

## REVISITING THE BASIC STRUCTURE DOCTRINE AND CONSTITUTIONAL MORALITY: THE IMPLICATIONS OF GRANTING PARLIAMENTARY PRIVILEGE TO BRIBERY

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*The Sita Soren v. Union of India case has once again brought the question of corrupt practices vis-à-vis parliamentary privileges to the fore. This paper delves into the relationship between bribery and parliamentary privileges from the perspective of the basic structure doctrine and the concept of constitutional morality. The purpose of this piece is not to delve into the technicalities of each case, but to explore the implications of the inclusion of bribery on overarching constitutional values. First, it provides a brief context of the concept of parliamentary privileges in India. Then it examines the relationship of such privileges with the basic structure doctrine and constitutional morality to analyse the impact of the inclusion of bribery on the features of these principles such as the rule of law, democracy, free and fair elections, justice, equality, etc. Second, other areas of jurisdictions including England, Australia, the USA, etc. which have excluded such corrupt practices from the ambit of parliamentary privileges have been presented to verify the possibility of choosing a similar approach for the Indian context. Third and finally, the paper concludes by highlighting that a grant of immunity to bribery would violate the basic structure doctrine and transcend constitutional morality, and thus be disallowed from immunity.*

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# REVISITING THE BASIC STRUCTURE DOCTRINE AND CONSTITUTIONAL MORALITY: THE IMPLICATIONS OF GRANTING PARLIAMENTARY PRIVILEGE TO BRIBERY

## INTRODUCTION

It is well-known that the Constitution of India endows the members of the Parliament with various privileges within its four walls. Such privileges bestow immunity upon the legislatures from ordinary law and judicial scrutiny, thus, the term “parliamentary privilege.” The provisions mainly highlighted are articles 194(2)<sup>2</sup> and 105(2)<sup>3</sup> which deal with parliamentary privileges and state legislatures, respectively. The provisions include immunity from being subjected to judicial proceedings for both – speech within the parliament and the act of voting, etc. for parliamentary processes.<sup>4</sup> Since the latter is *mutatis mutandis* with the former, discussing them separately for this study might not be very significant. The question is – should such immunity include immunity from criminal and corrupt acts like bribery as well? Way back in 1998, the Hon’ble Supreme Court had included bribery for voting in the parliamentary process to be within the ambit of parliamentary privileges.<sup>5</sup> In the landmark ruling of *P.V. Narasimha Rao*, the Hon’ble Supreme Court upheld the immunity of members of the Parliament even in cases of bribery. However, such acts of corruption by public representatives and officials have been rampant and such immunity might not bode well for the spirit of the Constitution and democratic values.

Thus, the question of whether bribery should be included within the ambit of parliamentary privileges or not was only reconsidered recently and has been reserved for judgement by the Court in the case of *Sita Soren v Union of India*<sup>6</sup>. While speculations are rife over what the answer of the court might be, this paper aims to delve into this question within the context of the validity of such an inclusion vis-à-vis the Constitution’s basic structure and the concept of constitutional morality i.e., deliberating on the potential *ultra vires* nature of such inclusion.

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<sup>2</sup> INDIA CONST. art. 194. cl. 2.

<sup>3</sup> INDIA CONST. art. 105. cl. 2.

<sup>4</sup> P.V. Narasimha Rao v. State (CBI/SPE), (1998) 4 SCC 626.

<sup>5</sup> *Id.*

<sup>6</sup> *Sita Soren v. Union of India*, 2024 SCC OnLine SC 229.

The basic structure doctrine was laid down in the renowned case of *Keshavananda Bharati*<sup>7</sup> wherein, to put simply, the Court ruled that even though the provisions related to fundamental rights as stated in the Constitution may be amended, the Constitution's basic framework cannot be modified to change its identity.<sup>8</sup> Therefore, it can be implied that the basic structure lies above the provisions related to fundamental rights and is unalterable. It was argued in the case of *Narasimha Rao*<sup>9</sup> that the provisions of 105(2) and 194(2) are privileges which cannot be limited, even by fundamental rights like the freedom of speech,<sup>10</sup> leading to the subsequent conclusion by the Hon'ble Court that even bribery for parliamentary proceedings is immunised.

Next, as was opined by the Hon'ble Chief Justice of India in his speech recently, constitutional morality includes constitutional values that the courts are supposed to uphold such as fraternity, human dignity, personal liberty, equality and other core constitutional values.<sup>11</sup> Constitutional morality is thus, quite different from popular morality.<sup>12</sup> It is tethered to the ideals and principles enshrined in the Constitution and serves as an anchor to rely upon. However, the concept is not static and evolves as society progresses, striving to achieve transformation and development of society.<sup>13</sup>

The judiciary does and is supposed to go by constitutional morality. One of the aspects of constitutional morality is maintaining public trust in democratic institutions. However, corrupt practices by public representatives themselves go against this very aspect of constitutional morality.

The purpose herein is not to delve into the technicalities of the cases dealing with the issue of the inclusion of bribery in parliamentary privileges.

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<sup>7</sup> *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

<sup>8</sup> *Id.*

<sup>9</sup> *P.V. Narasimha Rao v. State (CBI/SPE)*, (1998) 4 SCC 626.

