohibited by Article 1(6) of the US Constitution. They held that the immunity goes beyond the vote itself and "precludes all extra congressional scrutiny as to how and why he cast, or whatever cast, is voted a certain way". They held that if Members of Congress are to be subject to prosecutions in criminal courts, the speech and debate clause in Article 1(6) loses its force and that the argument that while a Congressman cannot be prosecuted for his vote whatever it might be but he can be prosecuted for an alleged agreement (of bribery), even if he votes contrary to the bargain, is unacceptable.

The decision in Brewster was followed in the later case referred to above.

6. THE BASIS OF THE DECISION IN P.V. NARSIMHA RAO VS. STATE

19. S.C. Aggarwal and A.S. Anand JJ. who rendered the minority opinion in the said decision relied upon and followed the majority opinion in Brewster. The learned Judges quoted with approval the following passages from the opinion of Burger, C.J. who delivered the majority opinion: "the authors of our Constitution were well aware of the history of both the need for the privilege and the abuses that could flow from the sweeping safeguards. In order to preserve other values, they wrote the privilege so that it tolerates and protects behavior on the part of Members not tolerated and protected when done by other citizens, but the shield does not extend beyond what is necessary to preserve the integrity of the legislative process….. Congress is ill-equipped to investigate, try, and punish its Members for a wide range of behavior that is loosely and incidentally related to the legislative process".

20. The learned Judges also quoted with approval the following comment of Burger, C.J. upon the reasoning of Brennan J. (who delivered one of the minority opinions in the said case):

> "Mr. Justice Brennan suggests that inquiry into the alleged bribe is inquiry into the motivation for a legislative act, and it is urged that this very inquiry was condemned as impermissible in Johnson. That argument misconstrues the concept of motivation for legislative acts. The Speech or Debate Clause does not prohibit inquiry into illegal conduct simply because it has some nexus to legislative functions."

Besides the decision in Brewster, the learned Judges referred to and followed the general trend of opinions in Australia and Canada.

21. S.P. Barucha and Rajendra Babu JJ., on the other hand, preferred to rely upon and follow the minority opinion in Brewster. The learned Judges pointed out at the outset that even Burger, C.J. said that the purpose of the speech or Debate Clause in Article 1(6) of the U.S. Constitution was to protect the individual legislator, not simply for his own sake, but to preserve the independence and thereby the integrity of the legislative process. The learned Judges quoted with approval the following observations of Brennan, J. in the said decision: "Senator Brewster is not charged with conduct merely 'relating to the legislative process' but with a crime whose proof calls into question the very motives behind his legislative acts. The indictment, then, lies not at the periphery but at the very center of the protection that this Court has said is provided a Congressman under the clause." The learned Judges pointed out that Brennan, J. rightly held that the Senator's immunity went beyond the vote itself and that it "precludes all extra-congressional scrutiny as to how and why he cast, or would have cast, his vote a certain way." The learned Judges pointed out further that Brennan J. has quoted from the opinion of Frankfurter, J. in an earlier case to the effect:

"One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. The holding of this Court in Fletcher v. Peck, (1809-15) 3 Law Ed 162, 176, that it was not consonant with our scheme of Government for a Court to inquire into the motives of legislators, has remained unquestioned…. In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses."

22. The learned Judges also quoted with approval the following observations of Brennan J.:

"this reprehensible and outrageous conduct, if committed by the Senator, should not have gone unpunished. But whether a Court or only the Senate might undertake the task is a constitutional issue of portentous significance, which must of course be resolved uninfluenced by the magnitude of the perfidy alleged. It is no answer that Congress assigned the task to the judiciary in enacting 18 USC201. Our duty is to Nation and Constitution, not Congress. We are guilty of a grave disservice to both Nation and Constitution when we permit Congress to shirk its responsibility in favour of the Courts. The Framers' judgment was that the American people could have a Congress of independence and integrity only if alleged misbehaviour in the performance of legislative functions was accountable solely to a Member's own House and never to the executive or judiciary. The passing years have amply justified the wisdom of that judgment. It is the Court's duty to enforce the letter of the Speech or Debate Clause in that spirit. We did so in deciding Johnson. In turning its back on that decision today, the Court arrogates to the judiciary an authority committed by the Constitution, in Senator Brewster's case, exclusively to the Senate of the United States."

