
In the matter of: Under Article 143 of the Constitution of India

Special Reference No. 1 of 1964

Court: Supreme Court of India

Date of Decision: Sept. 30, 1964

Acts Referred:

Constitution of India, 1950 – Article 143(1), 194(3), 211, 226, 32

Citation: AIR 1965 SC 745

Hon'ble Judges: P. B. Gajendragadkar, C.J; N. Rajagopala Ayyangar, J; M. Hidayatullah, J; K. Subba Rao, J; K. N. Wanchoo, J; J. C. Shah, J; A. K. Sarkar, J

Bench: Full Bench

Final Decision: Disposed Of

Judgement

Gajendragadkar, C.J.

This is Special Reference No. 1 of 1964 by which the President has formulated five questions for the opinion of this

Court under Article 143(1) of the Constitution. The Article authorises the President to refer to this Court questions of law or fact which appear to

him to have arisen or are likely to arise and which are of such a nature and of such public importance that it is expedient to obtain the opinion of the

Supreme Court upon them. Article 143(1) provides that when such questions are referred to this Court by the President, the Court may, after such

hearing as it thinks fit, report to the President its opinion thereon. In his Order of Reference made on March 26, 1964, the President has expressed

his conclusions that the questions of law set out in the Order of Reference are of such a nature and of such public importance that it is expedient

that the opinion of the Supreme Court of India should be obtained thereon.

2. It appears that on March 14, 1964, the Speaker of the Legislative Assembly of Uttar Pradesh administered, in the name of and under the orders

of the Legislative Assembly (hereinafter referred to as "the House"), a reprimand to Keshav Singh, who is a resident of Gorakhpur, for having

committed contempt of the House and also for having committed a breach of the privileges of Narsingh Narain Pandey, a member of the House.

The contempt and the breach of privileges in question arose of a pamphlet which was printed and published and which bore the signature of

Keshav Singh along with the signature of other persons. In pursuance of the decision taken by the House later on the same day, the Speaker

directed that Keshav Singh be committed to prison for committing another contempt of the House by his conduct in the House when he was

summoned to receive the aforesaid reprimand and for writing a disrespectful letter to the Speaker of the House earlier. According to this order, a

warrant was issued over the signature of the Speaker of the House, Mr. Verma, directing that Keshav Singh be detained in the District Jail,

Lucknow, for a period of seven days, and in execution of the warrant Keshav Singh was detained in the Jail.

3. On March 19, 1964, Mr. B. Solomon, an Advocate practising before the Lucknow Bench of the Allahabad High Court, presented a petition to

the High Court on behalf of Keshav Singh u/s 491 of the Code of Criminal Procedure, 1898, as well as under Article 226 of the Constitution. To

this petition were impleaded the Speaker of the House, the House, the Chief Minister of Uttar Pradesh and the Superintendent of the District Jail,

Lucknow where Keshav Singh was serving the sentence of imprisonment imposed on him by the House, as respondents 1 to 4 respectively. The

petition thus presented on behalf of Keshav Singh alleged that his detention in jail was illegal on several grounds. According to the petition, Keshav

Singh had been ordered to be imprisoned after the reprimand had been administered to him, and that made the order of imprisonment illegal and

without authority. The petition further alleged that Keshav Singh had not been given an opportunity to defend himself and that his detention was

mala fide and was against the principles of natural justice. It was also his case that respondents 1 to 3 has no authority to send him to the District

Jail, Lucknow, and that made his detention in jail illegal.

4. After the said petition was filed before the Lucknow Bench of the Allahabad High Court, the learned Advocates for both the parties appeared

before Beg and Sahgal JJ. at 2 p.m. and agreed that the petition should be taken up at 3 p.m. the same day. Mr. Solomon represented Keshav

Singh and Mr. K. N. Kapur, Assistant Government Advocate, appeared for all the respondent. Accordingly, the petition was taken up before the

Court at 3 p.m. On this occasion, Mr. Solomon appeared for the petitioner but Mr. Kapur did not appear in Court. The Court then passed an

Order that the applicant should be released on bail on furnishing two sureties in a sum of Rs. 1,000 each and a personal bond in the like amount to

the satisfaction of the District Magistrate, Lucknow. The Deputy Registrar of the Court was asked to take necessary action in connection with the

Order. The Court also directed that the applicant shall remain present in Court at every hearing of the case in future. Thus, the petition was

admitted and notice was ordered to be issued to the respondents with the additional direction that the case should be set down for hearing as early

as possible. This happened on March 19, at 3 P.M.

5. On March 20, 1964, Mr. Shri Rama, the Government Advocate, wrote to Mr. Nigam, Secretary to Government U.P., Judicial Department,

Lucknow, giving him information about the Order passed by the High Court on Keshav Singh's application. In this communication, Mr. Shri Rama

has stated that after the matter was mentioned to the Court at 2 P.M. it was adjourned to 3 P.M. at the request of the parties; soon thereafter Mr.

Kapur contacted Mr. Nigam on the phone, but while the conversation was going on, the Court took up the matter at 3 P.M. and passed the Order

directing the release of Keshav Singh on terms and conditions which have already been mentioned. Mr. Shri Rama sent to Mr. Nigam three copies

of the application made by Keshav Singh and suggested that arrangement should be made for making an appropriate affidavit of the persons

concerned. He also told Mr. Nigam that the application was likely to be listed for hearing at a very early date.

6. Instead of complying with the request made by the Government Advocate and instructing him to file a return in the application made by Keshav

Singh, the House proceeded to take action against the two learned Judges who passed the order on Keshav Singh's application, as well as

Keshav Singh and his Advocate, on March 21, 1964. It appears that two Members of the House brought to the notice of the Speaker before the

Court in regard to the application made by Keshav Singh. Taking notice of the order passed by the High Court on Keshav Singh's petition, the

House proceeded to pass a resolution on March 21, 1964. This resolution said that the House was of the definite view that M/s. G. D. Sahgal, N.

U. Beg, Keshav Singh and B. Solomon had committed contempt of the House and therefore, it was ordered that Keshav Singh should immediately

be taken into custody and kept confined in the District Jail, Lucknow, for the remaining term of his imprisonment and M/s. N. U. Beg, G. D.

Sahgal and B. Solomon should be brought in custody before the House. The resolution further added that after Keshav Singh completed the term

of his imprisonment, he should be brought before the House for having again committed contempt of the House on March 19, 1964.

7. The two learned Judges heard about this resolution on the radio on the evening of March 21, and read about it in the morning edition of the

Northern India Patrika published on March 22, 1964. That is why they rushed to the Allahabad High Court with separate petitions under Art. 226

of the Constitution. These petitions alleged that the impugned Resolution passed by the House was wholly unconstitutional and violated the

provisions of Art. 211 of the Constitution. According to the petitions, the application made by Keshav Singh under Art. 226 was competent and in

making an order releasing Keshav Singh, the Judges were exercising their jurisdiction and authority as Judges of the High Court under Art. 226.

Their contention was that the resolution passed by the House amounted to contempt of Court, and since it was wholly without jurisdiction, it should

be set aside and by an interim order its implementation should be stayed. To these petitions were impleaded as respondents Mr. Verma, the

Speaker, Vidhan Sabha, Lucknow, the State of Uttar Pradesh and the Marshal, Vidhan Sabha. These petitions were filed on March 23, 1964.

8. Apprehending that these developments had given rise to a very serious problem a Full Bench of the Allahabad High Court consisting of 28

Judges took up on the same day the petitions presented before them by their two colleagues at Lucknow, directed that the said petitions should be

admitted and ordered the issued of notices against the respondents restraining the Speaker from issuing the warrant in pursuance of the direction of

the House given to him on March 21, 1964, and from securing execution of the warrant if already issued, and restraining the Government of U.P.

and the Marshal of the House from executing the warrant.

9. Meanwhile, on March 25, 1964, Mr. Solomon, the learned Advocate of Keshav Singh, presented a similar petition to the High Court under

Art, 226. He prayed for a writ of mandamus on the same lines as the petitions filed by the two learned Judges, and he urged that suitable order

should be passed against the House, because it has committed contempt of Court. To his petition Mr. Solomon had impleaded seven respondents;

they were : the Speaker of the House, Mr. Verma : the Legislative Assembly, U.P.; the Marshal of the U.P. Legislative Assembly; Mr. Saran and

Mr. Ahmad, Members of the Legislative Assembly, U.P., who brought to the notice of the House the orders passed by the two learned Judges of

the High Court; and the State of Uttar Pradesh.

10. This application again was heard by a Full Bench of 28 Judges of the Allahabad High Court on March 25, and after admitting the petition, an

interim order was passed prohibiting the implementation of the resolution the validity of which was challenged by the petitioner. At the preliminary

hearing of this petition, notice had been served on the Senior Standing Counsel who was present in Court. He stated to the Court that he had no

instructions at that stage to oppose the application. That is why the Court issued notice of the application and passed what it thought would be

appropriate orders.

11. On the same day, the House passed a clarificatory resolution. This resolution began with the statement that a misgiving was being expressed

with regard to the motion passed by the House in that it could be construed as depriving the persons concerned of an opportunity of explanation,

and it added that it was never the intention of the House that a charge against a High Court Judge for committing breach of privilege or contempt of

that House, should be disposed of in a manner different from that governing breach of privilege or contempt committed by any other person. The

House, therefore, resolved that the question of contempt may be decided after giving an opportunity of explanation to the persons named in the

original resolution of March 20, 1964 according to rules.

12. As a result of this resolution, the warrants issued for the arrest of the two learned Judges and Mr. Solomon were withdrawn, with the result

that the two learned Judges and Mr. Solomon were placed under an obligation to appear before the House and offer their explanations as to why

the House should not proceed against them for their alleged contempt of the House.

13. When the incidents which happened in such quick succession from March 19 to March 25, 1964, had reached this stage, the President

decided to exercise his power to make a reference to this Court under Art. 143(1) of the Constitution on March 26, 1964. The Order of

Reference shows that it appeared to the President that the incidents in question had given rise to a serious conflict between a High Court and a

State Legislature which involved important and complicated questions of law regarding the powers and jurisdiction of the High Court and its

Judges in relation to the State Legislature and its officers and regarding the powers, privileges and immunities of the State Legislature and its

members in relation to the High Court and its Judges in the discharge of their duties. The President was also satisfied that the questions of law set

out in his Order of Reference were of such a nature and of such public importance that it was expedient to obtain the opinion of this Court on

them. That is the genesis of the present reference.

14. The questions referred to this Court under this Reference read as follows :-

(1) Whether, on the facts and circumstances of the case, it was competent for the Lucknow Bench of the High Court of Uttar Pradesh consisting

of the Hon"ble Mr. Justice N. U. Beg and the Hon"ble Mr. Justice G. D. Sahgal, to entertain and deal with the petition of Mr. Keshav Singh

challenging the legality of the sentence of imprisonment imposed upon him by the Legislative Assembly of Uttar Pradesh for its contempt and for

infringement of its privileges and to pass orders releasing Mr. Keshav Singh on bail pending the disposal of his said petition;

(2) Whether, on the facts and circumstances of the case, Mr. Keshav Singh, by causing the petition to be presented on his behalf to the High Court

of Uttar Pradesh as aforesaid, Mr. B. Soloman, Advocate, by presenting the said petition and the said two Hon"ble Judges by entertaining and

dealing with the said petition and ordering the release of Shri Keshav Singh on bail pending disposal of the said petition committed contempt of the

Legislative Assembly of Uttar Pradesh;

(3) Whether, on the facts and circumstances of the case, it was competent for the Legislative Assembly of Uttar Pradesh to direct the production

of the said two Hon"ble Judges and Mr. B. Soloman, Advocate, before it in custody or to call for their explanation for its contempt;

(4) Whether, on the facts and circumstance of the case, it was competent for the Full Bench of the High Court of Uttar Pradesh to entertain and

deal with the petitions of the said two Hon"ble Judges and Mr. B. Solomon, Advocate, and to pass interim orders restraining the Speaker of the

Legislative Assembly of Uttar Pradesh and other respondents to the said petitions from implementing the aforesaid direction of the said Legislative

Assembly; and

(5) Whether a Judge of a High Court who entertains or deals with a petition challenging any order or decision of a Legislature imposing any penalty

on the petitioner or issuing any process against the petitioner for its contempt of for infringement of its privileges and immunities or who passes any

order on such petition commits contempt of the said Legislature and whether the said Legislature is competent to take proceedings against such a

Judge in the exercise and enforcement of its powers, privileges and immunities.

15. At the hearing of this Reference, Mr. Varma has raised a preliminary objection on behalf of the Advocate-General of Bihar. He contends that

the present Reference is invalid under Art. 143(1) because the questions referred to this Court are not related to any of the entries in Lists I and III

and as such, they cannot be said to be concerned with any of the powers, duties or functions conferred on the President by the relevant articles of

the Constitution. The argument appears to be that it is only in respect of matters falling within the powers, functions and duties of the President that

it would be competent to him to frame questions for the advisory opinion of this Court under Art. 143(1). In our opinion, this contention is wholly

misconceived. The words of Art. 143(1) are wide enough to empower the President to forward to this Court for its advisory opinion any question

of law or fact which has arisen or which is likely to arise, provided it appears to the President that such a question is of such a nature or of such

public importance that it is expedient to obtain the opinion of this Court upon it. It is quite true that under Art. 143(1) even if questions are referred

to this Court for its advisory opinion, this Court is not bound to give such advisory opinion in every case. Art. 143(1) provides that after the

questions formulated by the President are received by this Court, it may, after such hearing as it thinks fit, report to the President its opinion

thereon. The use of the word ""may"" in contrast with the use of the word ""shall"" in the provision prescribed by Art. 143(2) clearly brings out the fact

that in a given case, this Court may respectfully refuse to express its advisory opinion if it is satisfied that it should not express its opinion having

regard to the nature of the questions forwarded to it and having regard to other relevant facts and circumstances. Art. 143(2) deals with cases in

which the President may refer a dispute to this Court notwithstanding the prohibition prescribed by the proviso to Art. 131, and it adds that when

such a reference is made, the Court shall, after such hearing as it thinks fit, report to the President its opinion thereon. In other words, whereas in

the case of reference made under Art. 143(2) it is the constitutional obligation of this Court to make a report on that reference embodying its

advisory opinion, in a reference made under Art. 143(1) there is no such obligation. In dealing with this latter class of reference, it is open to this

Court to consider whether it should make a report to the President giving its advisory opinion on the question under reference.

16. This position, however, has no bearing on the question raised by Mr. Varma. The validity of the objection raised by Mr. Varma must be

judged in the light of the words of Art. 143(1) themselves and these words are of such wide amplitude that it would be impossible to accede to the

argument that the narrow test suggested by Mr. Varma has to be applied in determining the validity of the reference itself. What Art. 143(1)

requires is that the President should be satisfied that a question of law or fact has arisen or is likely to arise. He should also be satisfied that such a

question is of such a nature and of such public importance that it is expedient to obtain the opinion of this Court on it. Prima facie, the satisfaction

of the President on both these counts would justify the reference, and it is only where this Court feels that it would be inadvisable for it to express

its advisory opinion on it that it may respectfully refuse to express any opinion. But there can be no doubt that in the present case it would be

impossible to suggest that questions of fact and law which have been referred to this Court, have not arisen and they are not of considerable public

importance. therefore, we do not think there is any substance in the preliminary objection raised by Mr. Varma.

17. The reference made to this Court since the Constitution was adopted in 1950 illustrate how it would be inappropriate to apply the narrow test

suggested by Mr. Varma in determining the competence or validity of the reference. The first Special Reference No. 1 of 1951 was made to this

Court to obtain the advisory opinion of this Court on the question about the validity and constitutionality of the material provisions of the Delhi

Laws Act, 1912, the Ajmer-Merwara (Extension of Laws) Act, 1947, and the Part C States (Laws) Act, 1951 (281647). The second Special

Reference (281270) was made in 1958. This had reference to the validity of certain provisions of the Kerala Education Bill, 1957, which had been

passed by the Kerala Legislative Assembly, but had been reserved by the Governor for the consideration of the President. The third Special

Reference (272386) was made in 1959, and it invited the advisory opinion of this Court in regard to the validity of the material provisions of an

agreement between the Prime Ministers of India and Pakistan which was described as the Indo-Pakistan Agreement. The fourth Special reference

(280738) By this reference, the President forwarded for the advisory opinion of this Court questions in regard to the validity of the relevant

provisions of a draft Bill which was intended to be moved in the Parliament with a view to amend certain provisions of the Sea Customs Act, 1878

and the Central Excises and Salt Act, 1944. It would thus be seen that the questions so far referred by the President for the uniform pattern and

that is quite clearly consistent with the broad and wide words used in Art. 143.

18. It is hardly necessary to emphasise that the questions of law which have been forwarded to this Court on the present occasion are of very great

constitutional importance. The incidents which have given rise to this Reference posed a very difficult problem and unless further developments in

pursuance of the orders passed by the two august bodies were arrested, they were likely to lead to a very serious and difficult situation. That is

why the President took the view that a case for reference for the advisory opinion of this Court had been established and he accordingly

formulated five questions and has forwarded the same to us for our advisory opinion. Under Art. 143(1) it may be competent to the President to

formulate for the advisory opinion of this Court questions of fact and law relating to the validity of the impugned provisions of existing laws; it may

be open to him to formulate questions in regard to the validity of provisions proposed to be included in the Bills which would come before the

Legislatures; it may also be open to him to formulate for the advisory opinion of this Court questions of constitutional importance like the present;

and it may be that the President may, on receiving our answers consider whether the Union Government or the State Government should be

requested to take any suitable or appropriate action, either legislative or executive in accordance with the opinion expressed by this Court. That is

why we feel no difficulty in holding that the present Reference is competent.

19. As we have already indicated, when a Reference is received by this Court under Art. 143(1), this Court may, in a given case, for sufficient and

satisfactory reasons, respectfully refuse to make a report containing its answers on the questions framed by the President; such a situation may

perhaps arise if the questions formulated for the advisory opinion of this Court are purely socio-economic or political questions which have no

relation whatever with any of the provisions of the Constitution, or have otherwise no constitutional significance. It is with a view to confer

jurisdiction on this Court to decline to answer questions for such strong and compelling reasons that the Constitution has used the word "may" in

Art. 143(1) as distinct from Art. 143(2) where the word used is "shall". In the present case, we are clearly of opinion that the questions formulated

for our advisory opinion are questions formulated for our advisory opinion are questions of grave constitutional importance and significance and it is

our duty to make a report to the President embodying our answers to the questions formulated by him.