<sup>10</sup> INDIA CONST. art. 19.

<sup>11</sup> Sheryl Sebastian, *Unlike Elected Government, Judges Don't Go By Popular Morality, But By Constitutional Morality: CJI DY Chandrachud*, Livelaw (Nov. 4, 2023), <https://www.livelaw.in/top-stories/unlike-elected-government-judges-dont-go-by-popular-morality-but-by-constitutional-morality-cji-chandrachud-241614>.

<sup>12</sup> *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

<sup>13</sup> *Id.*

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Rather, the aim is to look at the issue from the lens of the overarching principles and doctrines. The primary objectives of this paper will be fulfilled in a three-pronged approach. *First*, whether the features of the basic structure are violated by such an immunity (which includes bribery within parliamentary privileges). *Second*, since the concepts of basic structure and constitutional morality are intertwined, next would be the discussion regarding the possible violation of constitutional morality. The nature of constitutional morality will be studied to see if it is contravened in granting the immunity in question. *Third*, the jurisprudence of other countries (including England) which have exempted bribery from the scope of parliamentary privileges over time will be analysed to see if the same can be applied to the Indian context.

### IN RELATION TO THE BASIC STRUCTURE

In the case of *Kesavananda Bharati*,<sup>14</sup> the Hon'ble Apex Court held that even though amendments can be made in provisions relating to fundamental rights of the constitution, the constitution's basic structure is not to be meddled with. Therefore, it can be inferred that the basic structure lies above the law as interpreted from Article 13.<sup>15</sup> This is because Article 13 includes the fundamental rights and ordinary rights laid down in the constitution and all other rules, regulations, orders, by-laws, etc. having the force of law within the territory of India<sup>16</sup> that *can be amended* by the Parliament.<sup>17</sup> However, the basic structure has been repeatedly held to be unalterable and is not to be meddled with by any amendment.

Therefore, though it was held in the *P.V Narasimha* case that parliamentary privileges are absolute and unfettered,<sup>18</sup> this view has been overruled in the recent *Sita Soren* judgement, wherein the Hon'ble Court has rightly opined that *Narasimha* had wide ramifications on parliamentary democracy, probity and public interest.<sup>19</sup> Thus, applauding and supporting the *Sita Soren*

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<sup>14</sup> *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

<sup>15</sup> INDIA CONST. art 13.

<sup>16</sup> INDIA CONST. art 13, cl. 3 (a).

<sup>17</sup> *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

<sup>18</sup> *Markandey Katju v. Lok Sabha*, (2017) 2 SCC 384.

<sup>19</sup> *N. Ravi and Ors. v. Speaker, Legislative Assembly and Ors.*, (2005) 1 SCC 603.

judgement, the foremost point of contention in this paper, simply, is that bribery must not be included within the parliamentary privileges since it is violative of the features of the basic structure which are not to be altered. Such immunity, if given to bribery, in voting in furtherance of the activities of the Parliament, would violate the principles of the rule of law, constitutionalism, and free and fair elections, among others which are essential facets of the basic structure doctrine.

### A. RULE OF LAW<sup>20</sup>

It is one of the most significant facets of the basic structure.<sup>21</sup> It affirms the Parliament's supremacy while denying its sovereignty over the Constitution,<sup>22</sup> functioning as an implied limitation on the Parliament's powers. No one is above the rule of law. It does not discriminate or differentiate between individuals or institutions. One of the features of the rule of law is accountability, and an act which is found in breach of the law by any individual may be punishable.<sup>23</sup> An expanding and dynamic concept,<sup>24</sup> it stands for social justice and ensuring proper social life.<sup>25</sup>

An immunity to bribery as part of parliamentary privileges would impede the deliverance of social justice and create an arbitrary classification between the representatives and the common people who indulge in such corruptive acts. Furthermore, the parliamentary privileges apply to individual members only to the extent necessary for the free performance of functions by the house. They are not meant to absolve the individuals from societal obligations which equally apply to them and rather more firmly owing to their representative character than commoners.<sup>26</sup>

Moreover, precedents have laid down those acts done, or even a repetition of slanderous words that were made inside the Parliament during the proceedings of the house, if done outside the Parliament will not be given

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<sup>20</sup> *Indra Sawhney v Union of India*, (1992) Supp (3) SCC 217.

<sup>21</sup> *K.T. Plantation (P) Ltd. v. State of Karnataka*, (2011) 9 SCC 1.

<sup>22</sup> *Id.* ¶ 211.

<sup>23</sup> *State of Maharashtra v. Saeed Sohail Sheikh*, (2012) 13 SCC 192.

<sup>24</sup> *K.S. Puttaswamy (Aadhaar-5J.) v. Union of India*, (2019) 1 SCC 1, ¶ 94.

<sup>25</sup> *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438.

<sup>26</sup> *The Committee of Privileges, Report of Committee of Privileges in Lewis case* (HC 164 1939-40) pt. vi, ¶ 19.