23. Applying the ratio of Brennan J., the learned Judges held: (a) that the alleged bribes were accepted by the Members of Parliament "as a motive or reward for defeating the no-Confidence Motion…. the nexus between the alleged conspiracy and bribe and the no-Confidence Motion is explicit." Hence the said activity of bribe taking must fall within the ambit of the expression "in respect of" in clause (2) of article 105, which expression must receive a broad meaning, and (b) the true object behind clause (2) of article 105 is "to enable the 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". On the above reasoning the learned Judges (with whom G.N. Ray J. agreed), held that where a Member of Parliament votes pursuant to a bribe taken by him to influence his voting, he cannot be prosecuted in a court of law but where he has taken a bribe to vote in a particular manner, but does not actively cast the vote, he can be prosecuted in a criminal court because in such a case it cannot be said that there is a nexus between the vote and the bribe taken by him. The learned Judges have also referred to the decisions of courts in other countries but ultimately preferred to apply and follow the reasoning of the minority opinion in Brewster.

24. Commission seeks to point out hereinabove that the two main opinions in P.V. Narsimha Rao differ on yet another point viz., who is the authority to grant the sanction for prosecuting the Members of Parliament in a criminal court. In the absence of any specified authority, Aggrawal and Anand, JJ. held that the Speaker/Chairman of Lok Sabha/Rajya Sabha should be the authority to grant sanction pending legislation on the said aspect while Barucha and Rajendra Babu, JJ. opined that in the absence of any authority having been specified by law to grant sanction for prosecuting the Members of Parliament under the P.C. Act, it must be held that there is no authority that can grant such sanction. (G.N. Ray, J. did not express any opinion on this aspect, as has been pointed out by us hereinbefore).

25. It is evident from the above discussion that two issues require to be clarified by effecting necessary amendments in articles 105 and 194 and/or the Prevention of Corruption Act, 1988. The issues are (a) which among the two opinions in P.V. Narsimha Rao represents the correct interpretation of clause (2) of article 105 and if the answer is that the minority opinion (Aggarwal and Anand, JJ.) is the correct one, what are the changes required in the relevant constitutional provisions to give effect to their opinion to bring our law in accord with the law in major democracies, and (b) if an authority competent to grant sanction for prosecuting the Members of Parliament under the P.C. Act has to be constituted/specified - as indeed recommended by both the main opinions in P.V. Narsimha Rao - whether it should be brought about by amending the P.C. Act or whether article 105 itself is necessary to be amended for the purpose?

First Issue: The Preamble to our Constitution as well as articles 14 to 18 speak of equality before law in addition to equal protection of laws. It has been repeatedly held by the Supreme Court that the equality clause in our Constitution is the most fundamental and basic of all the rights and freedoms assured by our Constitution. (For example, see the opinion of Chandrachud J. in Indira Gandhi v. Raj Narain, 1975 SC 2299 at 2469 (para 680) where Article 14 has been described as "a basic postulate of our Constitution".) Creating an immunity in favour of Members of Parliament for their corrupt acts on the ground that such corrupt acts are "in respect of" their voting and speaking in Parliament appears to run counter not only to the principle of equality underlying our Constitution but against all notions of justice, fair play and above all good conduct which is expected from the Members of Parliament more than from the ordinary citizens of this country. The representatives of people, who make laws for the nation, must set standards of rectitude for the people and not the other way round. If they indulge in corrupt activity and bribe-taking for speaking or voting in a particular way in Parliament, with what face can they enact laws providing for good conduct and incorporating injunctions of corruption-free discharge of duties by officials and others? The unrestricted freedom of speech guaranteed by clause (1) of article 105 and the protection provided by clause (2) is to enable the members to function fearlessly, free from the fear of being prosecuted in a criminal court for their speeches and votes within the House. The Founding Fathers could never have meant the said freedom and protection in clauses (1) and (2) to protect the corrupt behaviour or to facilitate bribe-taking. A charter of freedom can not be converted into a charter for corruption. Clause (2) cannot and ought not to be construed as conferring an immunity for crimes committed. The privileges of Members of Parliament cannot be invoked where a crime has been committed. In this regard, it would be useful to refer to the decision of the U.S. Supreme Court in U.S. v. Nixon (1974) 418 US 683 = 41 L.Ed. 2d. 1039 where it has been held that the executive privilege of the President cannot be invoked, and not available, for screening a crime. The following observations in the said judgment are apposite:

> "[29] The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would

plainly conflict with the function of the courts under Art III. In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence. "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." Youngstown Sheet & Tube Co. v Sawyer, 343 US, at 635, 96 L Ed 1153, 26 ALR2d 1378 (Jackson, J., concurring). To read the Art II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of nonmilitary and non-diplomatic discussions would upset the constitutional balance of "a workable government" and gravely impair the role of the courts under Art III…. The allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. Without access to specific facts a criminal prosecution may be totally frustrated. The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases. [39] We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial."

26. It is a matter of common knowledge that President Nixon tendered his resignation soon after the said judgment of the Supreme Court.

27. We are also of the opinion that recognition of such an immunity is neither good for the image of the Parliament and of its Members nor is it in the interest of our society and our nation. Indeed it appears surprising that such a contention was urged by certain Members of Parliament before the courts including the Supreme Court. That the majority of the Members of the Constitution Bench of the Supreme Court felt obliged to accept the said plea in the light of the language employed in clause (2) does not mean that they have justified it or condoned such behaviour. On the contrary, they clearly expressed their disgust with such behaviour, though ultimately they felt constrained to uphold their contention in view of what they considered was the inescapable effect of the language in clause (2). Constitutionality and desirability are two different and distinct matters. With a view to maintaining the dignity, honour and respect, not excluding the self-respect, of the House and its Members, it is necessary to clarify the issue to the effect that the freedom of speech guaranteed by clause (1) or the protection provided by clause (2) shall not extend to corrupt acts of the Members of Parliament. In other words, it is necessary to specify that if any Member indulges in any corrupt act or accepts bribes or other unlawful benefit as an inducement or motive for his act namely, voting or speaking in a particular manner or not voting or not speaking in the House, shall be governed by the provisions of the Indian Penal Code and Prevention of Corruption Act and that such Member shall be liable to be proceeded against in a criminal court for such offences. It must also be mentioned that the Commission is not impressed by the argument (espoused by the minority opinions in Brewster) that such conduct can only be gone into by the House - and not by a court. Firstly, the House is not so constituted as to act as an effective forum to "investigate, try and punish its members" (Burger C.J.'s opinion in Brewster quoted above) which aspect has also been stressed in the

opinion of Mathew J. in Indira Gandhi v. Raj Narain (1975 SC 2299 at 2382-83 (para 329)). The learned judge pointed out that the Parliament, as it is constituted, is not a proper forum for deciding disputed questions of fact and law and that judicial process is the only appropriate process for resolving such disputes. Any attempt to decide judicial matters, the learned judge pointed out, may be likened to a "bill of attainder". There is yet another factor militating against the said argument: by the time, the bribery has come to light, the life of the House may have come to end; even otherwise, if the term of the House comes to an end before the conclusion of the proceedings taken against the member, the proceedings lapse. It is equally a matter for consideration whether even in the case of a continuing House like Rajya Sabha, whether the House can continue the proceedings after the expiry of the term of the member proceeded against; if not, the proceedings can be defeated by the member by simply resigning his membership. All these circumstances induce us to take the view that bribe-offering or bribe-taking by Members of Parliament should be within the purview of the criminal court, as mentioned above.