20. That takes us to the merits of the controversy disclosed by the question formulated by the President for our advisory opinion. This Reference

has been elaborately argued before us. The learned Attorney-General opened the proceedings before us and stated the relevant facts leading to the

Reference, and indicated broadly the rival contentions which the House and the High Court sought to raise before us by the statements of the case

filed on their behalf. Mr. Seervai, the learned Advocate-General of Maharashtra, appeared for the House and presented before the Court a very

learned, impressive and exhaustive argument. He was followed by several learned counsel who broadly supported the stand taken by the House.

Mr. Setalvad who appeared for the Judges of the Allahabad High Court, addressed to us a very able argument with his characteristic brevity and

lucidity; and he was, in turn, followed by several learned counsel who appeared to support the stand taken by the Judges. During the course of the

debate, several propositions were canvassed before us and very large area of constitutional law was covered. We ought, therefore, to make it

clear at the outset that in formulating our answers to the questions framed by the President in the present Reference, we propose to deal with only

such points as, in our opinion, have a direct and material bearing on the problems posed by the said questions. It is hardly necessary to emphasise

that in dealing with constitutional matters, the Court should to deal with question which do not strictly arise. This precaution is all the more

necessary in dealing with a reference made to this Court under Art. 143(1).

21. Let us then begin by stating broadly the main contentions urged on behalf of the House and on behalf of the Judges and the Advocate. Mr.

Seervai began his arguments by pointing out the fact that in dealing with reference under Art. 143(1), the Court is not exercising what may be

described as its judicial function. There are no parties before the Court in such a reference and there is no lis. The opinion expressed by the Court

on the reference is, therefore, advisory; and so, he contends that though he appears before us in the present reference on behalf of the House, he

wants to make it clear that the House does not submit to the jurisdiction of this Court in any manner in respect of the area of controversy covered

by the questions. In other words, he stated that his appearance before us was without prejudice to his main contention that the question about the

existence and extent of the powers, privileges and immunities of the House, as well as the question about the exercise of the powers and privileges

were entirely and exclusively within the jurisdiction of the House; and whatever this Court may say will not preclude the House from deciding for

itself the points referred to us under this Reference. This stand was based on the ground that the opinion expressed by us is advisory and not in the

nature of a judicial adjudication between the parties before the Court as such.

22. The same stand was taken by Mr. Seervai in regard to Art. 194 of the Constitution. Art. 194(3) deals with the question about the powers,

privileges and immunities of the Legislatures and of the Members and Committees thereof. We will have occasion to deal with the provisions of this

Article later on. For the present, it is enough to state that according to Mr. Seervai, it is the privilege of the House to construe the relevant

provisions of Art. 194(3) and determine for itself what its powers, privileges and immunities are, and that being so, the opinion expressed by this

Court on the questions relating to the existence and extent of its powers and privileges will not preclude the House from determining the same

questions for itself unfettered by the views of this Court.

23. Having thus made his position clear in regard to the claim which the House proposes to make in respect of its powers and privileges, Mr.

Seervai contended that even in England this dualism between the two rival jurisdictions claimed by the Judicature and the Parliament has always

existed and it still continues to be unresolved. On some occasions, the dispute between the Judicature and the House of Commons has assumed a

very bitter form and it has disclosed a complete antinomy or contradiction in the attitudes adopted by the two respective august bodies. The courts

claimed that they had a right to decide the question about the existence and extent of powers and privileges in question and the Parliament

consistently refused to recognise the jurisdiction of the courts in that behalf during the 17th, 18th and 19th centuries. The Parliament conceded that

it could not create any new privileges, but it insisted on treating itself as the sole and exclusive judge of the existing privileges and was not prepared

to part with its authority to determine what they were, or to deal with their breach, and how to punish the delinquent citizens. On the other hand,

the courts insisted on examining the validity of the orders passed by the Parliament on the ground of breach of privilege, and the dualism thus

disclosed persisted for many years.

24. Mr. Seervai argues that the House for which he appears adheres to the stand which the House of Commons took in similar controversies

which led to a conflict between the Judicature and itself on several occasions in the past. Consistently with this attitude, he denies the jurisdiction of

the Allahabad High Court to deal with the points raised by Keshav Singh in his writ petition. Logically, his argument is that the presentation of the

petition by Keshav Singh and his Advocate amounted to contempt of the House, and when the learned Judges entertained the petition and passed

an interim order on it, they committed contempt of the House. That is the view taken by the House, and the propriety, correctness, or validity of

this view is not examinable by the Judicature in this country.

25. Alternatively, Mr. Seervai put his argument on a slightly different basis. He conceded that for over a century past, in England, this controversy

can be taken to have been settled to a large extent by agreement between the Judicature and the House of Commons. It now appears to be

recognised by the House of Commons that the existence and extend of privilege can be examined by the courts. It also appears to be recognised

by the House of Commons that if in exercise of its power to punish a person for its contempt, it issues a speaking warrant, it would be open to the

court to consider whether the reasons set out in the warrant amount to contempt or not. To this limited extent, the jurisdiction of the Judicature is

recognised and consistently, for the last century, whenever it became necessary to justify the orders passed by it for its contempt, a return has

always been filed in courts. Mr. Seervai, however, emphasises the fact that even as a result of this large measure of agreement between the

Judicature and the House of Commons on the question about the mature and extent of privilege, it appears to be taken as settled that if an

unspeaking or general warrant is issued by the House of Commons to punish a person who is guilty of its contempt, the courts would invariably

treat the said general warrant as conclusive and would not examine the validity of the order passed by the House. In the present case, according to

Mr. Seervai, the resolution which has been passed by the House against the two learned Judges as well as against Mr. Solomon is in the nature of

a general resolution and though the warrants issued against the Judges have been withdrawn, it is clear that the decision of the House and the

warrants which were initially ordered to be issued in pursuance of the said resolution, were in the nature of general resolution and general warrants,

and so, it would not be open to this Court to enquire the reasons for which the said warrants were issued. The resolution in question and the

warrants issued pursuant to it are conclusive and must be treated as such. The argument, therefore, is that in answering the question formulated

under the present Reference, we should give effect to this position which appears to have been evolved by some sort of implied agreement

between the Judicature and the House of Commons. This agreement shows that the right to determine questions of contempt and to decide

adequacy of punishment for the said contempt belong exclusively to the House, and if in pursuance of the said exclusive power, a general warrant

is issued, the House can never be called upon to explain the genesis or the reasons for the said warrant. This itself is an integral part of the

privileges and powers of the House, and this integral part, according to the House, has been brought into India as a result of Art. 194(3) of the

Constitution. In other words, the argument is that even if this Court has jurisdiction to determine the scope and effect of Art. 194(3), it should bear

in mind the fact that this particular power to issue an unspeaking general warrant and to insist upon the Judicature treating the said warrant as

conclusive, is a part of the privileges to which the latter part of Art. 194(3) refers. It is on this broad ground that Mr. Seervai wanted us to frame

our answers to the questions which are subject-matter of the Reference.

26. On the other hand, Mr. Setalvad, for the Judges, contends that there is no scope for importing into our Constitution the dualism which existed

in England between the Judicature and the House of Commons. He contends that there can be no doubt that the question of construing Art. 194(3)

falls within the exclusive jurisdiction of this Court and the High Courts and that the construction which this Court would place upon the relevant

words used in the latter part of Art. 194(3) would finally determine the scope, extent and character of the privileges in question. According to Mr.

Setalvad, Art. 194(3) cannot be read in isolation, but must be read in its context and in the light of other important constitutional provisions, such as

Arts. 32, 211 and 226. When the material portion of Art. 194(3) is thus read, it would appear that there is no scope for introducing any antinomy

or conflict or dualism between the powers of the High Court and those of the House in relation to matters which have given rise to the present

questions. He further urges that it would be idle for the House to adopt an attitude which the House of Commons in England appears to have

adopted in the 17th, 18th and 19th centuries when conflicts arose between the said House and the Judicature. For more than a century no attempt

has been made by the House of Commons, says Mr. Setalvad, to contend that if a citizen who is punished by the House for its alleged contempt

committed by him would be guilty of another contempt if he moved the Court in its habeas corpus jurisdiction, nor has any attempt been made

during this period by the House of Commons to proceed against a lawyer who presents an application for habeas corpus or against Judges who

entertain such applications; and so, the argument is that we ought to deal with the present dispute on the basis of the common agreement which

has, by convention, been evolved between the two august and powerful institutions, the Judicature and the Legislature.

27. Mr. Setalvad conceded that there appears to be some convention recognised by the English courts by which they treat a general or unspeaking

warrant issued by the House as usually conclusive; but this aspect of the matter, according to him, is the result of convention or comity and cannot

be treated as an integral part of the privilege of the House itself. The basis for evolving this convention is rooted in the history of England, because

the Parliament was the highest Court of Justice at one time and it is because of this history that the House of Commons came also to be regarded

as a superior Court of Record. Such an assumption cannot be made in respect of the House in the present proceedings. Besides, in dealing with

the question about the effect of a general warrant, the Court cannot ignore the significance of Arts. 32, 211 and 226 of the Constitution. Basing

himself broadly on these arguments, Mr. Setalvad contends that the Constitution has resolved the problem of dualism in our country by conferring

on the High Courts and this Court the jurisdiction to deal with claims made by the citizens whose fundamental rights have been invaded, and that

means that in this country, if an application for habeas corpus is made, it would be competent to this Court or the High Courts to examine the

validity of the order passed by any authority including the legislature, and that must necessarily involve the consequence that an unspeaking warrant

cannot claim the privilege of conclusiveness. That, in brief, in its broad features, is the approach adopted by Mr. Setalvad before us.

28. It will thus be seen that the main controversy disclosed by the five questions formulated by the President ultimately lies within a very narrow

compass. Is the House the sole and exclusive judge of the issue as to whether its contempt has been committed where the alleged contempt has

taken place outside the four walls of the House ? Is the House the sole and exclusive judge of the punishment which should be imposed on the

party whom it has found to be guilty of its contempt ? And, if in enforcement of its decision the House issues a general or unspeaking warrant, is

the High Court entitled to entertain a habeas corpus petition challenging the validity of the detention of the person sentenced by the House ? The

argument urged by Mr. Seervai on behalf of the House is that in the case of a general warrant, the High Court has no jurisdiction to go behind the

warrant; and in the present case, since it has entertained the petition and passed an order case, since it has entertained the petition and passed an

order releasing Keshav Singh on bail without examining the warrant, and even before a return was filed by the respondents, it has acted illegally

and without jurisdiction, and so the learned Judges of the High Court, the Counsel, and the party are all guilty of contempt of the House. Mr.

Seervai urges that in any case, in habeas corpus proceedings of this character, the High Court had no jurisdiction to grant interim bail.

29. It is not seriously disputed by Mr. Setalvad that the House has the power to inquire whether its contempt has been committed by anyone even

outside its four-walls and has the power to impose punishment for such contempt; but his argument is that having regard to the material provisions

of our Constitution, it would not be open to the House to make a claim that its general warrant should be treated as conclusive. In every case

where a party has been sentenced by the House for contempt and detained, it would be open to him to move the High Court for appropriate relief

under Art. 226 and the High Court would be entitled to examine the merits of his pleas, even though the warrant may be general or unspeaking.

According to Mr. Setalvad, since the High Court has jurisdiction to entertain a Writ Petition for habeas corpus under Art. 226, it has also the

power to pass an order of interim bail. Thus, the dispute really centers round the jurisdiction of the High Court to entertain a habeas corpus petition

even in cases where a general or speaking warrant has been issued by the House directing the detention of the party in contempt.

30. Though the ultimate solution of the problem posed by the questions before us would thus lie within a very narrow compass, it is necessary to

deal with some wider aspects of the problem which incidentally arise and the decision of which will assist us in rendering our answers to the

questions framed in the present Reference. The whole of the problem thus presented before us has to be decided in the light of the provisions

contained in Art. 194(3) of the Constitution, and in that sense, the interpretation of Art. 194(3) is really the crux of the matter. At this stage, it is

necessary to read Article 194 :

194. (1) Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of the Legislature, there shall

be freedom of speech in the Legislature of every State.

(2) No member of the Legislature of a State shall be liable to any proceedings in any court in respect of anything said or any vote given by him in

the Legislature or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of a House of such

a Legislature of any report, paper, votes, or proceedings.

(3) In other respects, the powers, privileges and immunities of a House of the Legislature of a State, and of the members and the committees of a

House of such Legislature shall be such as may from time to time be defined by the Legislature by law, and, until so defined, shall be those of the

House of Commons of Parliament of the United Kingdom, and of its members and committees, at the commencement of this Constitution.

(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 the Legislature of a State or any committee thereof as they apply in relation to members of

that Legislature.

31. It will be noticed that the first three material clauses of Art. 194 deal with three different topics. Clause (1) makes it clear that the freedom of

speech in the Legislature of every State which it prescribes, is subject to the provisions of the Constitution, and to the rules and standing orders,

regulating the procedure of the Legislature. While interpreting this clause, it is necessary to emphasise that the provisions of the Constitution subject

to which freedom of speech has been conferred on the legislators, are not the general provisions of the Constitution but only such of them as relate

to the regulation of the procedure of the Legislature. The rules and standing orders may regulate the procedure of the Legislature and some of the

provisions of the Constitution may also purport to regulate it; these are, for instance, Articles 208 and 211. The adjectival clause ""regulating the

procedure of the Legislature"" governs both the preceding clauses relating to ""the provisions of the Constitution"" and ""the rules and standing orders.

therefore, clause (1) confers on the legislators specifically the right of freedom of speech subject to the limitation prescribed by its first part. It

would thus appear that by making this clause subject only to the specified provisions of the Constitution, the Constitution-makers wanted to make it

clear that they thought it necessary to confer on the legislators freedom of speech separately and, in a sense, independently of Art. 19(1)(a). If all

that the legislators were entitled to claim was the freedom of speech and expression enshrined in Art. 19(1)(a), it would have been unnecessary to

confer the same right specifically in the manner adopted by Art. 194(1); and so, it would be legitimate to conclude that Art. 19(1)(a) is not one of

the provisions of the Constitution which controls the first part of clause (1) of Art. 194.

32. Having conferred freedom of speech on the legislators, clause (2) emphasises the fact that the said freedom is intended to be absolute and

unfettered. Similar freedom is guaranteed to the legislators in respect of the votes they may give in the Legislature or any committee thereof. In

other words, even if a legislator exercise his right of freedom of speech in violation, say, of Art. 211, he would not be liable for any action in any

court. Similarly, if the legislator by his speech or vote, is alleged to have violated any of the fundamental rights guaranteed by Part III of the

Constitution in the Legislative Assembly, he would not be answerable for the said contravention in any court. If the impugned speech amounts to

libel or becomes actionable or indictable under any other provision of the law, immunity has been conferred on him from any action in any court by

this clause. He may be answerable to the House for such a speech and the Speaker may take appropriate action against him in respect of it; but

that is another matter. It is plain that the Constitution-makers attached so much importance to the necessity of absolute freedom in debates within

the legislative chambers that they thought it necessary to confer complete immunity on the legislators from any action in any court in respect of their

speeches in the legislative chambers in the wide terms prescribed by clause (2). Thus, clause (1) confers freedom of speech on the legislators

within the legislative chamber and clause (2) makes it plain that the freedom is literally absolute and unfettered.

33. That takes us to clause (3). The first part of this clause empowers the Legislatures of States to make laws prescribing their powers, privileges

and immunities; the latter part provides that until such laws are made, the Legislatures in question shall enjoy the same powers, privileges and

immunities which the House of Commons enjoyed at the commencement of the Constitution. The Constitution-makers must have thought that the

Legislatures would take some time to make laws in respect of their powers, privileges and immunities. During the interval, it was clearly necessary

to confer on them the necessary powers, privileges and immunities. There can be little doubt that the powers, privileges and immunities which are

contemplated by clause (3), are incidental powers, privileges and immunities which every Legislature must possess in order that it may be able to

function effectively, and that explains the purpose of the latter part of clause (3).

34. This clause requires that the powers, privileges and immunities which are claimed by the House must be shown to have subsisted at the

commencement of the Constitution, i.e., on January 26, 1950. It is well-known that out of a large number of privileges and powers which the

House of Commons claimed during the days of its bitter struggle for recognition, some were given up in course of time, and some virtually faded

out by desuetude; and so, in every case where a power is claimed, it is necessary to enquire whether it was an existing power at the relevant time.

It must also appear that the said power was not only claimed by the House of Commons, but was recognised by the English Courts. It would

obviously be idle to contend that if a particular power which is claimed by the House was claimed by the House of Commons but was not

recognised by the English courts, it would still be upheld under the latter part of clause (3) only on the ground that it was in fact claimed by the

House of Commons. In other words, the inquiry which is prescribed by this clause is : is the power in question shown or proved to have subsisted

in the House of Commons at the relevant time ?

35. Clause (4) extends the provision prescribed by the three preceding clauses to certain persons therein described.

36. It will thus be seen that all the four clauses of Art. 194 are not in terms made subject to the provisions contained in Part III. In fact, clause (2)

is couched in such wide terms that in exercising the rights conferred on them by clause (1), if the legislators by their speeches contravene any of the

fundamental rights guaranteed by Part III, they would not be liable for any action in any court. Nevertheless, if for other valid considerations, it

appears that the contents of clause (3) may not exclude the applicability of certain relevant provisions of the Constitution, it would not be

reasonable to suggest that those provisions must be ignored just because the said clause does not open with the words ""subject to the other

provisions of the Constitution."" In dealing with the effect of the provisions contained in clause (3) of Art. 194, wherever it appears that there is a

conflict between the said provisions and the provisions pertaining to fundamental rights, an attempt will have to be made to resolve the said conflict

by the adoption of the rule of harmonious construction. What would be the result of the adoption of such a rule we need not stop to consider at this

stage. We will refer to it later when we deal with the decision of this Court in Pandit M. S. M. Sharma v. Shri Sri Krishna Sinha & Others [1959]

Supp. 1 S.C.R. 806.