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parliamentary privileges.<sup>27</sup> The exchange of the promise of a bribe and the fulfilment of that promise wouldn't have been executed within the four walls of the Parliament. Therefore, such an act shouldn't be bestowed with any parliamentary privilege in accordance with the doctrine of *stare decisis*.<sup>28</sup> In other words, existing case law on the immunity of speech does not immunise any reiteration of the speech outside the Parliament, showcasing that it is only words spoken within the Parliament and not outside it which are protected. Thus, following this logic, any act of bribery executed outside the four walls of Parliament must also not be immunised. This is not to support any act of bribery done within the four walls of Parliament but rather only support the idea of de-immunisation in corollary with existing cases pertaining to the privilege of speech.

### B. CONSTITUTIONALISM

It is the Constitution of India which horizontally separates power between the three primary organs of Indian democracy i.e., the executive, the judiciary and the legislature. The legislature has complete authority to exercise its powers as per the allocation of the Seventh Schedule in the Constitution.<sup>29</sup> It is the Constitution and the values enshrined therein that reign supreme in India. The plenary powers of legislatures are to be in accordance with the Constitution's basic concepts and limits stated therein.<sup>30</sup>

All the functionaries, including members of legislatures, the executive or the judiciary, take their oath of allegiance to the Constitution and derive their authority and jurisdiction from its provisions.<sup>31</sup> Every action taken by public functionaries must align with constitutionalism where their every action accords with the basic tenets of the Constitution.<sup>32</sup> In *Navej Singh*

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<sup>27</sup> *Jatish Chandra Ghosh v. Hari Sadhan Mukherjee*, AIR 1961 SC 613.

<sup>28</sup> *State of Andhra Pradesh v. A.P. Jaiswal*, (2001) 1 SCC 748.

<sup>29</sup> INDIA CONST. sch. VII.

<sup>30</sup> *Gajendragadkar, C.J., Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

<sup>31</sup> K.S. CHAUHAN, *PARLIAMENT: POWERS, FUNCTIONS AND PRIVILEGES*, (LexisNexis, 1st ed., 2013).

<sup>32</sup> *State (NCT of Delhi) v. Union of India*, (2018) 8 SCC 501.

*Johar*<sup>33</sup>, it was stated that the values of constitutionalism are not limited to what has been written in the Constitution and must percolate down to the grassroots for the betterment of every citizen. Corrupt practices hinder such welfare of the people and are thus, violative of the principles of constitutionalism.

A prominent argument put forth by H.M. Seervai<sup>34</sup> in his book states that the fundamental right of speech of citizens (though not absolute) must be balanced with the parliamentary privileges of debate and discussion. He further states that when people draw the analogy of the Indian privileges in Parliament with that of the British, they miss out on important distinctions.<sup>35</sup> It must be noted that the British Parliament, reigns supreme, owing to its unitary structure of governance. They do not have a written constitution and the legislative supremacy of the Parliament has been recognised for hundreds of years by the courts.

However, in India, the situation is quite different. In a federal structure, the concept of supremacy is defined. It is not the Parliament that is supreme in our country, but rather the Constitution.<sup>36</sup> Since it is the Constitution that is supreme in our country, the Parliament must abide by the fundamental values enshrined in it. The powers of the legislatures are fettered by Fundamental Rights and other constitutional limitations.

Acts of corruption by elected representatives, in furtherance of parliamentary processes like electing individuals or saving the elected ones from impeachment<sup>37</sup> are an antithesis to the spirit of constitutionalism that upholds social justice, public welfare and interest, accountability, good governance and so on. Thus, drawing from the above argument, such acts are to be fettered by these principles and should not be immunised.

### **C. DEMOCRACY**

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<sup>33</sup> Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

<sup>34</sup> H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA, (Law and Justice Publication, 4th ed., 1975).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> P.V. Narasimha Rao v. State (CBI/SPE), (1998) 4 SCC 626.

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Democracy is not solely limited to electing governments but rather must give undivided attention to the goals of social, political and economic justice enshrined in the preamble to the Constitution to be meaningful. If only lip reverence is paid to the rule of law, democracy would be left fragile.<sup>38</sup> The democratic institutions generate aspirations of good governance and inspire passion among the people.<sup>39</sup>

The Parliament, one of the most prominent democratic institutions, has the power to legislate upon the privileges under the Constitution. The parliament formulates itself and its rules to ensure that it can function independently and discharge its functions freely. The elected chairman/speaker of the house has a pivotal role in the scheme of parliamentary democracy and is the guardian of the privileges and rights of the House.<sup>40</sup> Parliamentary privileges are, therefore, nothing but a special arrangement based on the principles of democracy. This is because the whole concept of privileges came about to empower the representatives of the people to fearlessly put forth their concerns and viewpoints. However, such acts of corruption erode the trust of the people in democratic institutions and undermine their faith – a quite undesirable effect which is harmful to the stable sustenance of the system, maintaining fraternity among citizens and the growth of the individuals within the society.

Another point that can be made is that the moment a legislator acts according to his promise undertaken in exchange for a bribe, his view expressed is no longer free and not in furtherance of the interest of the house but rather out of his selfish interest. The intent of working in the interest of the people represented is not fulfilled in a case of bribery for casting a vote or speaking or doing anything in furtherance of parliamentary processes. Since the privileges endowed in the Constitution are with the object of allowing legislators to function freely in the exercise of their Parliamentary functions to achieve the best possible outcomes for the people, the objective of the privilege is defeated by such an exchange.