28. At the same time, we are fully conscious of the fact that the Members of Parliament should not also be shackled or their freedom of action curtailed unnecessarily. We must also not create a situation where they may be subjected to constant criminal prosecution which would also restrict and curtail their freedom of action. Our object for the present is only one viz., to provide that accepting a bribe or any other illegal gratification or any other valuable consideration as a consideration or reward for voting in the House in a particular manner or for not voting in the House, shall not be covered by the immunity conferred upon them either clause (2) or clause (3) of Article 105.

Second Issue: If the Members are to be made liable for being proceeded against in a criminal court as suggested in the preceding paragraph, then the question arises as to who shall be the authority for granting sanction contemplated by section 19 of the Prevention of Corruption Act. Instead of placing this burden upon the Speaker or the Chairman of the Rajya Sabha (who also happens to be the Vice-President of the Republic) and thus involve them in delicate and very often politically surcharged issues, it would be appropriate to create a committee comprising of five Members of Parliament of a very high repute, drawn from both the Houses of Parliament - who shall be nominated by the President of India in consultation with the Speaker of the Lok Sabha and Chairman of the Rajya Sabha - for the purpose. This committee shall be constituted immediately after a new Lok Sabha is constituted. The term of the members of such committee shall be co-extensive with the duration of the House to which they belong or to the term of their membership, whichever is earlier. This Committee shall be the competent authority to grant the sanction required by section 19 of the Prevention of Corruption Act or any other similar provision in the Indian Penal Code or other penal enactments.

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7. RECOMMENDATIONS:

29. In the light of the above discussion, the following measures are recommended:

(a) A new clause – clause (3A) – may be inserted in Article 105 to the following effect:

"(3A)(i) Nothing in clauses (1), (2) or (3) shall bar the prosecution of a Member of Parliament, in any court of law, for an offence involving receiving or accepting, whether directly or indirectly, and whether for his own benefit or for the benefit of any other person in whom he is interested, any kind of monetary or other valuable consideration for voting in a particular manner or for not voting, as the case may be, in a House of Parliament.

(ii) No court shall take cognizance of the offence mentioned in sub-clause (i) of this clause, except with the previous sanction of the committee constituted under sub-clause (iii) of this clause.

(iii) The committee referred to in sub-clause (ii) shall be a permanent committee constituted by the President. It shall comprise five Members of Parliament drawn from the Lok Sabha and Rajya Sabha (in the proportion of 3:2) nominated by the President in consultation with the Speaker of the Lok Sabha and the Chairman of the Rajya Sabha. The term of the members of the committee and other incidental matters may be such as may be notified by the President in the order constituting the committee.

(Revised on 18.12.2000)

QUESTIONNAIRE

ON

IMMUNITY OF LEGISLATORS – WHAT DO THE WORDS 'IN RESPECT OF ANYTHING SAID OR ANY VOTE GIVEN BY HIM' IN ARTICLE 105(2) SIGNIFY ?

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1. Do you agree with the view expressed in the Consultation Paper that the position resulting from the opinion of the majority in the decision of the Supreme Court of India in P.V. Narasimha Rao V. State (AIR 1998 Supreme Court 2120) requires to be redressed by amending Article 105 and Article 194 of the Constitution of India?

2. If your answer to Question No. 1 is in the affirmative, which of the two alternatives mentioned at pages 20-21 of the Consultation Paper [regarding the wording of sub-clause (i) of clause (3A)] is more appropriate?

3. Do you support the suggestion contained in sub-clauses (ii) and (iii) (regarding the consultation of an authority to grant sanction to prosecute) at page 21 of the Consultation Paper?

4. Have you any other suggestions to offer on the issue/ issues dealt with in this Consultation Paper? If so, please state them.