37. The implications of the first part of clause (3) may, however, be examined at this state. The question is, if the Legislature of a State makes a

law which prescribed its powers, privileges and immunities, would this law be subject to Art. 13 or not ? It may be recalled that Art. 13 provides

that laws inconsistent with or in derogation of the fundamental rights would be void. Clause (1) of Art. 13 refers in that connection to the laws in

force in the territory of India immediately before the commencement of the Constitution, and clause (2) refers to laws that the State shall make in

future. Prima facie, if the legislature of a State were to make a law in pursuance of the authority conferred on it by clause (2) of Art. 13 would

render it void if it contravenes or abridges the fundamental rights guaranteed by Part III. As we will presently point out, that is the effect of the

decision of this Court in Pandit Sharma"s [1959] Supp. 1 S.C.R. 806 case. In other words, it must not be taken as settled that if a law is made

under the purported exercise of the power conferred by the first part of clause (3), it will have to satisfy the test prescribed by the fundamental

rights guaranteed by the Constitution. If that be so, it becomes at once material to enquire whether the Constitution-makers had really intended that

the limitations prescribed by the fundamental rights subject to which alone a law can be made by the Legislature of a State prescribing its powers,

privileges and immunities, should be treated as irrelevant in construing the latter part of the said clause. The same point may conveniently be put in

another form. If it appears that any of the powers, privileges and immunities claimed by the House are inconsistent with the fundamental rights

guaranteed by the Constitution, how is the conflict going to be resolved. Was it the intention of the Constitution to place the powers, privileges and

immunities specified in the latter part of clause (3) on a much higher pedestal than the law which the Legislature of State may make in that behalf on

a future date ? As a matter of construction of clause (3), the fact that the first part of the said clause refers to future laws which would be subject to

fundamental rights, may assume significance in interpreting the latter part of clause (3). That, in brief, is the position of the first three material

provisions of Art. 194.

38. The next question which faces us arises from the preliminary contention raised by Mr. Seervai that by his appearance before us on behalf of the

House, the House should not be taken to have conceded to the Court the jurisdiction to construe Art. 194(3) so as to bind it. As we have already

indicated, his stand is that in the matter of privileges, the House is the sole and exclusive judge at all stages. It may be that technically, the advisory

opinion rendered by this Court on the Reference made to it by the President may not amount to judicial adjudication properly so-called and since

there are no parties as such before the Court in the Reference, nobody would be bound by our answers. But apart from this technical aspect of the

matter, it is necessary that we should determine the basic question as to whether even in the matter of privileges, the Constitution confers on the

House sole and exclusive jurisdiction as claimed by Mr. Seervai. It is common ground that the powers have to be found in Art. 194(3). That

provision is the sole foundation of the powers, and no power which is not included in it can be claimed by the House; and so, at the very threshold

of our discussion, we must decide this question.

39. In dealing with this question, 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 recognised 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 (Dicey, The Law of the

Constitution 10th ed. pp. xxxiv, xxxv). 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 an independent of each others."" The supremacy of the constitution is

fundamental to the existence of a federal State in order to prevent either the legislature of the federal unit or those of the member States from

destroying or impairing that delicate balance of power which satisfies 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 (Ibid p. lxxvii). Thus the dominant characteristic of the British Constitution cannot be claimed by a federal constitution like ours.

40. Our Legislatures have undoubtedly plenary powers, but these powers are controlled by the basic concepts of the written Constitution itself and

can be exercised within the legislative fields allotted to their jurisdiction by the three Lists under the Seventh Schedule; but beyond the Lists, the

Legislatures cannot travel. They can no doubt exercise their plenary legislative authority and discharge their legislative functions by virtue of the

power conferred on them by the relevant provisions of the Constitution; but the basis of the power is the constitution itself. Besides, the legislative

supremacy of our Legislatures including the Parliament is normally controlled by the provisions contained in Part III of the Constitution. If the

Legislatures step beyond the legislative fields assigned to them, or acting within their respective fields, they trespass on the fundamental rights of the

citizens in a manner not justified by the relevant article dealing with the said fundamental rights, their legislative actions are liable to be struck down

by courts in India. therefore, it is necessary to remember that though our Legislatures have plenary powers, they function within the limits

prescribed by the material and relevant provisions of the Constitution.

41. In a democratic country governed by a written Constitution, is the Constitution which is supreme and supreme and sovereign. It is no doubt

true that the Constitution itself can be amended by the Parliament, but that is possible because Art. 368 of the Constitution itself makes a provision

in that behalf, and the amendment of the Constitution can be validity made only by following the procedure prescribed by the said article. That

shows that even when the Parliament purports to amend the Constitution, it has to comply with the relevant mandate of the Constitution itself.

Legislators, Ministers, and Judges all take oath of allegiance to the Constitution, for it is by the relevant provisions of the Constitution that they

derive their authority and jurisdiction and it is to the provisions of the Constitution that they owe allegiance. therefore, there can be no doubt that

the sovereignty which can be claimed by the Parliament in England, cannot be claimed by any Legislature in India in the literal absolute sense.

42. There is another aspect of this matter which must also be mentioned; whether or not there is distinct and rigid separation of powers under the

Indian Constitution, there is no doubt that the Constitution has entrusted to the Judicature in this country the task of construing the provisions of the

Constitution and of safeguarding the fundamental rights of the citizens. When a statute is challenged on the ground that it has been passed by

Legislature without authority, or has otherwise unconstitutionally trespassed on fundamental rights, it is for the courts to determine the dispute and

decide whether the law passed by the legislature is valid or not. Just as the legislatures are conferred legislative functions, and the functions and

authority of the executive lie within the domain of executive authority, so the jurisdiction and authority of the Judicature in this country lie within the

domain of adjudication. If the validity of any law is challenged before the courts, it is never suggested that the material question as to whether

legislative authority has been exceeded or fundamental rights have been contravened, can be decided by the legislatures themselves. Adjudication

of such a dispute is entrusted solely and exclusively to the Judicature of this country; and so, we feel no difficulty in holding that the decision about

the construction of Art. 194(3) must ultimately rest exclusively with the Judicature of this country. That is why we must over-rule Mr. Seervai's

argument that the question of determining the nature, scope and effect of the powers of the House cannot be said to lie exclusively within the

jurisdiction of this Court. This conclusion, however, would not impair the validity of Mr. Seervai's contention that the advisory opinion rendered by

us in the present Reference proceedings is not adjudication properly so-called and would bind no parties as such.

43. In coming to the conclusion that the content of Art. 194(3) must ultimately be determined by courts and not by the legislatures, we are not

unmindful of the grandeur and majesty of the task which has been assigned to the Legislatures under the Constitution. Speaking broadly, all the

legislative chambers in our country today are playing a significant role in the pursuit of the ideal of Welfare State which has been placed by the

Constitution before our country, and that naturally gives the legislative chambers a high place in the making of history today. The High Courts also

have to play an equally significant role in the development of the rule of law and there can be little doubt that the successful working of the rule of

law is the basic foundation of the democratic way of life. In this connection it is necessary to remember that the status, dignity and importance of

these two respective institutions, the Legislatures and the Judicature, are derived primarily from the status, dignity and importance of the respective

causes that are assigned to their charge by the Constitution. These two august bodies as well as the Executive which is another importance

constituent of a democratic State, must function not in antinomy not in a spirit of hostility, but rationally, harmoniously and in a spirit of

understanding within their respective spheres, for such harmonious working of the three constituents of the democratic State alone will help the

peaceful development, growth and stabilisation of the democratic way of life in this country.

44. But when, as in the present case, a controversy arises between the House and the High Court, we must deal with the problem objectively and

impersonally. There is no occasion to import heat into the debate or discussion and no justification for the use of strong language. The problem

presented to us by the present reference and though its consideration may present some difficult aspects, we must attempt to find the answers as

best we can. In dealing with a dispute like the present which concerns the jurisdiction, the dignity and the independence of two august bodies in a

State, we must remember that the objectivity of our approach itself may incidentally be on trial. It is, therefore, in a spirit of detached objective

enquiry which is the distinguishing feature of judicial process that we propose to find solutions to the questions framed for our advisory opinion. If

ultimately we come to the conclusion that the view pressed before us by Mr. Setalvad for High Court is erroneous, we would not hesitate to

pronounce our verdict against that view. On the other hand, if we ultimately come to the conclusion that the claim made by Mr. Seervai for the

House cannot be sustained, we would not falter to pronounce our verdict accordingly. In dealing with problems of this importance and significance,

it is essential that we should proceed to discharge our duty without fear or favour, affection or ill-will and with the full consciousness that it is our

solemn obligation to uphold the Constitution and the laws.

45. It would be recalled that Art. 194(3) consists of two parts. The first part empowers the Legislature to define by law from time to time its

powers, privileges and immunities, whereas the second part provides that until the legislature chooses so to define its powers, privileges and

immunities, its powers, privileges and immunities would be those of the House of Commons of the Parliament of the United Kingdom and of its

members and committees, as the commencement of the Constitution. Mr. Seervai's argument is that the latter part of Art. 194(3) expressly

provides that all the powers which vested in the House of Commons at the relevant time, vest in the House. This broad claim, however, cannot be

accepted in its entirety, because there are some powers which cannot obviously be claimed by the House. Take the privilege of freedom of access

which is exercised by the House of Commons as a body and through its Speaker ""to have at all time the right to petition, counsel, or remonstrate

with their Sovereign through their chosen representative and have a favourable construction placed on his words was justly regarded by the

Commons as fundamental privilege (Sir T. Erskine May""s Parliamentary Practice (16th ed.) p. 86"" It is hardly necessary to point out that the

House cannot claim this privilege. Similarly, the privilege to pass acts of attainder and the privilege of impeachment cannot be claimed by the

House. The House of Commons also claims the privilege in regard to its own Constitution. This privilege is expressed in three ways, first by the

order of new writs to fill vacancies that arise in the Commons in the course of a parliament; secondly, by the trial of controverted elections; and

thirdly, by determining the qualification of its members in cases of doubt (Ibid, p. 175). This privilege again, admittedly, cannot be claimed by the

House. therefore, it would not be correct to say that all powers and privileges which were possessed by the House of Commons at the relevant

time can be claimed by the House.

46. In construing the relevant provision of Art. 194(3), we must deal with the question in the light of the previous decision of this Court in Pandit

Sharma's [1959] Supp. 1 S.C.R. 806 case. It is, therefore, necessary to recall what according to the majority decision in the case, is the position

of the provision contained in Art. 194(3). In that case, the Editor of the English daily newspaper, Search Light of Patna, had been called upon by

the Secretary of the Patna Legislative Assembly to show cause before the Committee of Privileges why appropriate action should not be taken

against him for the breach of privileges of the Speaker and the Assembly in that he had published in its entirety the speech delivered in the

Assembly by a Member, portions of which had been directed to be expunged by the Speaker. The Editor who moved this Court under Art. 32,

contended that the said notice and the action proposed to be taken by the Committee contravened his fundamental right of freedom of speech and

expression under Art. 19(1)(a), and also trespassed upon the protection of his personal liberty guaranteed under Art. 21. It is on these two

grounds that the validity of the notice was impeached by him. This claim was resisted by the House by relying on Art. 194(3). Two questions

arose, one was whether the privilege claimed by the House was subsisting privilege in England at the relevant time; and the other was, what was

the result of the impact of Articles 19(1)(a) and 21 on the provisions contained in the latter part of Article 194(3) ? The majority decision was that

the privilege in question was subsisting at the relevant time and must, therefore, be deemed to be included under the latter part of Art. 194(3). It

also held that Art. 19(1)(a) did not apply, because under the rule of harmonious construction, in a case like the present where Art. 19(1)(a) was in

direct conflict with Art. 194(3), the particular provision in the latter article would prevail over the general provision contained in the former; it

further held that though Art. 21 applied, it had not been contravened.

47. The minority view, on the other hand, was that the privilege in question had not been established in fact, and that alternatively, if it be assumed

that such privilege was established and was, therefore, included under the latter part of Art. 194(3), it must be controlled by Art. 19(1)(a), it must

be controlled by Part III of the Constitution were of paramount importance and must prevail over a provision like that contained in Art. 194(3)

which may be inconsistent with them.

48. At this stage, it would be useful to indicate broadly the points decided both by the majority and minority decisions in that case. Before the

Court, it was urged by the petitioner that though Art. 194(3) had not been made subject to the provisions of the Constitution, it does not

necessarily mean that it is not so subject, and that the several clauses of Art. 194 should not be treated as distinct and separate provisions but

should be taken as subject to the provisions of the Constitution which, of course, would include Art. 19(1)(a). This argument was rejected both by

the majority and the minority views.

49. The next argument urged in that case was that Art. 194(1) in reality operates as an abridgment of the fundamental right of freedom of speech

conferred by Art. 19(1)(a) when exercised in the State Legislatures, but Art. 194(3) does not, in terms, purport to be an exception to Art. 19(1)

(a). This argument was also rejected by both the majority decision that clause (1) of Art. 194 no doubt makes a substantive provision of the said

clause subject to the provisions of the Constitution; but in the context, those provisions cannot take in Art. 19(1)(a), because this latter article does

not purport to regular the procedure of the legislature and it is only such provisions of the Constitution which regulate the procedure of the

legislature which are included in the first part of Art. 194(1).

50. The third argument urged by the petitioner was that Art. 19 enunciates a transcendental principle and should prevail over the provisions of Art.

194(3), particularly because these latter provisions were of a transitory character. This contention was rejected by the majority view, but was

upheld by the minority view.

51. The fourth argument urged was that if a law is made by the legislature prescribing its powers, privileges and immunities, it would be subject to

Art. 13 of the Constitution and would become void to the extent it contravenes the fundamental rights enshrined in Part III. This contention was

accepted by both the majority and the minority decisions.

52. That left one more point to be considered and it had reference to the observations made in an earlier decision of this Court in 273039 . The

majority decision has commented on this earlier decision and had observed that the said decision was based entirely on a concession and cannot,

therefore, be deemed to be a considered decision of this Court. As we will presently point out, the said decision dealt with the applicability of Art.

22(2) to a case falling under the latter part of Art. 194(3). The minority opinion, however, treated that said decision as a considered decision which

was binding on the Court.

53. We ought to add that the majority decision, in terms, held that Art. 21 applied, but, on the merits, it came to the conclusion that its alleged

contravention had not been proved. On the minority view it was unnecessary to consider whether Art. 21 as such applied, because the said view

treated all the fundamental rights guaranteed by Part III as paramount and, therefore, each one of them would control the provisions of Art.

194(3).

54. It would thus be seen that in the case of Pandit Sharma [1959] Supp. 1 S.C.R. 806, contentions urged by the petitioner did not raise a general

issue as to the relevance and applicability of all the fundamental rights guaranteed by Part III at all. The contravention of only two articles was

pleaded and they were Articles 19(1)(a) and 21. Strictly speaking, it was, therefore, unnecessary to consider the larger issue as to whether the

latter part of Art. 194(3) was subject to the fundamental rights in general, and indeed, even on the majority view it could not be said that the said

view excluded the application of all fundamental rights, for the obvious and simple reason that Art. 21 was held to be applicable and the merits of

the petitioner's arguments about its alleged contravention in his case were examined and rejected. therefore, we do not think it would be right to

read the majority decision as laying down a general proposition that whenever there is a conflict between the provisions of the latter part of Article

194(3) and any of the provisions of the fundamental rights guaranteed by Part III, the latter must always yield to the former. The majority decision,

therefore, must be taken to have settled that Art. 19(1)(a) would not apply, and Art. 21 would.

55. Having reached this conclusion, the majority decision has incidentally commenced on the decision in 273039 case. Apart from the fact that

there was no controversy about the applicability of Art. 22 in that case, we ought to point out, with respect, that the comment made by the

majority judgment on the earlier decision is partly not accurate. In that case, a Constitution Bench of this Court was concerned with the detention

of Mr. Mistry's under an order passed by the Speaker of the Uttar Pradesh Legislative Assembly for breach of privilege of the said Assembly.

The validity of Mr. Mistry's detention was challenged on the ground that it had contravened Art. 22(2) of the Constitution. The facts alleged in

support of this plea were admitted to be correct by the Attorney-General, and on those admitted facts, the Court held that Mr. Mistry's detention

was clearly invalid. Referring to this decision, the majority judgment has observed that it ""proceeded entirely on a concession of counsel and cannot

be regarded as a considered opinion on the subject."" There is no doubt that the first part of this comment is not accurate. A concession was made

by the Attorney-General not on a point of law which was decided by the Court, but on a point of fact; and so, this part of the comment cannot

strictly be said to be justified. It is, however, true that there is no discussion about the merits of the contention raised on behalf of Mr. Mistry and to

that extent, it may have been permissible to the majority judgment to say that it was not a considered opinion of the Court. But, as we have already

pointed out, it was hardly necessary for the majority decision to deal with the point pertaining to the applicability of Art. 22(2), because that point

did not arise in the proceedings before the Court in Pandit Sharma's [1959] Supp. 1 S.C.R. 806 case. That is why we wish to make it clear that

the obiter observations made in the majority judgment about the validity or correctness of the earlier decision of this Court in 273039 case should

not be taken as having decided the point in question. In other words, the question as to whether Art. 22(2) would apply to such a case may have

to be considered by this Court if and when it becomes necessary to do so.

56. Before we part with the decision of this Court in Pandit Sharma's [1959] Supp. 1 S.C.R. 806 case, it is necessary to refer to another point.

We have already observed that the majority decision has accepted the contention raised by the Legislature of a State prescribing its powers,

privileges and immunities as authorised by the first part of Art. 194(3), it would be subject to Art. 13. Mr. Seervai has attempted to challenge the

correctness of this conclusion. He contends that the power conferred on the legislatures by the first part of Art. 194(3) is a constitutional power,

and so, if a law is passed in exercise of the said power, it will be outside the scope of Art. 13. We are unable to accept this contention. It is true

that the power to make such a law has been conferred on the legislatures by the first part of Art. 194(3), but when the State Legislatures purport

to exercise this power, they will undoubtedly be acting under Art. 246 read with Entry 39 of List II. The enactment of such a law cannot be said to

be in exercise of a constituent power, and so, such a law will have to be treated as a law within the meaning of Art. 13. That is the view which the

majority decision expressed in the case of Pandit Sharma [1959] Supp. 1 S.C.R. 806, and we are in respectful agreement with that view. Mr.