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<sup>38</sup> Anoop Baranwal v. Union of India (Election Commission Appointments), (2023) 6 SCC 161, ¶ 124.

<sup>39</sup> *Id.* ¶¶ 291- 292.

<sup>40</sup> Kihoto Hollohan v. Zachillhu, (1992) Supp (2) SCC 651.

The immunity is not provided with individual legislators in mind but rather for the effective functioning of the Parliament as a whole.<sup>41</sup> The Constitution only immunises acts and speech which are in the furtherance of the parliamentary functions.

Therefore, such acts for self-gratification and corruption amount to an abuse of privilege (incorruptibility and honesty being the most elementary traits for elected representatives)<sup>42</sup> and should not be immune from criminal proceedings against the individual. This is in view of the fact that it has not been done in the interest of his public duty as a legislator and elected representative. On the contrary, the representative has acted in keeping with his own selfish gains, defeating his mandate as a representative. Furthermore, since the life of the government is dependent upon majority support, governments may be destabilised by bribing members of the house, threatening and undermining the authority and stability of the legislature itself.

### **Free and Fair Elections**

Democracy is a part of the basic structure, and free and fair elections are a basic feature of democracy.<sup>43</sup> The very fact that the voting process was rigged due to bribery of the elected members of the house in the case of *Narasimha Rao* defeats the principle of free and fair elections, embedded within the concept of democracy itself. Thus, providing immunity to such a deplorable act would undermine the institution of democracy itself.

### **Public Welfare**

The object of the legislative system as a whole is to advance public welfare. The ideals of justice and reason make up the larger legislative intent of every legislation.<sup>44</sup> Bribery goes against the very objective of public welfare and is an undeniable part of corruption. Such an act, by an elected

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<sup>41</sup> *Markandey Katju v. Lok Sabha*, (2017) 2 SCC 384.

<sup>42</sup> *Common Cause, A Registered Society v. Union of India*, (1999) 6 SCC 667.

<sup>43</sup> *Anoop Baranwal v. Union of India (Election Commission Appointments)*, (2023) 6 SCC 161 .

<sup>44</sup> *Quintin Johnstone, An Evaluation of the Rules of Statutory Interpretation*, 3(1) KANSAS L. REV. (1954).

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representative, is punishable under the Prevention of Corruption Act<sup>45</sup> to prevent the abuse of power by such individuals.

Since there are not many cases relating to bribery in the exercise of parliamentary privileges and the act of voting and freedom of speech have been given equal immunity under the Constitution, it would not be wrong to draw an analogy from cases relating to immunity of free speech. It was established in the case of *Horrocks v. Lowe*<sup>46</sup> that the parliamentary privilege of speech is lost if abused. The individual making a defamatory statement has to establish that the statement made is justified. There is a special reason why the law accords immunity from a suit – there should exist a public or private, legal or moral duty on the one who makes the defamatory statement. If the individual uses the occasion for some other purpose, he loses the privilege.

Drawing an analogy in this instance, the person is not discharging his moral and public duty of voting/acting fairly and independently but rather votes/acts in a corrupt manner. Thus, the individual is essentially liable for abuse of privilege and must not be granted immunity.

### IN RELATION TO CONSTITUTIONAL MORALITY

Constitutional interpretation must flow from constitutional morality. Values of Constitutional Morality are a “*non-derogable entitlement*”.<sup>47</sup> It should have a value of permanence. Yet, it is not a static concept but rather a concept to be cultivated.<sup>48</sup>

Constitutional morality is tethered to the values enshrined in the Constitution along with the basic structure doctrine. Both concepts are not limited to the provisions laid down in the Constitution but go much further. They uphold the underlying values of the written provisions such as the principles of natural justice, liberty, dignity and other core principles

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<sup>45</sup> The Prevention of Corruption Act 1988, § 7, No. 49, Acts of Parliament, 1988.

<sup>46</sup> *Horrocks v. Lowe*, (1975) AC 137 (U.K.).

<sup>47</sup> *Indian Young Lawyers Assn. (Sabarimala Temple-5J.) v. State of Kerala*, (2019) 11 SCC 1 ¶¶ 289, 357.

<sup>48</sup> *Id.*

which form the foundational values of the Constitution. While the basic structure protects equality, constitutional morality strikes down anything that prevents the realisation of the same, as was witnessed in the judgement of *Joseph Shine*.<sup>49</sup> Thus, the two seem to be quite intertwined in practical application. The principles which are upheld by the basic structure doctrine are more or less done at the touchstone of constitutional morality. The content of constitutional morality is in turn founded upon the precepts of the Preamble to the Constitution.<sup>50</sup>

Consequently, democratic ideals are to be protected, sustained and guided by the presence of constitutional morality. Constitutional morality protects citizens' rights and safeguards democratic principles, without which it would be difficult for democratic institutions to thrive. If constitutional morality is replaced with public morality, there would be no stability of the underlying values since public morality may change with time. The anchor provided by constitutional morality will be lost and institutions will go astray. For instance, it makes the government accountable to the represented people and makes them function in accordance with the rule of law, without which, public trust in democratic ideals will be lost.

It plays a prominent role in a democratic set-up and basically means obeisance to the norms of the constitution, making sure to not act arbitrarily.<sup>51</sup> The democratic values survive and turn out to be successful when the common masses and concerned officials of institutions do not go astray but rather strictly adhere to the constitutional parameters. Their act should reflect their regard for institutional integrity and requisite constitutional restraints.<sup>52</sup> By placing responsibility and duties on occupiers of constitutional institutions and offices,<sup>53</sup> it acts as a check on the functionaries and citizens alike. It highlights the need to preserve the public trust in democratic institutions<sup>54</sup> and provide the means to ensure the deliverance of justice in all its dimensions. Thus, practices like bribery that hinder a fair democratic functioning and erode public trust must not be provided immunity in parliament as they serve no public or social benefit

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<sup>49</sup> *Joseph Shine v. Union of India*, (2019) 3 SCC 39.

<sup>50</sup> *Id.* ¶ 215.

<sup>51</sup> *Manoj Narula v. Union of India*, (2014) 9 SCC 1.

<sup>52</sup> *Id.*

<sup>53</sup> *State (NCT of Delhi) v. Union of India*, (2018) 8 SCC 501, ¶ 295.

<sup>54</sup> *Id.*

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but rather undermine democracy and are detrimental to the basic structure itself.

Adding on, the courts have to ensure that what is protected conforms with the fundamental values, guarantees and morality of the Constitution.<sup>55</sup> Corruption, especially by elected representatives who are supposed to discharge public function with all sincerity keeping the welfare of the people in mind goes against the tenets of the preamble. Bribery impinges upon the welfare and development of the state, integrity of democratic institutions, fraternity amongst the citizens, fairness and equality, the rule of law and so on. It thus seriously violates Constitutional morality and should not be given immunity by the courts since no privilege should be so absolute as to violate the basic constitutional principles.

In the famous *Sabarimala* case,<sup>56</sup> the Court stated that the Constitution didn't intend to grant immunity to practices that speak against the vision of dignity and equality of individuals. The provision of immunity to members of parliament even in cases of bribery would create an arbitrary classification between representatives and the commoners who indulge in such practices. This is because the objective of granting parliamentary privileges is already lost when the legislator acts in furtherance of his own gains and not that of the people he represents. Thus, when the objective is itself negated, there remains no difference between a common man or public official who takes bribes for his own gains, and an elected representative sitting in the legislature. Such acts go against the basic Right to Equality of all citizens and are a blow to their dignity. Thus, such arbitrary classification is liable to be struck down.

### JURISPRUDENCE IN OTHER COUNTRIES

The attorney general in *PV Narasimha Rao*<sup>57</sup> had also argued that the immunity provided by Article 105(2)<sup>58</sup> ought to be interpreted in context

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<sup>55</sup> SEBASTIAN, *supra* note 11.

<sup>56</sup> Indian Young Lawyers Assn. (Sabarimala Temple-5J.) v. State of Kerala, (2019) 11 SCC 1.

<sup>57</sup> P.V. Narasimha Rao v. State (CBI/SPE), (1998) 4 SCC 626.

<sup>58</sup> INDIA CONST. art. 105 cl. 2.

of the contemporary times and thus, must exclude corrupt legislators from its ambit. In several countries across the globe, including England, the USA, Canada, and Commonwealth countries like Australia and New Zealand, the courts have held that a legislator could be proceeded against for corruption. An analysis of their rationale can prove helpful in understanding the implications of such an exclusion if applied to Indian Parliamentary privileges.

### A. ENGLAND

Under the chairmanship of Lord Salmon, *the Royal Commission on Standards of Conduct in Public Life*, presented its report in July 1976. It recommended bringing corruption, bribery and even attempted bribery by elected representatives acting in a parliamentary capacity within criminal law's ambit.<sup>59</sup> This is because being a Member of the Parliament brings with it great honour and a strict adherence to the special “*duty to maintain the highest standards of probity.*”

To provide clarity and better certainty to the question of applicability of the criminal law, and of parliamentary privilege, in cases of alleged corruption by a member of Parliament, the government of the United Kingdom, in 1996, released a discussion paper titled ‘*Clarification of the law relating to the Bribery of Members of Parliament.*’ It clarified that an offer of a bribe to (and acceptance of the same) members of the Parliament to influence their conduct in the house is a *breach of privilege*.<sup>60</sup> However, the debate over whether such acts should be excluded or not and what way of prosecution of such offences is to be implemented if such acts are included, etc. is being deliberated upon.<sup>61</sup>

### B. EUROPE

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<sup>59</sup> U.K. Parliament, *The Royal Commission on Standards of Conduct in Public Life* (1974-1976) HO 241, ¶ 311.

<sup>60</sup> Government of the United Kingdom, *Clarification of the law relating to the Bribery of Members of Parliament* (Dec. 1966), <https://publications.parliament.uk/pa/jt199899/jtselect/jtpriv/43/8012002.htm>.