Seervai attempted to support his contention by referring to some observations made by Venkatarama Aiyar J. in *Ananthakrishnan v. State of*

Madras ILR Mad. 933, 951. In that case, the learned Judge has observed that "[Art. 13] applies in terms only to laws in force before the

commencement of the Constitution and to laws to be enacted by the States, that is, in future. It is only those two classes of laws that are declared

void as against the provisions of Part III. It does not apply to the Constitution itself. It does not enact that the other portions of the Constitution

should be void as against the provisions the Part III and it would be surprising if it did, seeing that all of them are parts of one organic whole." This

principle is obviously unexceptionable. This principle could have been invoked if it had been urged before us that either the first or the second part

of Art. 194(3) itself is invalid because it is inconsistent with the relevant provisions in Part III which provides for fundamental rights. That, however,

is not the argument of Mr. Setalvad, nor was it the argument urged before this Court in the case of Pandit Sharma ILR [1952] Mad. 933. The

argument was and is that if in pursuance of the power conferred by the first part of Art. 194(3) a law is made by the legislature, it is a law within

the meaning of Art. 13, and this argument proceeds on the words of Art. 13(2), itself. Art. 13(2) provides that the State shall not make any law

which takes away or abridges the rights conferred by Part III and any law made in contravention of this clause shall, to the extent of the

contravention, be void. The law with which we are dealing does not purport to amend the Constitution and would not, therefore form part of the

Constitution when it is passed; like other laws passed by the Legislatures in exercise of the legislative powers conferred on them, this law would

also be law within the meaning of Art. 13, and so, it is unreasonable to contend that the view taken by this Court in the case of Pandit Sharma that

such a law would be subject to the fundamental rights and would fall within the mischief of Art. 13(2), requires reconsideration. The position,

therefore, is that in dealing with the present dispute we ought to proceed on the basis that the latter part of Art. 19(3) is not subject to Art. 19(1)

(a), but is subject to Art. 21.

57. The next question which we ought to consider is : was it the intention of the Constitution to perpetuate the dualism which rudely disturbed

public life in England in the 17th, 18th and 19th centuries ? the Constitution-makers were aware of several unhappy situations which arose as a

result of the conflict between the Judicature and the Houses of Parliament and they knew that these situations threatened to create a deadlock in

the public life of England. When they enacted Art. 19(3), was it their intention to leave this conflict at large, or have they adopted a scheme of

constitutional provisions to resolve that conflict ? The answer to this question would obviously depend upon a harmonious construction of the

relevant provisions of the Constitution itself.

58. Let us first take Art. 226. This Article confers very wide powers on every High Court throughout the territories in relation to which it exercise

jurisdiction, to issue to any person or authority, including in appropriate cases any Government, within those territories directions, orders or writs,

including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto, certiorari, or any of them for the enforcement of any of the

right conferred by Part III and for any other purpose. It is hardly necessary to emphasise that the language used by Art. 226 in conferring power

on the High Courts is very wide. Art. 12 defines the "State" as including the Legislature of such State, and so, prima facie, the power conferred on

the High Court under Art. 226(1) can, in a proper case, be exercised even against the Legislature. If an application is made to the High Court for

the issue of a writ of habeas corpus, it would not be competent to the House to raise a preliminary objection that the High Court has no jurisdiction

to entertain the application because the detention is by an order of the House. Art. 226(1) read by itself, does not seem to permit such a plea to be

raised, Art. 32 which deals with the power of this Court, puts the matter on a still higher pedestal; the right to move this Court by appropriate

proceedings for the enforcement of the fundamental rights is itself a guaranteed fundamental right, and so, what we have said about Art. 226(1) is

still more true about Art. 32(1).

59. Whilst we are considering this aspect of the matter, it is relevant to emphasise that the conflict which has arisen between the High Court and the

House is, strictly speaking, not a conflict between the High Court as and the House as such, but between the House and a citizen of this country.

Keshav Singh claims certain fundamental rights which are guaranteed by the Constitution and he seeks to move the High Court under Art. 226 on

the ground that his fundamental rights have been contravened illegally. The High Court purporting to exercise its power under Art. 226(1), seeks to

examine the merits of the claims made by Keshav Singh and issues an interim order. It is this interim order which has led to the present unfortunate

controversy. No doubt, by virtue of the resolution passed by the House requiring the Judges to appear before the Bar of the House to explain their

conduct, the controversy has developed into one between the High Court and the House; but it is because the High Court in the discharge of its

duties as such Court intervened to enquire into the allegations made by a citizen that the Judges have been compelled to enter the arena. Basically

and fundamentally, the controversy is between a citizen of Uttar Pradesh and the Uttar Pradesh Legislative Assembly. That is why in dealing with

the question about the extent of the powers of the House in dealing with cases of contempt committed outside its four-walls, the provisions of Art.

226 and Art. 32 assume significance. We have already pointed out that in Pandit Sharma ([1959] Supp. 1 S.C.R. 806 this Court has held that Art.

21 applies where powers are exercised by the legislature under the latter part of Art. 194(3). If a citizen move the High Court on the ground that

his fundamental right under Art. 21 has been contravened, the High Court would be entitled to examine his claim, and that itself would introduce

some limitation on the extent of the powers claimed by the House in the present proceedings.

60. There are two other articles to which reference must be made. Art. 208(1) provides that a House of the Legislature of a State may make rules

for regulating, subject to the provisions of this Constitution, its procedure and the conduct of its business. This provision makes it perfectly clear

that if the House were to make any rules as prescribed by it, those rules would be subject to the fundamental rights guaranteed by Part III. In other

words, where the House makes rules for exercising its powers under the latter part of Art. 194(3), those rules must be subject to the fundamental

rights of the citizens.

61. Similarly, Art. 212(1) makes a provision which is relevant. It lays down that the validity of any proceedings in the Legislature of a State shall

not be called in question on the ground of any alleged irregularity of procedure. Art. 212(2) confers immunity on the officers and members of the

Legislature in whom powers are vested by or under the Constitution for regulating procedure or the conduct of business, or for maintaining order,

in the Legislature from being subject to the jurisdiction of any court in respect of the exercise by him of those powers. Art. 212(1) seems to make it

possible for a citizen to call in question in the appropriate court of law the validity of any proceedings inside the legislative chamber if his case is that

the said proceedings suffer not from mere irregularity of procedure, but from an illegality. If the impugned procedure is illegal and unconstitutional, it

would be open to be scrutinised in a court of law, though such scrutiny is prohibited if the complaint against the procedure is no more than this that

the procedure was irregular. That again is another indication which may afford some assistance in construing the scope and extent of the powers

conferred on the House by Art. 194(3).

62. That takes us to Art. 211. This article provides that no discussion shall take place in the Legislature of a State with respect to the conduct of

any Judge of the Supreme Court or of a High Court in the discharge of his duties. This provision amounts to an absolute constitutional prohibition

against any discussion in the Legislature of a State in respect of the judicial conduct of a judge of this Court or of the High Court. Mr. Setalvad

who appeared for the Judges has, based his argument substantially on the provisions of this article. He contends that the unqualified and absolute

terms in which the constitutional prohibition is couched in Art. 211 unambiguously indicate that the conduct of a Judge in the discharge of his duties

can never become the subject-matter of any action taken by the House in exercise of its powers or privileges conferred by the latter part of Art.

194(3). If a Judge in the discharge of his duties commits contempt of the House, the only step that can be taken against him is prescribed by Art.

121 Art. 121 provides that no discussion shall take place in Parliament with respect to the conduct of any Judge of the Supreme Court or of a

High Court in the discharge of his duties except upon a motion for presenting an address to the President praying for the removal of the Judge as

hereinafter provided. Reading Articles 121 and 211 together, two points clearly emerge. The judicial conduct of the Judge. The Constitution-

makers attached so much importance to the independence of the Judicature in this country that they thought it necessary to place them beyond any

controversy, except in the manner provided by Art. 121. If the judicial conduct of a Judge cannot be discussed in the House, it is inconceivable

that the same conduct can be legitimately made the subject-matter of action by the House in exercise of its powers under Art. 194(3). That, in

substance, is the principal argument which has been urged before us by Mr. Setalvad.

63. On the other hand, Mr. Seervai has argued that the effect of the provisions contained in Art. 211 should not be exaggerated. He points out that

Art. 211 appears in Chapter III which deals with the State Legislature and occurs under the topic ""General Procedure"", and so, the only object

which it is intended to serve is the regulation of the procedure inside the chamber of the Legislature. He has also relied on the provisions of Art.

194(2) which expressly prohibit any action against a member of the Legislature for anything said or any vote given by him in the Legislature. In

other words, if a member of the Legislature contravenes the absolute prohibition prescribed by Art. 211, no action can be taken against him a

court of law and that, says Mr. Seervai, shows that the significance of the prohibition prescribed by Art. 211 should not be overrated. Besides, as

a matter of construction, Mr. Seervai suggests that the failure to comply with the prohibition contained in Art. 211 cannot lead to any constitutional

consequence, and in support of this argument, he has relied on a decision of this Court in 284864 . In that case, this Court was dealing with the

effect of the provisions contained in Art. 320 of the Constitution. Art. 320 prescribes the functions of the Public Service Commissions, and by

clause 3(c) it has provided that the Union Public Service Commission or the state Public Service Commission, as the case may be, shall be

consulted on all disciplinary matters affecting a person serving under the Government of a State in a civil capacity, including memorials or petitions

relating to such matters. It was held that provisions of this clause were not mandatory and did not confer any right on a public servant, so that the

absence of consultation or any irregularity in consultation or any irregularity in consultation did not afford him a cause of action in a court of law.

Mr. Seervai's argument is that the words used in Art. 211 should be similarly construed and the prohibition on which Mr. Setalvad relies should be

deemed to be merely directory and not mandatory.

64. We are not impressed by Mr. Seervai's arguments. The fact that Art. 211 appears under a topic dealing with ""Procedure Generally"", cannot

mean that the prohibition prescribed by it is not mandatory. As we have already, in trying to appreciate the full significance of this prohibition, we

must read Articles 211 and 121 together. It is true that Art. 194(2) in terms provides for immunity of action in any court in respect of a speech

made by a member or a vote given by him in the Legislative Assembly. But this provision itself emphatically brings out the fact that the Constitution

was anxious to protect full freedom of speech and expression inside the legislative chamber, and so, it took the precaution of making a specific

provision to safeguard this freedom of speech and expression by saying that even the breach of the constitutional prohibition prescribed by Art.

211 should not give rise to any action. Undoubtedly, the Speaker would not permit a member to contravene Art. 211; but if, inadvertently or

otherwise a speech is made within the legislative chamber which contravenes Art. 211, the Constitution-makers have given protection to such

speech from action in any court. The House itself may and would, no doubt, take action against him.

65. It is also true that if a question arises as to whether a speech contravenes Art. 211 or not, it would be for the Speaker to give his ruling on the

point. In dealing with such a question, the Speaker may have to consider whether the observations which a member wants to make are in

relation to the conduct of a Judge in discharge of his duties, and in that sense, that is a matter for the Speaker to decide. But the significant fact still

remains that the Constitution-makers thought it necessary to make a specific provision by Art. 194(2) and that is the limit to which the Constitution

has gone in its objective of securing complete freedom of speech and expression within the four-walls of the legislative chamber.

66. The latter part of Art. 194(3) makes no such exception, and so, it would be logical to hold that whereas a speech made in contravention of

Art. 211 is protected from action in a court by Art. 194(2), no such exception or protections is provided in prescribing the powers and privileges

of the House under the latter part of Art. 194(3). If a Judge in the discharge of his duties passes an order or makes observations which in the

opinion of the House amount to contempt, and the House proceeds to take action against the Judge in that behalf, such action on the part of the

House cannot be protected or justified by any specific provision made by the latter part of Art. 194(3). In our opinion, the omission to make any

such provision when contrasted with the actual provision made by Art. 194(2) is not without significance. In other words, this contrast leads to the

inference that Constitution-makers took the view that the utmost that can be done to assure absolute freedom of speech and expression inside the

legislative chamber, would be to make a provision in Art. 194(2); and that is about all. The conduct of a Judge in relation to discharge of his duties

cannot be the subject-matter of action in exercise of the powers and privileges of the House. therefore, the position is that the conduct of a Judge

in relation to the discharge of his duties cannot legitimately be discussed inside the House, though if it is, no remedy lies in a court of law. But such

conduct cannot be made the subject-matter of any proceedings under the latter part of Art. 194(3). If this were not the true position, Art. 211

would amount to a meaningless declaration and that clearly could not have been the intention of the Constitution.

67. Then, as regards the construction of Art. 211 itself, Mr. Seervai is no doubt in a position to rely upon the decision of this Court in 284864 .

But it would be noticed that in coming to the conclusion that the provision contained in Art. 320(3)(c) was not mandatory, this Court has referred

to certain other facts which determined the said construction. Even so, this Court has accepted the principle laid down by the Privy Council in

Montreal Street Railway Company v. Normandin L.R. [1917] A.C. 170 wherein the Privy Council observed that "[t]he question whether

provisions in a statute are directory or imperative has very frequently arisen in this country, but it has been said that no general rule can be laid

down, and that in every case the object of the statute must be looked at." "The question as to whether a statute is mandatory or directory depends

upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern,

and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences

which would follow from construing it the one way or the other." (People v. De Renna (2 N.Y.S.) (2) 694, 166 Misc. (582) cited in Crawford,

Statutory Construction p. 516) These principles would clearly negative the construction for which Mr. Seervai contends. It is hardly necessary to

refer to other provisions of the Judicature in this country. The existence of a fearless and independent judiciary can be said to be the very basic

foundation of the constitutional structure in India, and so it would be idle, we think, to contend that the absolute prohibition prescribed by Art. 211

should be read as merely directory and should be allowed to be reduced to a meaningless declaration by permitting the House to take action

against a Judge in respect of his conduct in the discharge of his duties. therefore, we are satisfied that Mr. Setalvad is right when he contends that

whatever may be the extent of the powers and privileges conferred on the House by the latter part of Art. 194(3), the power to take action against

a Judge for contempt alleged to have been committed by him, by his act in the discharge of his duties cannot be included in them. Thus, Mr.

Setalvad's case is that so far as the Judges are concerned, the position is quite clear that as a result of the impact of the provisions contained in

Articles 226 and 211, judicial conduct can never become the subject-matter of contempt proceedings under the latter part of Art. 194(3), even if it

is assumed that such conduct can become the subject-matter of contempt proceedings under the powers and privileges possessed by the House of

Commons in England.

68. On the other hand, Mr. Seervai disputes Mr. Setalvad's contention as to the impact of Arts. 226 and 211 on the latter part of Art. 194(3) and

further urges that even if Mr. Setalvad be right in respect of that contention, he would not be entitled to dispute the validity of the power and

privilege claimed by the House of Commons-which can, therefore, be claimed by the House in the present proceedings-that no court can go

behind a general or unspeaking warrant. In order to determine the validity of these rival contentions, it is now necessary to consider very briefly

what was the position of this particular power and privilege at the commencement of the Constitution. In dealing with this question, we will also

very broadly refer to the wider aspect of the powers, privileges and immunities which vest in both the Houses of Parliament in England.

69. While considering the question of the powers, privileges and immunities of the English Parliament it would, we think, be quite safe to base

ourselves on the relevant statements which have been made in May's Parliamentary Practice. This work has assumed the status of a exposition of

parliamentary practice; and so, we think it would be an exercise in futility to attempt to deal with this question otherwise than by reference to May.

Parliamentary privilege, according to May, is the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High

Court of Parliament, and by members of each House individuals. Thus, privilege, though part of the law of the land, is to a certain extent an

exemption from the ordinary law. The particular privileges of the House of Commons have been defined as ""the sum of the fundamental rights of

the House and of its individual Members as against the prerogatives of the Crown; the authority of the ordinary courts of law and the special rights

of the House of Lords"". There is a distinction between privilege and function, though it is not always apparent. On the whole, however, it is more

convenient to reserve the term "privilege" to certain fundamental rights of each House which are generally accepted as necessary for the exercise of

its constitutional functions. The distinctive mark of a privilege is its ancillary character. The privileges of Parliament are rights which are "absolutely

necessary for the due execution of its powers". They are enjoyed by individual Members, because the House cannot perform its functions without

unimpeded use of the services of its Members; and by each House for the protection of its Members and the vindication of its own authority and

dignity (May's Parliamentary Practice pp. 42-43).

70. May points out that except in one respect, the surviving privileges of the House of Lords and the House of Commons are justifiable on the

same ground of necessity as the privileges enjoyed by legislative assemblies of the self-governing Dominions and certain British colonies, under the

common law as a legal incident of their legislative authority. This exception is the power to punish for contempt. Since the decision of the Privy

Council in *Kielley v. Carson* (4 Moore P. C. 63) it has been held that this power is inherent in the House of Lords and the House of Commons,

not as a body with legislative functions, but as a descendant of the High Court of Parliament and by virtue of the *lex et consuetudo parliamenti*

(May's Parliamentary Practice pp. 42-43) Historically as originally the weaker body, the Commons had a fiercer and more prolonged struggle for

the assertion of their own privileges, not only against the King began to be claimed by the Commons as customary rights, and some of these claims

in the course of repeated efforts to assert them hardened into legally recognised "privileges".

71. In regard to the fierce struggle by the House of Commons to assert its privileges in a militant way, May has made the significant comment that

these claims to privileges established in the late fifteenth and in the sixteenth centuries and were used by the House of Commons against the King in

the seventeenth and - arbitrarily - against the people in the eighteenth century. Not until the nineteenth century was equilibrium reached and the

limits of privilege prescribed and accepted by Parliament, the Crown and the Courts (May's Parliamentary Practice, p. 44). The two Houses are

thus of equal authority in the administration of a common body of privileges. Each House, as a constituent part of Parliament, exercised its own

privileges independently of the other. They are enjoyed however, not by any separate right peculiar to each, but solely by virtue of the law and

custom of Parliament. Generally speaking, all privileges properly so - called, appertain equally to both Houses. They are declared and expounded

by each House; and breaches of privilege are adjudged and censured by each; but essentially, it is still the law of Parliament that is thus

administered. It is significant that although either Houses may expound the law of Parliament, and vindicate its own privileges, it is agreed that no

new privilege can be created. This position emerged as a result of the historic resolution passed by the House of Lords in 1704. This resolution

declared ""that neither House of Parliament have power, by any vote or declaration, to create to themselves new privileges, not warranted by the

known laws and customs of Parliament."" This resolution was communicated by the House of Lords to Commons and asserted to by them (May""s

Parliamentary Practice, p.47). Thus, there can be no doubt that by its resolutions, the House of Commons cannot add to the list of its privileges

and powers.

72. It would be relevant at this stage to mention broadly the main privileges which are claimed by the House of Commons. Freedom of speech is a

privilege essential to every free council or legislature, and that is claimed by both the Houses as a basic privilege. This privilege was from 1541

included by established practice in the petition of the Commons to the King at the commencement of the Parliament. It is remarkable that

notwithstanding the repeated recognition of this privilege, the Crown and the Commons were not always agreed upon its limits. This privilege

received final statutory recognition after the Revolution of 1688. By the 9th Article of the Bill of Rights, it was declared ""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""(Ibid., p. 52).

73. Amongst the other privileges are : the right to exclude strangers, the right to control publication of debates and proceedings, the right to

exclusive cognizance of proceedings in Parliament, the right of each House to be the sole judge of the lawfulness of its own proceedings, and the

right implied to punish its own Members for their conduct in Parliament (Ibid., pp. 52-53).

74. Besides these privileges, both Houses of Parliament were possessed of the privilege of freedom from arrest or molestation, and from being

impleaded, which was claimed by the Commons on ground of prescription. Although this privilege was given royal and statutory recognition at an

early date, ironically enough the enforcement of the privilege was dependent on the Lords and King, who were not always willing to the case of

Thorpe who was the Speaker of the House of Commons and was imprisoned in 1452, under execution from the Court of Exchequer, at the suit of

the Duke of York. It is an eloquent testimony to the dominance of the House of Lords in response to the application of the Commons adjudged

that Thorpe should remain in prison, the Commons so easily acquiesced in this decision that they immediately proceeded to the election of another

Speaker (May""s Parliamentary Practice, p.70).

75. May points out that certain privileges have in course of time, been discontinued. Amongst them may be mentioned the freedom from being

impleaded. Similarly, by the Parliamentary Privilege Act, 1770 a very important limitation of the freedom from arrest was affected. A somewhat

similar position arises in respect of the privilege of exemption from jury service (Ibid. pp. 75-77). In fact the list of privileges claimed by the House

of Commons in early days was a long and formidable list and it showed how the House of Commons was then inclined to claim all kinds of

privileges for itself and its members. In course of time, however, many of these privileges fell into disuse and faded out of existence, some were

controlled by legislation while the major privileges which can be properly described as privileges essential for the efficient functioning of the House,

still continued in force.

76. In considering the nature of these privileges generally, and particularly the nature of the privilege claimed by the House to punish for contempt,

it is necessary to remember the historical origin of this doctrine of privileges. In this connection, May has emphasised that the origin of the modern

Parliament consisted in its judicial functions. "One of the principal lines of recent research", says May, "has revealed the importance of the judicial

elements in the origins of Parliament. Maitland, in his introduction to the Parliament Roll of 1305, was the first to emphasise the importance of the

fact that Parliament at that time was the King's "great court" and was thereby (among other things) the highest court of royal justice. There is now

general agreement in recognising the strongly judicial streak in the character of the earliest Parliaments and the fact that, even under Edward III,

although Parliaments devoted a considerable part of their time to political and economic business, the dispensation of justice remained one of their

chief functions in the eyes of the King's subjects" (May's Parliamentary Practice, pp. 3-4). As is well-known, the Parliament of the United

Kingdom is composed of the Sovereign, the House of Lords, and the House of Commons. These several powers collectively form the

Legislature; and, as distinct members of the constitution, they exercise functions and enjoy privileges peculiar to each.

77. The House of Lords, Spiritual and Temporal, sit together, and jointly constitute the House of Lords (Ibid, pp. 8-9). The exact date of the

admission of the Commons to a distinct place in the legislature has always been a subject of controversy; but as it is admitted that they often sat

apart for deliberation, particular instances in which they met in different places will not determine whether their separation, at those times, was

temporary or permanent. When the Commons deliberated apart, they sat in the chapter house or the refectory of the abbot of Westminster; and

they continued their sittings in that place after their final separation (Ibid, p. 12). The House of Lords is their judicature, of which they exercise

several kinds. They have the power to sit as a court during prorogation and dissolution; a Court of Appeal is constituted by the House of Lords

and final appellate jurisdiction vests in them (Ibid, pp. 38-39). May has also referred to the power claimed by the Parliament in respect of acts of

attainder and impeachments, and he has described how this privilege was exercised by the House of Lords and the House of Commons (Ibid, p.

40).i "In impeachments", says May, "the Commons are but accusers and advocates; while the Lords alone are judges of the crime. On the other

hand, in passing bills of attainder, the Commons in commit themselves by no accusation, nor are their powers directed against the offender; but

they are judges of equal jurisdiction, and with the same responsibility, as the Lords; and the accused can only be condemned by the united

judgment of the Crown, the Lords, and the Commons (Ibid, p. 41)."" This aspect of the privilege is one of the typical features of the historical

development of the constitutional law in England. It would thus be seen that a part of the jurisdiction claimed by the House of Lords as well as the

House of Commons can be distinctly traced to the historical origin of the modern Parliament which, as we have just indicated, consisted in the

judicial functions of Parliament.

78. The differences in punishments inflicted by Lords and Commons is also of some significance in this context. ""While both Houses agree in

regarding the same offences as breaches of privilege"", says May, ""in several important particulars there is a difference in their modes of punishment.

The Lords have claimed to be a court of record and, as such, not only to imprison, but to impose fines. They also imprison for a fixed time, and

order security to be given for good conduct; and their customary form of commitment is by attachment. The Commons, on the other hand, commit

for no specified period, and during the last two centuries have not imposed fines. There can be no question that the House of Lords, in its judicial

capacity, is a court of record; but, according to Lord Kenyon, "when exercising a legislative capacity, it is not a court of record". Whether the

House of Commons be, in law, a court of record, it would be difficult to determine; for this claim, once firmly maintained, has latterly been virtually

abandoned, although never distinctly renounced"" (Ibid., p. 90). This last comment made by May would be of decisive significance when we later

have occasion to deal with the question as to whether the privilege claimed by Mr. Seervai that a general warrant cannot be examined by courts is

a part of the privilege itself, or is the result of convention established between the courts and the House of Commons.

79. Let us then briefly indicate, in the words of May, the general features of the power of commitment possessed by the House of Commons. ""The

power of commitment"", says May, ""is truly described as the keystone of parliamentary privilege"". As was said in the Commons in 1593, ""This court

for its dignity and highness hath privilege, as all other courts have. And, as it is above all other courts, so it hath privilege above all other courts; and

as it hath privilege and jurisdiction too, so hath it also Coercion and Compulsion; otherwise the jurisdiction is nothing in a court, if it hath on

Coercion"" (Ibid., p. 90). The comment made by May on this power of commitment is very instructive. The origin of this power which is judicial in

its nature is to be found naturally in the medieval conception of Parliament as primarily a court of justice - the ""High Court of Parliament"". As a

court functioning judicially, the House of Lords undoubtedly possessed the power of commitment by at least as good a title as any court of

Westminster Hall.

80. But the Commons, "new-comers to Parliament" within the time of judicial memory could not claim the power on grounds of immemorial

antiquity. As late as 1399 they had recorded their protest that they were not sharers in the judgments of Parliament, but only petitioners. The

possession of the right by the Commons was challenged on this ground, and was defended by arguments which confounded legislative with judicial

jurisdiction authority otherwise than as in some sense a court of justice that the Commons succeeded in asserting their right to commit offenders on

the same terms as the Lords. That is the genesis of the privilege claimed by the House of Commons in the matter of commitment.

81. As the history of England shows, the House of Commons had to engage in a fierce struggle in order to arrest recognition for this right from the

King, the House of Lords, and in many cases the people themselves. This power was distinctly admitted by the Lords at the conference between

the two Houses, in the case of *Ashby v. White* L.J. [1701] 714, in 1704 and it has been repeatedly recognized by courts of law. In fact this power

is also virtually admitted by the statute, 1 James I, c. 13, s. 3, which provides that nothing therein shall "extend to the diminishing of any punishment

to be hereafter, by censure in Parliament, inflicted upon any person (May's Parliamentary Practice, p. 92).

82. Now we will refer to the statement of law in May's book on the vexed question about the jurisdiction of courts of law in matters of privilege.

May says, it would require a separate treatise to deal adequately with a subject which raises incidentally such important questions of constitutional

law. According to him, in cases affecting parliamentary privilege the tracing of a boundary between the competence of the courts and the exclusive

jurisdiction of either House is a difficult question of constitutional law which has provided many puzzling cases, particularly from the seventeenth to

the nineteenth centuries. It has been common ground between the Houses and the courts that privilege depends on the "known laws and customs

of Parliament", and not on the ipse dixit of either House. The question in dispute was whether the law of Parliament was or part of the common law

in its wide and extended sense, and in the former case whether it was a superior law which overrode the common law. Arising out of this question

another item of controversy arose between the courts and the Parliament and that was whether a matter of privilege should be judged solely by the

House which it concerned, even when the rights third parties were involved, or whether it might in certain cases be decided in the courts, and, if so,

in what sort of cases (May's Parliamentary Practice, p. 150). The points of view adopted by the Parliament and the courts appeared to be

irreconcilable. The courts claimed the right to decide for themselves when it became necessary to do so in proceeding brought before them,

questions in relation to the right to decide for themselves when it became necessary to do so in proceedings brought before them, questions in

relation to the existence or extent of these privileges, whereas both the Houses claimed to be exclusive judges of their own privileges. Ultimately,

the two points of view were reconciled in practice and a solution acceptable to both out by the courts is to insist on their right in principle to decide

all questions of privilege arising in litigation before them, with certain large exceptions in favour of parliamentary jurisdiction. Two of these are the

exclusive jurisdiction of each House over its own internal proceedings, and the right of either House to commit and punish for contempt. May adds

that while it can-not be claimed that either House has formally acquiesced in this assumption of jurisdiction by the courts, the absence of any

conflict for over a century may indicate a certain measure of tacit acceptance (Ibid., p. 152). In other words, the question about the existence and

extent of privilege is generally treated as justiciable in courts where it becomes relevant for adjudication of any dispute brought before the courts.

83. In regard to punishment for contempt, a similar process of give and take by convention has been in operation and gradually a large area of

agreement has, in practice, been evolved. Theoretically, the House of Commons claims that its admitted right to determine the existence and extent

of the privileges themselves. It has never expressly abandoned this claim. On the other hand, the courts regard the privileges of Parliament as part

of the law of the land, of which they are bound to take judicial notice. They consider it their duty to decide any question of privilege arising directly

or indirectly in a case which falls within their jurisdiction, and to decide it according to their own interpretation of the law (Ibid., p. 172) Naturally,

as a result of this dualism the decisions of the courts are not accepted as binding by the House in matters of privilege, nor the decisions of the

House by the courts; and as May points out, on the theoretical plane, the old dualism remains unresolved. In practice, however, "there is much

more agreement on the nature and principles of privilege than the deadlock on the question of jurisdiction would lead one to expect" and May

describes these general conclusions in the following words :

(1) It seems to be recognized that, for the purpose of adjudicating on questions of privilege, neither House is by itself entitled to claim the

supremacy over the ordinary courts of justice which was enjoyed by the undivided High Court of Parliament. The supremacy of Parliament,

consisting of the king and the two Houses, is a legislative supremacy which has nothing to do with the privilege jurisdiction of either House acting

singly.

(2) It is admitted by both Houses that, since neither House can by itself add to the law, neither House can by its own declaration create a new

privilege. This implies that privilege is objective and its extent ascertainable, and reinforces the doctrine that it is known by the courts.

On the other hand, the courts admit :-

(3) That the control of each House over its internal proceedings is absolute and cannot be interfered with by the courts.

(4) That a committal for contempt by either House is in practice within its exclusive jurisdiction, since the facts constituting the alleged contempt

need not be stated on the warrant of committal (May's Parliamentary Practice, p. 173).

84. It is a tribute to the remarkable English genius for finding pragmatic ad hoc solutions to problems which appear to be irreconcilable by adopting

the conventional method of give and take. The result of this process has been, in the words of May, that the House of Commons has not for a

hundred years refused to submit its privileges to the existence and extent of its privileges. On the other hand, the courts have always, at any rate in

the last resort, refused to interfere in the application by the House of any of its recognized privileges. (Ibid., pp. 173-74) That broadly stated, is the

position of powers and privileges claimed by the House of Commons.

85. What now remains to consider is the position in regard to the special privilege with which we are concerned, viz., the privilege to determine

whether its contempt has been committed and to punish for such contempt, and to claim that a general order or warrant sentencing a person for its

contempt is not examinable in a court of law. Is this last right claimed by Mr. Seervai on behalf of the House a part of the privilege vesting in the

House of Commons, or is it the result of an agreement evolved between the courts and the House by convention, or by the doctrine of comity, or

as a matter of legal presumption ? It is to this question that we must now turn.

86. Even while dealing with this narrow question, it is necessary, we think, to refer broadly to the somewhat tortuous course through which the law

on this question has been gradually evolved by judicial decisions in England. Just as in dealing with the question of privileges, on principle we have

mainly based ourselves on the statements of May, so in dealing with the evolution of the law on this question, we will mainly rely on the decisions

themselves. Both Mr. Seervai and Mr. Setalvad have referred us to a large number of English decisions while urging their respective contentions

before us and in fairness, we think we ought to mention some of the important representative decisions to indicate how this doctrine of privilege

and its accompaniments has been gradually developed in England.

87. For our purpose, the story can be said to begin in the year 1677 when the Court of King's Bench had occasion to deal with a part of this

problem in The Earl of Shaftesbury's case (86 E.R. 792); it develops from time to time when some aspect or the other of this problem of

parliamentary privileges came before the courts at Westminster until we reach 1884 when the case of Bradlaugh v. Gossett L.R. 12 Q.B.D. 721

was decided.

88. Let us then begin with Shaftesbury's case. In that case, the Earl of Shaftesbury was committed to the Tower of London under an order of the

House of Lords which directed the constable of the Tower of London to receive him and keep him in safe custody during the pleasure of the

House ""for high contempts committed against this House; and this shall be a sufficient warrant on that behalf."" The Earl of Shaftesbury took the

mater before the Court of Kings" Bench on a writ of habeas corpus and urged that the committal of the Earl was unjustified in law because the

general allegation of ""high contempts"" too uncertain for the court to sustain. It was also argued on his behalf that in respect of the jurisdiction

exercised by the Lords the boundaries of the said jurisdiction were limited by common law and its exercise was examinable in the courts. This plea

was unanimously rejected by the Court could not question the judgment of the House of Lords as a superior court. Rainford C.J. held ""that this

Court hath no jurisdiction of the cause, and therefore, the form of the return is not considerable."" According to the learned Chief Justice, the

impugned commitment was in execution of the judgment given by the Lords for the contempt; and therefore, if the Earl be bailed, he would be

delivered out of execution; because for a contempt in facie curiae, there is no other judgment for execution. This case, therefore, accepted the

principle that the House of Lords had jurisdiction to issue a warrant for contempt and that since the commitment of the person thus committed was

in execution of the judgment given by the House of Lords, the general warrant issued in that behalf was not examinable by the King"s Bench

Division.

89. Five years thereafter, Jay moved the King"s Bench Division for release from arrest and brought an action against Topham, the Serjeant at

Arms, for arresting and detaining him. Topham pleaded to the jurisdiction of the court, but the court rejected his plea and judgment was given in

favour of Jay. Seven years thereafter, the House of Commons declared that the said judgment was ""illegal, a violation of the privileges of

Parliament, and pernicious to the rights of Parliament"". Acting on this view the two Judges were called at the Bar of the House and asked to

explain their conduct. Appearing before the Bar, Sir Francis Pemberton mentioned to the House that he had been out of the Court for more than

six years and did not exactly remember what had happened in the case. He expressed surprise that he was called to the Bar without giving him

enough notice as to what was the charge against him. He also urged that if the defendant should plead he did arrest him by the command of this

House, and should plead that to the jurisdiction of the Court of King"s Bench, he would satisfy the House that such a plea ought to be overruled.

That is why he asked for time to look into the records of the court to make his further pleas. Eventually, the two Judges were ordered to be

imprisoned (12 State Tr. 822). This incident has been severely criticised by all prominent writers on constitutional law in England and it would be

fairly accurate to say that it has been regarded as an unfortunate and regrettable episode in the history of the House of Commons. It is somewhat

ironical that what happened as long ago as 1689 is attempted to be done by the House in the present proceedings 14 years after this country has

been used to a democratic way of life under a written Constitution !

90. Before we part with this case, however, it would be material to indicate briefly how succeeding Judges have looked at this conduct of the

House of Commons. In *Sir Francis Burdett v. Abbot* 104 E.R. 501, Lord Ellenborough C.J., observed : ""It is surprising upon looking at the record

in that case how a Judge should have been questioned, and committed to prison by the House of Commons, for having given a judgment, which no

Judge whoever sat in this place could differ from"" , and he added that the Attorney-General who had appeared in *Burdett* had conceded that

probably the matter was not so well understood at that time, whereupon Lord Ellenborough observed that it was after the Revolution, which

makes such a commitment for such a cause a little alarming; and he pointed out that it must recollect that Lord C.J., Pemberton stood under the

disadvantage at that period of having been one of the Judges who had sat on the trial of Lord Russel, and therefore did not stand high in popularity

after the Revolution, when the judgment and attainder in his case had been recently reversed by Parliament.

91. Similarly, in *Stockdale v. Hansard* 112 E.R. 1112, referring to this incident, Lord Denman C.J. declared : ""Our respect and gratitude to the

Convention Parliament ought not to blind us to the fact that this sentence of imprisonment was as unjust and tyrannical as any of those acts of

arbitrary power for which they deprived King James of his Crown"".