<sup>61</sup> The Leader of the House of Commons and Lord Privy Seal by Command of Her Majesty, *Parliamentary Privilege* (Apr. 2012), <https://assets.publishing.service.gov.uk/media/5a78e3fd40f0b6324769af87/consultation.pdf>.

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The Venice Commission Report on *the Scope and Lifting of Parliamentary Immunities*, adopted in 2014 recognises that “*in such cases it is not the vote but the taking of the bribe which is the criminal offence, for which there is certainly no reason to protect the member concerned.*” Amongst its criteria and guidelines for non-liability, it holds that the freedom to vote must be absolute, provided it “*does not put any limitation on the power and the duty to hold Members of the Parliament liable for corrupt acts,*”<sup>62</sup> thus recognising the requirement of regulating the corrupt practices of legislative members.

### C. NEW ZEALAND AND CANADA

In the ruling of *Pebbles v Television New Zealand Ltd.*, The Privy Council considered Article 9 of the Bill of Rights 1688 which applies by way of incorporation in New Zealand. The Privy Council refused to allow any challenges to anything said or done within the parliament in the course of its legislative functioning and the protection of its privileges.<sup>63</sup>

However, in a subsequent case, the trial judge relied upon the case of *R. v. White*,<sup>64</sup> a case concerning the attempted bribery of a Member of Parliament in New South Wales, wherein it was stated that:

*“it would be a reproach to the common law if the offer to, or acceptance of, a bribe by a legislator were not an offence. A legislator who suffers his votes to be influenced by a bribe does that which is calculated to sap the utility of representative institutions at their foundations.”*

A similar view was opted for in Canada in the case of *R. v. Bunting*<sup>65</sup> and *R. v. Boston*.<sup>66</sup> In the latter case, Buckley J., quoted Lord Salmon and reiterated,

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<sup>62</sup> European Commission for Democracy through Law (Venice Commission), *Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts*, CDL-AD(2014)011 (Oct. 10-11, 2014), [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)011-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)011-e).

<sup>63</sup> *Pebbles v Television New Zealand Ltd.*, [1995] 1 AC 321.

<sup>64</sup> *R. v. White*, (1875) 13 SCR (NSW) (L) 322 (Austral.).

<sup>65</sup> *R. v. Bunting*, (1885) Ontario Reports 524 (Can.).

<sup>66</sup> *R. v. Boston*, (1923) HCA 59 (Austral.).

“...Equality before the law is one of the pillars of freedom. To say that immunity from criminal proceedings against anyone who tries to bribe a member of the parliament and any member of the parliament who accepts the bribe stems from the bill of rights is a serious mistake...”

He further stated that a bribe was taken and/or given by a member of the Parliament to use his position favouring the one giving the bribe in place of acting on his conscience and the merits, the crime of bribery is done and is not dependent on anything said or done during parliamentary proceedings or on whether the bribe worked or not. The proof of the existence of corruption in such an exchange is a separate consideration altogether. These rulings and Section 9 of the Parliamentary Privilege Act, 2014 of New Zealand provide for the prosecution of offences related to Parliamentary proceedings, and lists offences under the Crimes Act of 1961, including Section 102<sup>67</sup> and Section 103<sup>68</sup> therein.<sup>69</sup>

The law in Canada is similar to that of Australia. The acts of offer or acceptance of a bribe by a provincial or a federal member of Parliament are recognised as an offence under Section 108 of the Criminal Code, Canada.

#### **D. AUSTRALIA**

As is visible from the ruling of *R. v. White*,<sup>70</sup> Australia excludes acts like bribery from the ambit of parliamentary privileges. In Australia, legislative members can be proceeded against for criminal offences and acts falling outside their protected area, no matter whether the act in question is done in the capacity of a member or is linked to the acts of a member during Parliamentary proceedings.

For instance, asking for or obtaining a bribe in return for exercising the functions of a member in a particular way is recognised as an offence under section 73A of the Crimes Act 1914. If a member is proceeded against for

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<sup>67</sup> The Crimes Act, 1961, §. 102 (N. Z.).

<sup>68</sup> The Crimes Act, 1961, §. 103 (N. Z.).

<sup>69</sup> New Zealand Parliament, *Parliamentary Practice in New Zealand 2023* (Sep. 29, 2023), [https://www.parliament.nz/en/visit-and-learn/how-parliament-works/parliamentary-practice-in-new-zealand-2023-by-chapter/chapter-57-parliamentary-privilege/#\\_ftnref49](https://www.parliament.nz/en/visit-and-learn/how-parliament-works/parliamentary-practice-in-new-zealand-2023-by-chapter/chapter-57-parliamentary-privilege/#_ftnref49).

<sup>70</sup> *R. v. White*, (1875) 13 SCR (NSW) (L) 322 (Austral.).