92. The next case to which reference may be made is *Ashby v. White* (1703-) 92 E.R. 126. In that case, the plaintiff was a burgess of Aylesbury,

and as such entitled to vote for two Members of Parliament. On the day of the election he requested the defendants, who were the Returning

Officers of the borough, to receive his vote. This the defendants refused to do, and the plaintiff was not allowed to vote. That led to an action

against the Returning Officers for fraudulently and maliciously refusing his vote, and it ended in an award for damages by the jury. In an action

before the Queen's Bench in arrest of judgment, it was urged that the claim made by the plaintiff was not maintainable. This action succeeded

according to the majority decision Holt C.J., dissenting. Justice Gould held that he was of opinion that the action brought against the defendants

was not maintainable, and in support of his conclusion he gave four reasons; first, because the defendants are judges of the, and act herein as

judges; secondly, because it is a Property or profit, so that the hindrance of it is merely *damnum sine injuria*; and fourthly, it relates to the publick,

and is a popular offence 92 E.R. 126.

93. Holt C.J., however, dissented from the majority opinion and expressed his views in somewhat strong language. Referring to the opinion

expressed by his colleagues that the Court cannot judge or the matter because it was a Parliamentary thing, he exclaimed : ""O ! by all means be

very tender of that. Besides, it is intricate, and there may be contrariety of opinions. But this matter can never come in question in Parliament; for it

is agreed that the persons for whom the plaintiff voted were elected; so that the action is brought for being deprived of his vote."" (Ibid., 137) He

conceded that the court ought not to encroach or enlarge its jurisdiction; but he thought that the court must determine on a charter granted by the

King, or on a matter of custom or prescription, when it comes before the court without encroaching on the Parliament. His conclusion was that if it

be a matter with the jurisdiction of the Court, ""we are bound by our oaths to judge of it""(Ibid., 138). This decision, however, has nothing to do

with the question of contempt.

94. The next case which deals with the question of contempt of the House of Commons, is *R. v. Paty* (1704) 92 E.R. 232. In that case, Paty and

four others were committed to Newgate by warrant issued by the Speaker of the House. The warrant was speaking warrant and showed that the

persons detained had committed contempt of the jurisdiction of the House and open breach of its known privileges. The validity of this warrant

was challenged by the said persons on the ground that it suffered from many infirmities. The majority decision in the case, however, was that the

court had no jurisdiction to deal with the matter, because the House of Commons were the proper judges of their own privileges. Justice Powys

referred to the earlier decision in *The Earl of Shaftesbury's* case 86 E.R. 792 and observed : ""If all commitments for contempts, even those by this

Court, should come to be scanned, they would not hold water. Our warrants here in such cases are short, as for a contempt, or for a contempt in

such a cause. So in Chancery the commitments for contempt are for a contempt in not fully answering, etc., and would not this commitment be

sufficient ?"" He held that ""the House of Commons was a great Court, and all things done by them are to be intended to have been rite acta, and the

matter need not be so specially recited in their warrants; by the same reason as we commit people by a rule of Court of two lines, and such

commitments are held good, because it is to be intended, that we understand what we do."" 92 E.R. 232 It would thus be seen that the majority

decision in that case proceeded on the basis that the House of Commons was a great Court and like the superior courts at Westminster, it was

entitled to issue a short general warrant for committing persons for its contempt. If such a general warrant was issued and it was challenged before

the courts at Westminster, it should be treated with the same respect as is accorded to similar warrants issued by the superior courts. Holt C.J.

however, was not persuaded to take the view that the impugned imprisonment was such ""as the freeman of England ought to be bound by""; and he

added, ""for that this, which was only doing a legal act, could not be made illegal by the vote of the House of Commons; for that neither House of

Parliament, nor both Houses jointly, could dispose of the liberty or property of the subject; for to this purpose the Queen must join : and that it was

in the necessity of their several concurrences to such acts, that the great security of the liberty of the subject consisted."" (p. 236). This case,

therefore, seems to recognise that it would be inappropriate for the courts at Westminster to examine the validity of a general warrant issued by the

House of Commons.

95. That takes us to the decision in *Murray's case* (95 E.R. 629) 1750. Murray was committed to prison by the House of Commons for refusal to

kneel, when brought up to the bar of the House. It was declared by the House that the refusal of Murray to kneel was "a most dangerous contempt

of privilege". When a petition for habeas corpus was moved before the Court, it was rejected on the ground that "the House of Commons was

undoubtedly a High Court and that it was agreed on all hands that they have power to judge to their own privileges, and it need not appear to us

what the contempt was, for if it did appear, we could not judge thereof." That is the view expressed by Justice Wright. The learned Judge also

added that the House of Commons was superior to his own Court, and that his Court could not admit to bail person committed for a contempt in

any other Court in Westminster Hall. Dennison J. agreed and expressed his opinion that the Court at Westminster Hall was inferior to the House of

Commons with respect to Judging of their privileges and contempts against them. This case again proceeds on the basis that the House of

Commons is a superior court, and as such its warrants cannot be examined.

96. The next relevant case in point of time is *Brass Crosby* 95 E.R. 1005. Brass Crosby was Lord Mayor of London and a Member of the House

of Commons, and as Magistrate he had admitted to bail a person who had been committed to prison under a warrant issued by the Speaker of the

House under the orders of the House itself. The House held that Lord Mayor was guilty of breach of privilege of the House, and as such he was

committed to the Tower of London. The validity of this order was challenged by Brass Crosby. The challenge, however, failed on the ground that

when the House of Commons adjudges anything to be a contempt or a breach of privilege, their adjudication is a conviction, and their commitment

in consequence is in execution. As Lord C.J. de Grey observed, "no court can discharge or bail a person that is in execution by the judgment of

any other court," and so, he came to the conclusion that "the House of Commons having authority to commit, and that commitment being an

execution, the question is what can this Court do? He gave the answer with the remark that "it can do nothing when a person is in execution, by

the judgment of a court having a competent jurisdiction; in such case, this Court is not a court of appeal." (Ibid., 1011) Concurring with this view,

Blackstone J. observed that the House of Commons is a Supreme Court and he was impressed by the argument that "it would occasion the utmost

confusion, if every Court of this Hall should have power to examine the commitments of the other Courts of the Hall, for contempts; so that the

Judgment and commitment of each respective Court, as to contempts, must be final, and without control." (Ibid., 1014). It would thus be seen that

this decision proceeded on the same ground which had by then been recognised that the House of Commons was a superior court and as such had

jurisdiction to punish persons adjudged by it to be guilty of contempt. A general warrant issued by the House in respect of such a contempt was

treated as of the same status as a similar warrant issued by other superior courts at Westminster Hall.

97. Before parting with this case, we may incidentally advert to the comment made by Lord Denman C.J. on this decision. Said Lord Denman :

We know now, as a matter of history, that the House of Commons was at that time engaged, in unison with the Crown, in assailing the just rights

of the people. Yet that learned Judge [Blackstone J.] proclaimed his unqualified resolution to uphold the House of Commons, even though it should

have abused its power (Stockdale v. Hansard, 112 E.R. 1112.

98. The next important decision on this topic is Sir Francis Burdett's case 104 E.R. 501. This case arose out of an action of trespass which Sir

Francis Burdett commenced against the Speaker of the House of Commons for breaking and entering his house, and imprisoning him in the Tower.

The plea raised in defence was that the conduct of the defendant was justified by an order of the House for Burdett's committal after the House

had adjudicated that he had been guilty of a contempt of the House by publishing a libellous and scandalous paper reflecting on the just rights and

privileges of the House. The case was elaborately argued and as May points out : ""This case provides one of the principal authorities for the

Commons' power (as Lord Shaftesbury's case does for the Lords") to commit for contempt (May's Parliamentary Practice, p. 159)."" the warrant

in this case was a speaking warrant and the contempt was the contempt of the House of Commons. The plea made by Burdett was rejected, but

the reasons given for rejecting the plea are significant. Lord Ellenborough C.J. has considered the question exhaustively. He has observed that

upon the authority of precedents in Parliament, upon the recognition by statute, and upon the continued recognition of all Judges, he should have

thought that there was a quantity of authority enough to have put the question to rest, that is, whether the House of Commons has the power of

commitment for a contempt of their privileges ? the House undoubtedly had that power. Proceeding to deal with the matter on that basis, Lord

Ellenborough held that the effect of the publication which was held by it to be libellous, and he added that by analogy to the judgment of a Court of

law, (and the judgments of either House of Parliament cannot with propriety be put upon a footing less authoritative than those of the ordinary

Courts of Law), the House must be considered as having decided both, as far as respects any question thereupon which may arise in other Courts.

99. The next question which Lord Ellenborough considered was if the warrant itself disclosed a sufficient ground for commitment and an order to

the officers of the House to execute it, then the justification means appear to have been afterwards used to carry the warrant into execution."" It

appears that in that case it was urged before the Court that if the warrant issued appeared to be on the face of it unjustified, illegal or extravagant,

the Court would be entitled to entertain the petition for a writ of habeas corpus and grant relief to the petitioner. Lord Ellenborough dealt with this

argument and expressed the opinion that if a commitment appeared to be for a contempt of the House of Commons generally, he would neither in

the case of that Court, nor of any other of the Superior Courts, inquire further; but if it did not profess to commit for a contempt, but for some

matter appearing on the return, which could by no reasonable intendment be considered as a contempt of the Court committing, but a ground of

commitment palpably and evidently arbitrary, unjust, and contrary to every principle of positive law, or national justice, in such a case the Court

must look at it and act upon it as justice may require from whatever Court it may profess to have proceeded (pp. 558-60). It is thus clear that even

while recognising that it would be inappropriate or improper to examine a general warrant issued by the House of Commons, Lord Ellenborough

made it clear that this convention would be subject to the exception that wherever it appeared from the return or otherwise that the commitment

was palpably unjust, the court would not be powerless to give relief to the party.

100. This case went in appeal before the Court of Exchequer and the decision under appeal was confirmed. It appears that before the appellate

decision was pronounced, Lord Eldon proposed to their Lordships that the counsel for the defendants should not be heard until they received the

advice of the Judges on the question which he formulated. This question was : ""Whether, if the Court of Common Pleas, having adjudged an act to

be a contempt of Court, had committed for the contempt under a warrant, stating such adjudication generally without the particular

circumstances, and the matter were brought before the Court of King's Bench, by return to a writ of habeas corpus, the return setting forth the

warrant, stating such adjudication of contempt generally; whether in that case the Court of King's Bench would discharge the prisoner, because the

particular facts and circumstances, out of which the contempt arose, were not set forth in the warrant."" After this question was handed to the

Judges and they consulted among themselves for a few minutes, Lord Ch. Baron Richards delivered their unanimous opinion that in such a case the

Court of King's Bench would not liberate. 3 E.R. 1289 This opinion was accepted and Burdett's appeal was dismissed without calling on the

respondent. In this case, Lord Erskine observed that ""the House of Commons, whether a Court or not, must like every other tribunal, have the

power to protect itself from obstruction and insult, and to maintain its dignity and character. If the dignity of the law is not sustained, its sun is set,

never to be lighted up again. So much I thought it necessary to say, feeling strongly for the dignity of the law; and have only to add that I full concur

in the opinion delivered by the Judges."" This case seems to establish the position that a warrant issued by the House of Commons was treated as a

warrant issued by a superior Court and as such, the courts in Westminster Hall could not go behind it.

101. In 1836-37 began a series of cases in which John Joseph Stockdale was concerned. This series of cases ultimately led to the arrest and

imprisonment of the Sheriffs of Middlesex. It appears that in one of the reports published by the inspectors of prisons under the order of the House

of Commons Stockdale was described in a libellous manner, and so, he brought an action against Messrs. Hansard in 1836. In defence, Hansard

pleaded privilege and urged that the reports in question had been published under the orders of the House. The Court held that the order of the

House. The Court held that the order of the House supplied no defence to the action. Even so, the verdict of the jury went against Stockdale on a

plea of justification on the merits, the jury having apparently held that the alleged libellous description of Stockdale was accurate. At the time when

this case was tried, Lord Chief Justice Denman made certain observations which were adverse to the privileges of the House claimed by Hansard.

He observed ""that the fact of the House of Commons having directed Messrs. Hansard to publish all their parliamentary reports is no justification

for them, or for any book-seller who publishes a parliamentary report containing a libel against any man (May's Parliamentary Practice, p. 159).

Incidentally, it may be added that as a result of this controversy, the Parliament ultimately passed the Parliamentary Papers Act, 1840, which

overruled this view.

102. Not deterred by the adverse verdict of the jury on the merits, Stockdale began another action. Before this action was commenced, the House

of Commons had passed a resolution in 1837 reaffirming its privileges, and expressing its deliberate view that for any court to assume to decide

upon matters of privilege inconsistent with the determination of either House of Parliament was contrary to the law of Parliament. Nevertheless, in

this second action brought by Stockdale, the House decided to put in a defence of privilege. This defence was rejected and a decree was passed

for payment of damages and costs. Even so, the House of Commons did not act upon its resolutions and refrained from publishing Stockdale and

his legal advisers for having taken the matter to a court of law; instead, it decided that the damages and costs be paid under the special

circumstances of the case.

103. Encouraged by this result Stockdale brought a third action for another publication of the said report. This time Messrs. Hansard did not

plead; in consequence, the judgment went against them in default, and the damages were assessed by a jury, in the Sheriff's Court, at \$ 600. The

Sheriffs of Middlesex levied for that amount, but were served with the copies of the resolutions passed by the House; and that naturally made them

cautious in the matter. They, therefore, delayed the payment of the money to Stockdale as long as possible, but ultimately the money was paid by

them to Stockdale under an attachment. At this stage, the House Commons entered the arena and committed Stockdale to the custody of the

Serjeant. It called upon the Sheriffs to refund the money and on their refusal, they were also committed for contempt. That led to proceedings

taken by the Sheriffs for their release on a writ of habeas corpus. These proceedings, however, failed and that is the effect of the decision in the

Case of the Sheriff of Middlesex 113 E.R. 419.

104. Naturally, Mr. Seervai has laid considerable emphasis on this decision. He has pointedly drawn our attention to the fact that the Court found

itself powerless to protect the Sheriffs of Middlesex against their imprisonment, though the conduct which gave rise to contempt of the House

was, in terms, the result of an order passed by the Court. Lord Denman C.J., who had himself elaborately discussed the question and disputed the

validity of the claim made by the House of Commons in regard to its privileges in the case of Stockdale v. Hansard 112 E.R. 1112, was a party to

this decision. He began his judgment by declaring that his earlier judgment delivered in the case of Stockdale v. Hansard was correct in all

respects. Even so, the plea raised by the Sheriffs had to be answered against them, because their commitment was sustained by a legal warrant.

Lord Denman then examined the three grounds on which the validity of the warrant was impeached and he found that there was no substance in

those pleas. The learned Chief Justice considered the previous decisions bearing on the point and observed that the test prescribed by Lord Eldon

in the case of Burdett v. Abbot 104 E.R. 501 was relevant; and this test, as we have already seen, proceeds on the assumption that like the

general warrants for commitment issued by the superior courts, the general warrants issued by the House of Commons on the ground of contempt

should not be examined in proceedings for habeas corpus. Littleton J. concurring with Lord Denman C.J. said : ""if the warrant declares the

grounds of adjudication, this Court, in many cases, will examine into their validity; but, if it does not, we cannot go into such an inquiry. Here we

must suppose that the House adjudicated with sufficient reason; and they were the proper judges"". Justice Williams, who also concurred with Lord

Denman, thought it necessary to add that ""if the return, in a case like this, shewed a frivolous cause of commitment, as for wearing a particular

dress, I should agree in the opinion expressed by Lord Ellenborough in Burdett v. Abbot 104 E.R. 501, where he distinguishes between a

commitment stating a contempt generally, and one appearing by the return to be made on grounds palpably unjust and absurd. Coleridge J.

preferred to put his conclusion on the ground that ""[the right of the House of Commons] to adjudicate in this general form in cases of contempt is

not founded on privilege, but rests upon the same grounds on which this Court or the Court of Common Pleas might commit for a contempt

without stating a cause in the commitment."" It is remarkable that Justice Coleridge thought it necessary to make it clear that the right to require a

general warrant to be respected when its validity is challenged in habeas corpus proceedings, is now a part of the privilege itself; it is the result of a

convention by which such warrants issued by superior courts or record are usually respected. This decision was pronounced in 1840, and can be

said to constitute a landmark in the development of the law on this topic. Thus, this decision also does not assist Mr. Seervai in contending that it is

a part of the privilege of the House to insist that a general warrant issued by it must be treated as conclusive and is not examinable in courts of law.

105. The next case is *Howard v. Sir William Gosset* 116 E.R. 139. In that case, by a majority decision a warrant issued by the Speaker of the

House against Howard was held to be invalid as a result of certain infirmities discovered in the warrant. Williams J. alone dissented. The warrant in

this case was a general warrant and Williams J. held that the technical objections raised against the validity of the warrant could not be entertained,

because a general warrant should be treated as conclusive of the fact that the party against whom the warrant had been issued had been properly

adjudged to be guilty of contempt. Since the judgment was pronounced in favour of the plaintiff Howard, the matter was taken in appeal, and the

majority decision was reversed by the Court of Exchequer. Parke B. considered the several arguments urged against the validity of the warrant and

rejected them. The general ground for the decision of the Court of Exchequer was expressed in these words : "We are clearly of opinion that at

least as much respect is to be shewn, and as much authority to be attributed, to these mandates of the House as to those of the highest Courts in

the country; and, if the officers of the ordinary Courts are bound to obey the process delivered to them, and are therefore protected by it, the

officer of the House of Commons is as much bound and equally protected. The House of Commons is a part of the High Court of Parliament,

which is without question not merely a Superior but the Supreme Court in this country, and higher than the ordinary courts of law (*Ibid.*, at 174).

106. Thus, the result of this decision is that the House of Commons being part of the High Court of Parliament is a superior Court and the general

warrants issued by it cannot be subjected to the close scrutiny, just as similar warrants issued by other superior courts of record are held to be

exempt from such scrutiny. It would be noticed that the Court of Exchequer has observed in this case that the House of Commons as a part of the

High Court of Parliament, is a Supreme Court in this country and is higher than the ordinary courts of law; and this recalls the original judicial

character of the House of Parliament in its early career and emphasizes the fact that the House of Lords which is a part of the House of Parliament

still continues to be the highest court of law in England.

107. The last case in this series to which we ought to refer is the decision of the Queen's Bench Division in *Bradlaugh v. Gossett* (1884) L.R. 12

Q.B.D. 271. This decision is not directly relevant or material but since Mr. Seervai appeared to rely on certain statements of law enunciated by

Stephen J., we think it necessary to refer to it very briefly. In the case of Bradlaugh the Court was called upon to consider whether an action could

lie against the Serjeant-at-Arms of the House of Commons for excluding a member from the House in obedience to a resolution of the House

directing him to do so; and the answer was in the negative. It appears that the material resolution of the House of Commons was challenged as

being contrary to law, and in fact the Queen's Bench Division proceeded to deal with the claim of Bradlaugh on the footing that the said resolution

may strictly not be in accordance with the true effect of the relevant provision of the law; and yet it was held that the matter in dispute related to the

internal management the procedure of the House of Commons, and so, the Court of Queen's Bench had no power to interfere. It was pressed

before the Court that the resolution was plainly opposed to the relevant provision of the law. In repelling the validity of this argument, Stephen J.,

observed that in relation to the rights and resolutions concerning its internal management, the House stood precisely in the same relation ""as we the

judges of this Court stand into the laws which regulate the rights of which we are the guardians, and to the judgments which apply them to

particular cases; that is to say, they are bound by the most solemn obligations which can bind men to any course of conduct whatever, to guide

their conduct by the law as they understand it"". The learned Judge then proceeded to add ""If they misunderstand it, or (I apologize for the

supposition) wilfully disregard it, they resemble mistaken or unjust judges; but in either case, there is in my judgment no appeal from their decision.

The law of the land gives no such appeal; no precedent has been or can be produced in which any Court has ever interfered with the internal affairs

of either House of Parliament, though the cases are no doubt numerous in which the Courts have declared the limits of their powers outside of their

respective Houses"". That, said the learned Judge, was enough to justify the conclusion which he had arrived at (Ibid., 286). Mr. Seervai's

argument was that though the resolution appeared to constitute an infringement of the Parliamentary Oaths Act, the Court refused to give any

relief to Bradlaugh, and he suggested that a similar approach should be adopted in dealing with the present dispute before us. The obvious answer

to this contention is that we are not dealing with any matter relating to the internal management of the House in the present proceedings. We are

dealing with the power of the House to punish citizens for contempt alleged to have been committed by them outside the fourwalls of the House,

and that essentially raises different considerations.

108. Having examined the relevant decisions bearing on the point, it would, we think, not be inaccurate to observe that the right claimed by the

House of Commons not to have its general warrants examined in habeas corpus proceedings has been based more on the consideration that the

House of Commons is in the position of a superior court of record and has the right like other superior courts of record to issue a general warrant

for commitment of persons found guilty of contempt. Like the general warrant issued by superior courts of record in respect of such contempt, the

general warrants issued by the House of Commons in similar situations should be similarly treated. It is on that ground that the general warrants

issued by the House of Commons were treated beyond the scrutiny of the courts in habeas corpus proceedings. In this connection, we ought to

add that even while recognizing the validity of such general warrants, Judges have frequently observed that if they were satisfied upon the return

that such general warrants were issued for frivolous or extravagant reasons, it would be open to them to examine their validity.

109. Realizing that the position disclosed by the decisions so far examined by us was not very favourable to the claim made by him that the

conclusive character of the general warrants is a part of the privilege itself, Mr. Seervai has very strongly relied on the decisions of the Privy

Council which seem to support his contention, and so, it is now necessary to turn to these decisions. The first decision in this series is in the case of

the Speaker of the Legislative Assembly of Victoria v. Hugh Glass [1869] 3 L.R.P.C. 560. In that case by the Constitution Act for the Colony of

Victoria power had been given to the Legislative Assembly of Victoria to commit by a general warrant for contempt and breach of privilege of that

Assembly. In exercise of that power, Glass was declared by the House to have committed contempt and under the Speaker's warrant, which was

in general terms, he was committed to jail. A habeas corpus petition was then moved on his behalf and this petition was allowed by the Chief

Justice of the Supreme Court in the Colony, on the ground that the Constitution Statute and the Colonial Act did not confer upon the Legislative

Assembly the same powers, privileges and immunities as were possessed by the House of Commons. On appeal by the Speaker of the Assembly,

the decision of the Supreme Court in the Colony was reversed and it was held that the relevant Statute and the Act gave to the Legislative

Assembly the same powers and privileges as the House of Commons had at the time of the passing of the said Acts.

110. Having held that the Legislative Assembly had the same powers as the House of Commons, the Privy Council proceeded to consider the

nature and extent of these powers. Lord Cairns who delivered the judgment of the Privy Council observed that ""beyond all doubt, one of the

privileges - and one of the most important privileges of the House of Commons - is the privilege of committing for contempt; and incidental to that

privilege, it has been well-established in this country that the House of Commons have the right to be the judges themselves of what is

contempt, and to commit for that contempt by a Warrant, stating that the commitment is for contempt of the House generally, without specifying

what the character of the contempt is."" Then he considered the merits of the argument that the relevant Constitution Act did not confer on the

Legislative Assembly of Victoria the incidental power of issuing a general warrant, and rejected it. ""[Their Lordships] consider"", said Lord Cairns,

that there is an essential difference between a privilege of committing for contempt such as would be enjoyed by an inferior Court, namely,

privilege of first determining for itself what is contempt, then of stating the character of the contempt upon a Warrant, and then of having that

Warrant subjected to review by some superior Tribunal, and running the chance whether that superior Tribunal will agree or disagree with the

determination of the inferior Court, and the privilege of a body which determines for itself, without review, what is contempt, and acting upon the

determination, commits for that contempt, without specifying upon the Warrant the character or the nature of the contempt."" According to Lord

Cairns, the latter of the two privileges is a higher and more important one than the former, and he added that it would be strange indeed if, under a

power to transfer the whole of the privileges and powers of the House of Commons, that which would only be a part, and a comparatively

insignificant part, of this privilege and power were transferred 1869-71] 3 L.R.P.C. 572.

111. In other words, this decision shows that the Privy Council took the view that the power to issue a general warrant and to insist upon the

conclusive character of the said warrant is itself a part of the power and privilege of the House. Even so, it is significant that the distinction is drawn

between the power and privilege of an inferior Court and the power and privilege of a superior Court; and so, the conferment of the larger power

is deemed to have been intended by the relevant provision of the Constitution Act, because the status intended to be conferred on the Legislative

Assembly of Victoria was that of the superior Court. In other words, the Legislative Assembly was treated as a superior Court and the power and

privilege conferred on it was deemed to include both aspects of the power. Incidentally, it may be pointed out, with respect, that in considering the

question, Lord Cairns did not apparently think it necessary to refer to the earlier English decisions in which the question about the extent of this

power and its nature had been elaborately considered from time to time.

112. The next Privy Council decision on which Mr. Seervai relied is *Fielding and Others v. Thomas* [1896] L.R.A.C. 600]. In that case, the

question about the extent of the power conferred on the Nova Scotia House of Assembly fell to be considered, and it was held by the Privy

Council that the said Assembly had statutory power to adjudicate that willful disobedience to its order to attend in reference to a libel reflecting on

its members is a breach of privilege and contempt, and to punish that breach by imprisonment. For our present purpose, it is not necessary to refer

to the relevant provisions of the statute on which the argument proceeded, or the facts which gave rise to the action. It is only one observation

made by Lord Halsbury which must be quoted. Said Lord Halsbury in that case : ""The authorities summed up in *Burdett v. Abbot* 104 E.R. 501,

and followed in the Case of *The Sheriff of Middlesex* 113 E.R. 419, establish beyond all possibility of controversy the right of the House of

Commons of the United Kingdom to protect itself against insult and violence by its own process without appealing to the ordinary courts of law

and without having its process interfered with by those courts."" [1896] L.R.A.C. 600 It is the last part of this observation which lends some

support to Mr. Seervai's case. All that we need say about this observation is that it purports to be based on two earlier decisions which we have

already examined, and that it is not easily reconcilable with the reservations made by some of the Judges who had occasion to deal with this point

in regard to their jurisdiction to examine the validity of the imprisonment of a petitioner where it appeared that the warrant issued by the House of

Commons appeared on a return made by the House to be palpably frivolous or based on extravagant or fantastic reasons.

113. The last decision on which Mr. Seervai relies is the case of *The Queen v. Richards* 92 C.L.R. 157. In that case, the High Court of Australia

was called upon to construe the provisions of s. 49 which are similar to the provisions of Art. 194(3) of our Constitution. Section 49 reads thus :-

The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each

House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United

Kingdom, and of its members and committees, at the establishment of the Commonwealth.

114. One of the points which fell to be considered was what was the nature and extent of the powers, privileges and immunities conferred by s. 49

of the Constitution on the Senate and the House of Representative in Australia ? It appears that in that case Fitzpatrick and Browne were taken

into custody by Edward Richards in pursuance of warrants issued by the Speaker of the House of Representatives of the Parliament of the

Commonwealth. These warrants were general in character and they commanded Richards to receive the said two persons into his custody. On

June 10, 1955, on the application of Fitzpatrick and Browne as prosecutors, the Supreme Court of the Australian Capital Territory (Simpson J.)

granted an order nisi for two writs of habeas corpus directed to the said Edward Richards. On June 15, 1955, Simpson J. acting under s. 13 of the

Australian Capital Territory Supreme Court Act directed that the case be argued before a Full Court of the High Court of Australia. That is how

the matter went before the said High Court.

115. The High Court decided that s. 49 operated independently of s. 50 and was not to be read down by implications derived from the general

structure of the Constitution and the separation of powers thereunder. Construing s. 49 independently of s. 50, the High Court held that the

powers, privileges and immunities of the House of Commons at the establishment of the Commonwealth were conferred on the Parliament and

since Parliament had made no declaration within the meaning of the said section, it was necessary to consider what the powers of the House of

Commons were at the relevant time in order to determine the question as to whether a general warrant could be issued by Parliament or not, and

the High Court held that under s. 49 the Australian Parliament could claim the privilege of judging what is contempt and of committing therefore. It

was also held that if the Speaker's warrant is upon its face consistent with the breach of an acknowledged privilege, it is conclusive notwithstanding

that the breach of privilege is stated in general terms. In other words, this decision undoubtedly supports Mr. Seervai's contention that a general

warrant issued by the House in the present case is not examinable by the High Court.

116. In appreciating the effect of this decision it is necessary to point out that so far as Australia was concerned, the point in issue had been already

established authoritatively by the decisions of the Privy Council in *Dill v. Murphy* 15 E.R. 784 as well as in *Hugh Glass*. In fact, fact, Dixon C.J.

has expressly referred to this aspect of the matter. Naturally, he has relied on the observations made by Lord Cairns in *Hugh Glass* and has

followed the said observations in deciding the point raised before the High Court of Australia. That is the basis which was adopted by Dixon C.J.

in dealing with the question. Having adopted this approach, the learned Chief Justice thought it unnecessary to discuss at length the situation in

England, because what the situation in England was, had been conclusively determined for the guidance of the Australian courts by the

observations made by Lord Cairns in *Hugh Glass* [1869] 3 L.R.P.C. 560. Even so, he has observed that the question about the powers, privileges

and immunities of the House of Commons is one which the courts of law in England have treated as a matter for their decision, though he has

added that "the courts in England arrived at that position after a long course of judicial decision not unaccompanied by political controversy. The

law in England was finally settled about 1840." This observation obviously refers to the *Case of the Sheriff of Middlesex* 113 E.R. 419. To quote

the words of the learned Chief Justice : "Stated shortly, it is this : it is for the courts to judge of the existence in either House of Parliament of a

privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise. This judgment of the

House is expressed by its resolution and by the warrant of the Speaker. If the warrant specifies the ground of the commitment the court may, it

would seem, determine whether it is sufficient in law as a ground to amount to a breach of privilege, but if the warrant is upon its face consistent

with a breach of an acknowledged privilege it is conclusive and it is no objection that the breach of privilege is stated in general terms. This

statement of law appears to be in accordance with cases by which it was finally established, namely, the *Case of the Sheriff of Middlesex*" 113

E.R. 419. Thus, even according to Chief Justice Dixon, the existence and extent of privilege is a justiciable matter and can be adjudicated upon by

the High Court. If the warrant is speaking warrant, the Court can determine whether it is sufficient in law as a ground to amount to breach of

privilege, though, if the warrant is unspeaking or general, the court cannot go behind it. In our opinion, it would not be reasonable to treat this

decision as supporting the claim made by the House that the conclusive character of its general warrant is a part and parcel of its privilege. The

learned Chief Justice in fact did not consider the question on the merits for himself. He felt that he was bound by the observations made by Lord

Cairns and he has merely purported to state what in his opinion is the effect of the decision in the Case of the Sheriff of Middlesex 113 E.R. 419.

117. Besides, there is another aspect of this matter which cannot be ignored. The learned C.J. Dixon was dealing with the construction of s. 49 of

the Australian Constitution, and as Gwyer C.J. has observed in *In re The Central Provinces and Berar Act No. XIV of 1938* [1939] F.C.R. 18,

there are few subjects on which the decisions of other Courts require to be treated with greater caution than that of federal and provincial powers,

for in the last analysis the decision must depend upon the words of the Constitution which the Court is interpreting; and since no two Constitutions

are in identical terms, it is extremely unsafe to assume that a decision on the one of them can be applied without qualification of another." The learned

Chief Justice has significantly added that this may be so even where the words or expressions used are the same in both cases for a word or

expressions used are the same in both cases for a word or a phrase may take a colour from its context and bear different senses accordingly (p.

38).

118. These observations are particularly relevant and appropriate in the context of the point which we are discussing. Though the words used in s.

49 of the Australian Constitution are substantially similar to the words used in Art. 194(3), there are obvious points on which the relevant

provisions of our Constitution differ from those of the Australian Constitution. Take, for instance, Art. 32 of our Constitution. As we have already

noticed, Art. 32 confers on the citizens of India the fundamental right to move this Court. In other words, the right to move this Court for breach of

their fundamental rights is itself a fundamental right. The impact of this provision as well as of the provisions contained in Art. 226 on the

construction of the latter part of Article 194(3) has already been examined by us, it may be that there are some provisions in the Australian

Constitution which may take in some of the rights which are safeguarded under Art. 226 of our Constitution. Art. 32 finds no counter-part in the

Australian Constitution. Likewise, there is no provision in the Australian Constitution corresponding to Art. 211 of ours : and the presence of these

distinctive features contributes to make a substantial difference in the meaning and denotation of similar words used in the two respective

provisions. viz., s. 49 of the Australian Constitution and Art. 194(3) of ours. Besides, the declaration to which s. 49 refers may not necessarily

suffer to the same extent from the limitation which would govern a law when it is made by the Indian Legislatures under the first part of Art. 194(3).

These distinctive features of the relevant and material provisions of our Constitution would make it necessary to bear in mind the words of caution

and warning which Gwyer C.J., uttered as early as 1938. therefore, we think that it would not safe or reason able to rely too much on the

observation made by Dixon C.J. in dealing with the question of privileges in the case of Richards 92 C.L.R.157.

119. Before we part with this topic, however, we may incidentally point out that he recent observations made by Lord Parker C.J. in In re Hunt

[1959] 1 Q.B.D. 378 indicate that even in regard to a commitment for contempt by the superior court of record, the court exercising its jurisdiction

over a petition filed for habeas corpus would be competent to consider the legality of the said contempt notwithstanding the fact that the warrant of

commitment is general or unspeaking. Dealing with the arguments urged by Kenneth Douglas Hunt who had been commitment for contempt by

WynnParry J., Parker C.J. observed : ""It may be that the true view is, and I think the cases support it, that though this Court always has power to

inquire to inquire into the legality of the committal, it will not inquire whether the power has been properly exercised."" He, however, added that in

the case before him, he was quite satisfied that the application ought to fail on the merits. These observation tend to show that in exercising habeas

corpus jurisdiction, a court at Westminster has jurisdiction to inquire into the legality of the commitment even though the commitment has been

ordered by another superior court of record. If that be the true position, it cannot be assumed with certainty that Courts at Westminster would

today concede to the House of Commons the right to claim that its general warrants are unexaminable by them.

120. Even so, let us proceed on the basis that the relevant right claimed by the House of Commons is based either on the ground that as a part of

the High Court of Parliament, the House of Commons is a superior court of record and as such, a general warrant for commitment issued by it for

contempt is treated as conclusive by courts at Westminster Hall, or in course of time the right to claim a conclusive character for such a general

warrant became an incidental and integral part of the privilege itself. The question which immediately arises is : can this right be deemed to have

been conferred on the House in the present proceedings under the latter part of Art. 194(3) ?

121. Let us first take the basis relating to the status of the House of Commons as a Superior Court of Record. Can the House claim such a status

by any legal fiction introduced by Art. 194(3) ? In our opinion, the answer to this question cannot be in the affirmative. The previous legislative

history in this matter does not support the idea that our State Legislatures were superior Courts of Record under the Constitution Act of 1935.

Section 28 of the said Act which dealt with the privileges of the Federal Legislature is relevant on this point. S. 28(1) corresponds to Art. 194(3)

of the present Constitution. Section 28(2) provides that in other respects, the privileges of members of the Chambers shall be such as may from

time to time be defined by Act of the Federal Legislature and, until so defined, shall be such as were immediately before the establishment of the

Federation enjoyed by members of the Indian Legislature. It is not disputed that the members of the Indian Legislature could not have claimed the

status of being members of a superior Court of Record prior to the Act of 1935. Section 28(3) prescribes that nothing in any existing Indian Act,

and, notwithstanding anything in the foregoing provisions of this section, nothing in this Act, shall be construed as conferring, or empowering the

Federal Legislature to confer, on either Chamber or on both Chambers sitting together, or on any committee or officer of the Legislature, the status

of a Court, or any punitive or disciplinary powers other than a power to remove or exclude persons infringing the rules or standing orders, or

otherwise behaving in a disorderly manner. Section 28(4) is also relevant for our purpose. It provides that provision may be made by an Act of the

Federal Legislature for the punishment, on conviction before a Court, of persons who refuse to give evidence or produce documents before a

committee of a Chamber when duly required by the Chairman of the committee so to do. There can be no doubt that these provisions clearly

indicate that the Indian Legislature could not have claimed the power to punish for contempt committed outside the four-walls of its Legislative

Chamber. Section 71 of the same Act deals with the Provincial Legislatures and contains similar provisions in its clauses (2), (3) and (4).