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offences like receiving a bribe in return for asking certain questions in Parliament, the offence would be the receiving of the bribe and the prosecution would not have to present any evidence of what the member subsequently said or did in the Parliament.<sup>71</sup>

### E. UNITED STATES OF AMERICA

The law in the USA is similar to the Commonwealth countries. In *Daniel v. Brewster*,<sup>72</sup> the majority view in the Supreme Court held that the immunities of the speech or debate clause are meant to protect the legislative integrity and independence of Congress by ensuring the members' independence. It is neither aimed for their personal or private benefit nor for establishing the supremacy of the body. Even though the clause is rooted in English History, yet, it had to be interpreted in the light of the American experience and the context of the American constitutional scheme of government. The court thus had to apply the clause to maintain the historic balance of the government's three branches vis-à-vis the independence of the legislature.

Along the same lines, the interpretation of such privileges must be done keeping in mind India's constitutional scheme of governance and experiences. As is evident from parliamentary debates on the matter, the intent of the legislators was to provide a platform for elected representatives to put forth their concerns fearlessly. Their intent was clearly not to enable these representatives to forget their primary duties and probity and act for their personal gains. Our scheme of parliamentary privileges is thus rooted in the ideal of providing the best possible representation of the voters and not to immunise the individuals for any personal act whatsoever.

Moreover, the constitutional scheme of the Indian government is that of horizontal classification between the three organs of the government.

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<sup>71</sup> Parliament of Australia, *Odger's Australian Senate Practice*, ch. 2, [https://www.aph.gov.au/About\\_Parliament/Senate/Powers\\_practice\\_n\\_procedures/Odgers\\_Australian\\_Senate\\_Practice/Chapter\\_02](https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Odgers_Australian_Senate_Practice/Chapter_02).

<sup>72</sup> *United States of America v. Daniel B. Brewster*, (1972) 33 Law Ed 2d 507 (U.S.).

While the English Parliament exercises supremacy, the Indian Parliament is not supreme to the other two organs, thus, members of Parliament cannot be given such privileges that unnecessarily rule out our system of checks and balances, rendering them superior.

Thus, there is a need for the application of Transformative Constitutionalism, given the jurisprudence of other contemporary countries where similar privileges exist. Transformative constitutionalism is the Constitution's ability to adapt and mould according to the changing times.<sup>73</sup> Its objective is to improve society and embrace the ideals of justice, liberty and equality as set out in the Preamble of the Constitution.<sup>74</sup> Given the changing jurisprudence across the globe where, like India, absolute immunity was bestowed upon members of legislatures but has subsequently evolved to not giving immunity to criminal acts like bribery, the Constitution must be interpreted by the need and requirements of the changing times following the principle of transformative constitutionalism.

Also, to understand the substance of a provision and make out what the makers of the Constitution have truly intended to do, the court needs to look beyond what is written to grasp the legislation's true character.<sup>75</sup> As was the argument of the learned counsels in the *Sita Soren* case,<sup>76</sup> *prima facie*, the object of Article 105(2) or Article 194(2) doesn't seem to be the rendition of immunity from criminal proceedings, which may arise independently of the exercise of the rights and duties as a member of the legislature.<sup>77</sup> The object is not to give protection from criminal laws to the members. The object instead is, to protect the integrity of the legislative process, by securing the legislature's independence.<sup>78</sup> Thus, the true intent behind such privileges can be made from an application of the doctrine of pith and substance.

Corruption is a punishable offence and must not be let go of, without a trial. If bribery is included in parliamentary privileges, it would come under the scrutiny of the Parliament and not the courts of law. The majority view

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<sup>73</sup> SEBASTIAN, *supra* note 11, at ¶¶ 108, 109.

<sup>74</sup> *Id.* ¶ 107.

<sup>75</sup> *Dwarkadas Shrinivas v. Sholapur Spg. and Wvg. Co.* (1954) SCR 674.

<sup>76</sup> *Sita Soren v. Union of India*, 2024 SCC OnLine SC 229.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

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in the *P.V. Narasimha Rao* ruling<sup>79</sup> held that a member can be prosecuted without such sanction for offences of these types, but not without the permission of the Chairman/Speaker of the concerned House.<sup>80</sup> However, since bribery is a crime and the House doesn't have the power to try a crime, there exists no competent authority capable of trying a legislator or removing a member of the Parliament/ State Legislature.<sup>81</sup>

### RISK OF POLITICISATION

In the context of rife politicisation these days, any action against a guilty member will not be without politicisation, which runs the risk of dividing the house into political lines. The speaker/chairperson of the house is empowered to decide such cases of corruption and it cannot be ignored that the speaker is a politician himself and would be prone to partiality, rather than objectivity or impartiality.<sup>82</sup> Even the Lok Sabha Ethics Committee which recommended expelling a member of the Parliament, Mahua Moitra, from the house was not based on any clear principle and seemed like a result of political bias in contrast to the lukewarm response of the Privileges Committee to the passing of a defamatory casteist slur by the ruling party's member of the Parliament, Ramesh Bidhuri.<sup>83</sup> This clearly showcases the defects in the current mechanism.

Such politicisation also risks targeting opposition MPse while the ones within the fold of the ruling party are assured of not being acted against and remain unafraid of any action against them.

Thus, instead of enforcing democratic principles and probity amongst the elected representatives, this system might as well serve as another way for the ruling party to suppress the views of the opposition, thus defeating the

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<sup>79</sup> *P.V. Narasimha Rao v. State (CBI/SPE)*, (1998) 4 SCC 626.

<sup>80</sup> *Id.* ¶¶ 98, 99.

<sup>81</sup> *Election Commission v. Subramaniam Swamy*, (1996) AIR 1996 SC 1810.

<sup>82</sup> M. P. JAIN, *INDIAN CONSTITUTIONAL LAW*, (LexisNexis, 8th ed., 2018).

<sup>83</sup> *Over the Top: The decision to expel Mahua Moitra smacks of political vendetta*, THE HINDU, (Nov. 11, 2023) <https://www.thehindu.com/opinion/editorial/over-the-top-the-hindu-editorial-on-mahua-moitra-and-the-lok-sabha-ethics-panels-disqualification-recommendation/article67521709.ece>.

very purpose of granting such parliamentary privileges. Hence, augmenting the parliamentary mechanism for the resolution of such cases to make it unbiased is the need of the hour, or else, the substance behind such immunities is negated.

### **IMPORTANCE OF JUDICIAL SCRUTINY**

Bribery shouldn't be exempted from judicial scrutiny as it would create arbitrary discrimination between the elected representatives and other public officials regarding the liability of the bribery, as the latter might as well be absolved of an otherwise serious liability or wrongfully indicted owing to political biases. This lacuna of law must be rectified as bribery is an act that goes against our constitutional norms, even more so when done by an elected representative. A corrupt official shouldn't be allowed to wash their hands off such a grave abuse of power with such ease. It is ironic to note that the individual who truly exercised his conscience, acted in the interest of the Parliament and discharged his public duty as an elected representative in not voting per the promise of bribery was deprived of the privilege; while others whose conscience and act was marred by selfish intent were absolved of their liabilities. Such a decision may not set an ideal precedent for the legislators in future who might consider the parliament as the blind spot for the commission of unethical and corrupt practices like bribery.

By and large, the idea herein is not to deprive the legislators of their privileges of speaking their will or acting free of any fear of judicial proceedings for the furtherance of the interests of the people they represent. However, criminal acts like bribery are consciously driven acts which do not serve any public benefit but rather prove to be contrary to constitutional values. Hence, the *principle of harmonious construction* must be implemented to balance the privileges of the legislatures in the context of the constitutional principles, so that effect may be given to all provisions and values as much as possible while avoiding any interpretation which might leave any of them ineffective.<sup>84</sup> The principle is to be applied in keeping with the concepts which give life to the Constitution, such as that of the basic structure and constitutional morality.

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<sup>84</sup> State of Rajasthan v. Gopi Kishan Sen, (1993) Supp (1) SCC 522.

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### CONCLUSION

Therefore, in view of the above, and the persuasive rulings of other countries which also provide similar parliamentary privileges, including England itself, it can be concluded that extending the parliamentary privileges to acts of bribery in voting in furtherance of the proceedings of the Parliament is indeed violative of the basic structure and constitutional morality of the constitution. This is because it is a clear antithesis to some of the essential features of our Constitution including the principles of the rule of law, constitutionalism, democratic values, free and fair elections, justice and fairness, integrity and fraternity etc. Therefore, it might not be in the interest of the people to bestow parliamentary privilege on unethical and corrupt practices such as bribery.

The questions being deliberated upon in the UK are more related to how the way ahead would be rather than disputing this argument. Indeed, the ways to go about the prosecution of such unethical practices would depend upon the circumstances of each country in the context of its structure and experiences and thus, would require in-depth deliberation. In Australia, for instance, recognising that unless absolute parliamentary privilege is curtailed, the way to resolve issues of abuse of privileges would have to be through the *existing* procedures of proceedings in the House (as new internal regulations might be aimed at suppression of embarrassment or inconvenient debates by the ruling majority). Therefore, the Senate accepted giving the aggrieved individuals a right of reply.<sup>85</sup> Similar way-outs can be looked at for the prevention of abuse of parliamentary privileges while making sure that the purpose of the immunity is fulfilled.

As Mr. Seervai opined, by limiting the absolute parliamentary privileges by Fundamental Rights, the abuse of privileges would be greatly minimised if not prevented altogether.<sup>86</sup> The very fact that the same question has arisen, that the unethical act of bribery in voting in Parliament by elected

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<sup>85</sup> Parliament of Australia, *Odger's Australian Senate Practice*, ch. 2, [https://www.aph.gov.au/About\\_Parliament/Senate/Powers\\_practice\\_n\\_procedures/Odgers\\_Australian\\_Senate\\_Practice/Chapter\\_02](https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Odgers_Australian_Senate_Practice/Chapter_02).

<sup>86</sup> SEERVAI, *supra* note 34, at 2204.

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representatives has surfaced again, is proof enough that such acts would not stop but rather continue to happen.

An inclusion of bribery would not be in the interests of our democracy and would undermine our constitutional values. Rather, an exclusion of the same might serve as a needed deterrent for such acts in times to come. The main concern and task of the three fundamental democratic institutions is to ensure proportionality, such that these limitations don't create a chilling effect upon the legislators to impede the freedom and independence of the body. An application of well-established doctrines of harmonious construction, pith and substance and transformative constitutionalism can be of significance in making such a decision.