122. After the Indian Independence Act, 1947 (10 & 11 Geo. VI, c. 20) was passed, this position was altered by the amendments made in the

Government of India Act, 1935 by various amendment orders. The result of the amendment orders including Third Amendment Order, 1948 was

that sub-sections (3) and (4) of section 28 of the said Act were deleted and sub-section (2) was amended. The effect of this amendment was that

the members of the Federal Chambers of Legislature could until their privileges were defined by Act of Federal Legislature claim the privileges

enjoyed by the members of the House of Commons which were in existence immediately before the establishment of the Federation. It is,

however, remarkable that the corresponding sub-sections (3) and (4) of section 71 were retained. The question as to where the result of the

deletion of sub-sections (3) and (4) and the amendment of sub-section (2) of s. 28 was to confer on the Federal Legislature the same status as that

of the House of Commons, does not call for our decision in the present Reference. Prima facie, it may conceivably appear that the conferment of

the privileges of the members of the House of Commons on the members of the Federal Legislature could not necessarily make the Federal

Legislature the House of Commons for all purposes; but that is a matter which we need not discuss and decide in the present proceedings. The

position with regard to the Provincial Legislatures at the relevant time is, however, absolutely clear and there would obviously be no scope for the

argument that at the time when the Constitution was passed the Provincial Legislature could claim the status of the House of Commons and as such

of a superior Court of Record. That is the constitutional background of Art. 194(3) insofar as the provincial Legislature are concerned. Considered

in the light of this background, it is difficult to accept the argument that the result of the provisions contained in the latter part of Art. 194(3) was

intended to be to confer on the State Legislatures in India the status of a superior Court of Record.

123. In this connection, it is essential to bear in mind the fact that the status of a superior Court of Record which was accorded to the House of

Commons, is based on historical facts to which we have already referred. It is a fact of English history that the Parliament was discharging judicial

functions in its early career. It is a fact of both historical and constitutional history in England that the House of Lords still continues to be the highest

Court of law in the country. It is a fact of constitutional history even today that both the Houses possess powers of impeachment and attainder. It is

obvious, we think, that these historical facts cannot be introduced in India by any legal fiction. Appropriate legislative provisions do occasionally

introduce legal fiction, but there is a limit to the power of law to introduce such fictions. Law can introduce fictions as to legal rights and obligations

and as to the retrospective operation of provisions made in that behalf; but legal fiction can hardly introduce historical facts from one country to

another.

124. Besides, in regard to the status of the superior Court of Record which has been accorded to the House of Commons, there is another part of

English history which it is necessary to remember. The House of Commons had to fight for its existence against the King and the House of Lords,

and the Judicature was regarded by the House of Commons as a creature of the King and the Judicature was obviously subordinate to the House

of Lords which was the main opponent of the House of Commons. This led to fierce struggle between the House of Commons on the one hand,

and the King and the House of Lords on the other. There is no such historical background in India and there can be no historical justification for

the basis on which the House of Commons struggled to deny the jurisdiction of the Court; that is another aspect of the matter which is relevant in

considering the question as to whether the House in the present case can claim the status of a superior Court of Record.

125. There is no doubt that the House has the power to punish for contempt committed outside its chamber, and from that point of view it may

claim one of the rights possessed by a Court of Record. A Court of Record, according to Jowitts Dictionary of English Law, is a court whereof the

acts and judicial proceedings are enrolled for a perpetual memory and testimony, and which has power to fine and imprison for contempt of its

authority. The House, and indeed all the Legislative Assemblies in India never discharged any judicial function and constitutional background does

not support the claim that they can be regarded as Courts of Record in any sense. If that be so, the very basis on which the English Courts agreed

to treat a general warrant issued by the House of Commons on the footing that it was a warrant issued by a superior Court of Record, is absent in

the present case, and so, it would be unreasonable to contend that the relevant power to claim a conclusive character for the general warrant which

the House of Commons, by agreement, is deemed to possess, is vested in the House. On this view of the matter, the claim made by the House

must be rejected.

126. Assuming, however, that the right claimed by the House can be treated as an integral part of the privileges of the House of Commons, the

question of consideration would be whether such a right has been conferred on the House by the latter part of Art. 194(3). On this alternative

hypothesis, it is necessary to consider whether this part of the privilege is consistent with the material provision of our Constitution. We have

already referred to Articles 32 and 226. Let us take Art. 32 because it emphatically brings out the significance of the fundamental right conferred

on the citizens of India to move this Court if their fundamental rights are contravened either by the Legislature or the Executive. Now, Art. 32

makes no exception in regard to any encroachment at all, and it would appear illogical to contend that even if the right claimed by the House may

contravene the fundamental rights of the citizen the aggrieved citizen cannot successfully move this Court under Art. 32. To the absolute

constitutional right conferred on the citizens by Art. 32 no exception can be made and no exception is intended to be made by the Constitution by

reference to any power or privilege vesting in the Legislatures of this country.

127. As we have already indicated we do not propose to enter into a general discussion as to the applicability of all the fundamental rights to the

cases where legislative powers and privileges can be exercised against any individual citizen of this country, and that we are dealing with this matter

on the footing that Art. 19(1)(a) does not apply and Art. 21 does. If an occasion arises, it may become necessary to consider whether Art. 22 can

be contravened by the exercise of the power or privilege under Art. 194(3). But, for the moment, we may consider Art. 20. If Art. 21 applies Art.

20 may conceivably apply, and the question may arise, if a citizen complains that his fundamental right had been contravened either under Art. 20

or Art. 21, can he or can he not move this Court under Art. 32? For the purpose of making the point which we are discussing, the applicability of

Art. 21 itself would be enough. If a citizen moves this Court and complains that his fundamental right under Art. 21 had been contravened, it would

plainly be the duty of this Court to examine the merits of the said contention, and that inevitably raises the question as to whether the personal

liberty of the citizen has been taken away according to the procedure established by law. In fact, this question was actually considered by this

Court in the case of Pundit Sharma [1959] Supp. 1 S.C.R. 806. It is true that the answer was made in favour of the legislature; but that is wholly

immaterial for the purpose of the present discussion. If in a given case, the allegation made by the citizen is that he has been deprived of his liberty

not in accordance with law, but for capricious or mala fide reasons, this Court will have to examine the validity of the said contention, and it would

be no answer in such a case to say that the warrant issued against the citizen is a general warrant and a general warrant must stop all further judicial

inquiry and scrutiny. In our opinion, therefore, the impact of the fundamental constitutional right conferred on Indian citizens by Art. 32 on the

construction of the latter part of Art. 194(3) is decisively against the view that a power or privilege can be claimed by the House though it may be

inconsistent with Art. 21. In this connection, it may be relevant to recall that the rules which the House has to make for regulating its procedure and

the conduct of its business have to be subject to the provisions of the Constitution under Art. 208(1).

128. Then, take the case of Art. 211 and see what its impact would be on the claim of the House with which we are dealing. If the claim of the

House is upheld, it means that the House can issue a general warrant against a Judge and no judicial scrutiny can be held in respect of the validity

of such a warrant. It would indeed be strange that the Judicature should be authorised to consider the validity of the legislative acts of our

Legislatures, but should be prevented from scrutinizing the validity of the action of the legislatures trespassing on the fundamental rights conferred

on the citizens. If the theory that the general warrant should be treated as conclusive is accepted, then, as we have already indicated, the basic

concept of judicial independence would be exposed to very grave jeopardy; and so the impact of Art. 211 on the interpretation of Art. 194(3) in

respect of this particular power is again decisively against the contention raised by the House.

129. If the power of the High Courts under Art. 226 and the authority of these Courts under Art. 32 are not subject to any exceptions, then it would

be futile to contend that a citizen cannot move the High Courts or this Court to invoke their jurisdiction even in cases where his fundamental rights

have been violated. The existence of judicial power in that behalf must necessarily and inevitably postulate the existence of a right in the citizen to

move the Court in that behalf; otherwise the power conferred on the High Courts and this Court would be rendered virtually meaningless. Let it not

be forgotten that the judicial power conferred on the High Courts and this Court is meant for the protection of the citizens' fundamental rights, and

so, in the existence of the said judicial power itself is necessarily involved the right of the citizen to appeal to the said power in a proper case.

130. In *In re Parliamentary Privilege Act, 1770* [1985] A.C. 331, the Privy Council was asked to consider whether the House of Commons

would be acting contrary to the Parliamentary Privilege Act, 1770, if it treated the issue of a writ against a Member of Parliament in respect of a

speech or proceeding by him in Parliament as a breach of its privileges. The said question had given rise to some doubt, and so, it was referred to

the Privy Council for its opinion. The opinion expressed by the Privy Council was in favour of Parliament. Confining its answer to the said limited

question, the Privy Council took the precaution of adding that ""they express no opinion whether the proceedings referred to in the introductory

paragraph were "a proceeding in Parliament", a question not discussed before them, nor on the question whether the mere issue of a writ would in

any circumstances be a breach of privilege."" ""In taking this course"", said Viscount Simonds who spoke for the Privy Council, ""they have been

mindful of the inalienable right of Her Majesty's subjects to have recourse to her courts of law for the remedy of their wrong and would not

prejudice the hearing of any cause in which a plaintiff sought relief."" The inalienable right to which Viscount Simonds referred is implicit in the

provisions of Art. 226 and Art. 32, and its existence is clearly inconsistent with the right claimed by the House that a general warrant should be

treated as conclusive in all courts of law; it would also be equally inconsistent with the claim made by the House that Keshav Singh has committed

contempt by moving the High Court under Art. 226.

131. In this connection, it would be interesting to refer to a resolution passed by the House of Lords in 1704. By this resolution, it was declared

that deterring electors from prosecuting actions in the ordinary courts of law, where they are deprived of their right of voting, and terrifying

attorneys, solicitors, counsellors, and serjeants-at-law, from soliciting, prosecuting and pleading in such cases, by voting their so doing to be a

breach of privilege of the House of Commons, is a manifest assuming of power to control the law, to hinder the course of justice, and subject the

property of Englishmen to the arbitrary votes of the House of Commons. This was in answer to the resolution passed by the House of Commons in

the same year indicating that the House would treat the conduct of any person in moving the court for appropriate reliefs in matters mentioned by

the resolution of the House as amounting to its contempt. These resolution and counter resolutions merely illustrate the fierce struggle which was

going on between the House of Commons and the House of Lords during those turbulent days; but the interesting part of this dispute is that if a

question had gone to the House of Lords in regard to the competence of the House of Commons to punish a man for invoking the jurisdiction of

the ordinary courts of law, the House of Lords would undoubtedly have rejected such claim, and that was the basic apprehension of the House of

Commons which was responsible of its refusal to recognise the jurisdiction of the courts which in the last analysis were subordinate to the House of

Lords.

132. Section 30 of the Advocates Act, 1961 (25 of 1961) confers on all Advocates the statutory right to practise in all courts including the

Supreme Court, before any tribunal or person legally authorised to take evidence, and before any other authority or person before whom such

advocate is by or under any law for the time being in force entitled to practice. Section 14 of the Bar Councils Act recognises a similar right. If a

citizen has the right to move the High Court or the Supreme Courts against the invasion of his fundamental rights, the statutory right of the advocate

to assist the citizen steps in and helps the enforcement of the fundamental rights of the citizen steps in and helps the enforcement of the fundamental

rights of the citizen. It is hardly necessary to emphasise that in the enforcement of fundamental rights guaranteed to the citizens the legal profession

pays a very important and vital role, and so, just as the right of the Judicature to deal with matters brought before them under Art. 226 or Art. 32

cannot be subjected to the powers and privileges of the House under Art. 194(3), so the rights of the citizens to move the Judicature and the rights

of the advocates to assist that process must remain uncontrolled by Article 194(3). That is one integrated scheme for enforcing the fundamental

rights and for sustaining the rule of law in this country. therefore, our conclusion is that the particular right which the House claims to be an integral

part of its power or privilege is inconsistent with the material provisions of the Constitution and cannot be deemed to have been included under the

latter part of Art. 194(3).

133. In this connection, we ought to add that there is no substance in the grievance made by Mr. Seervai that Keshav Singh acted illegally in

impleading the House to the habeas corpus petition filed by him before the Lucknow Bench. In our opinion, it can not be said that the House was

improperly joined by Keshav Singh, because it was open to him to join the House on the ground that his commitment was based on the order

passed by the House, and in that sense the House was responsible for, and had control over, his commitment (vide *The King v. The Earl of*

Crewe, *Ex parte Sekgome* [1910] 2 K.B. 576 and *The King v. Secretary of State for Home Affairs*, *Ex parte O'Brien* [1923] 2 K.B. 361.

Besides, the fact that Keshav Singh joined the House to his petition, can have no relevance or materiality in determining the main question of the

power of the House to take action against the Judges, the Advocate, and the party for their alleged contempt.

134. As we have indicated at the outset of this opinion, the crux of the matter is the construction of the latter part of Art. 194(3), and in the light of

the assistance which we must derive from the other relevant and material provisions of the Constitution, it is necessary to hold that the particular

power claimed by the House that its general warrants must be held to be conclusive, cannot be deemed to be the subject-matter of the latter part

of Art. 194(3). In this connection, we may incidentally observe that it is some what doubtful whether in power to issue a general inspecting warrant

claimed by the House is consistent with s. 554(2)(b) and s. 555 of the Code of Criminal Procedure. It appears that in England, general warrants

are issued in respect of commitment for contempt by superior courts of record, and the whole controversy on this point, therefore, rested on the

theory on the theory that the right to issue a general warrant which is recognised in respect of superior Courts of Record must be conceded to the

House of Commons, because as a part of the High Court of Parliament it is itself a superior Court of Record.

135. Before we part with this topic, there are two general considerations which we ought to advert. It has been urged before us by Mr. Seervai

that the right claimed by the House to issue a conclusive general warrant in respect of contempt is an essential right for the effective functioning of

the House itself, and he has asked us to deal with this matter from this point of view. It is true that this right appears to have been recognised by

courts in England by agreement or convention or by considerations of comity; but we think it is strictly not accurate to say that every democratic

legislature is armed with such a power. Take the case of the American Legislatures. Article 1, section 5 of the American Constitution does not

confer on the American Legislature such a power at all. It provides that each House shall be the judge of the Elections, Returns and Qualifications

of its own Members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may

be authorised to compel the attendance of absent Members, in such manner, and under such penalties as each House may provide. Each House

may determine the Rules of its proceedings, punish its Members for disorderly behavior, and, with the concurrence of two-thirds, expel a Member.

Contempt committed outside the four-walls of the legislative chamber by a citizen who is not a Member of the House seems to be outside the

jurisdiction of the American Legislature. As Willis has observed, punishment for contempt is clearly a judicial function; yet in the United States,

Congress may exercise the power to punish for contempt as it relates to keeping order among its own members, to compelling their attendance, to

protecting from assaults or disturbances by others (except by slander and libel), to determining election cases and impeachment charges, and to

exact information about other departments in aid of the legislative function (Willis, Constitutional Law, p. 145). Nobody has ever suggested that

the American Congress has not been functioning effectively because it has not been armed with the particular power claimed by the House before

us.

136. In India, there are several State Legislatures in addition to the Houses of Parliament. If the power claimed by the House before us is

conceded, it is not difficult to imagine that its exercise may lead to anomalous situations. If by virtue of the absolute freedom of speech conferred

on the Members of the Legislatures, a Member of the Legislature makes a speech in his legislative chamber which another legislative chamber

regards as amounting to its contempt, what would be the position? The latter legislative chamber can issue a general warrant and punish the

Member alleged to be in contempt, and a free exercise of such power may lead to very embarrassing situations. That is one reason why the

Constitution-makers thought it necessary that the Legislatures should in due course enact laws in respect of their powers, privileges and immunities,

because they knew that when satchels are made, they would be open to examination by the courts in India. Pending the making of such laws,

powers, privileges and immunities were conferred by the latter part of Art. 194(3). As we have already emphasised, the construction of this part of

the particle is within the jurisdiction of this Court, and in construing this part, we have to bear in mind the other relevant and material provisions of

the Constitution, Mr. Seervai no doubt invited our attention to the fact that the Committees of Privileges of the Lok Sabha and the Council of

States have adopted a Report on May 22, 1954 with a view to avoid any embarrassing or anomalous situations resulting from the exercise of the

legislative powers and privileges against the members of the respective bodies, and we were told that similar resolutions have been adopted by

almost all the Legislatures in India. But these are matters of agreement, not matters of law, and it is not difficult to imagine that if the same political

party is not in power in all the States, these agreements themselves may not prove to be absolutely effective. Apart from this aspect of the matter, in

construing the relevant clause of Art. 194(3), these agreements can play no significant part.

137. In the course of his arguments, Mr. Seervai laid considerable emphasis on the fact that in habeas corpus proceedings, the High Court had no

jurisdiction to grant interim bail. It may be conceded that in England it appears to be recognised that in regard to habeas corpus proceedings

commenced against orders of commitment passed by the House of Commons on the ground of contempt, bail is not granted by courts. As a

matter of course, during the last century and more in such habeas corpus proceeding returns are made according to law by the House of

Commons, but "the general rule is that the parties who stand committed for contempt cannot be admitted to bail." But it is difficult to accept the

argument that in India the position is exactly the same in this matter. If Art. 226 confers jurisdiction on the Court to deal with the validity of the

order of commitment even though the commitment has been ordered by the House, how can it be said that the Court has no jurisdiction to make

an interim order in such proceedings ? As has been held by this Court in 278530, an interim relief can be granted only in aid of, and as ancillary to,

the main relief which may be available to the party on final determination of his rights in a suit or proceeding. Indeed, as Maxwell has observed,

when an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary

to its execution (Maxwell on Interpretation of Statutes, 11th ed., p.350). That being so, the argument based on the relevant provisions of the

Criminal Procedure Code and the decision of the Privy Council in *Lala Jai Ram Das and Others v. King Emperor* (72 I.A. 120), is of no assistance.

138. We ought to make it clear that we are dealing with the question of jurisdiction and are not concerned with the propriety or reasonableness of

the exercise of such jurisdiction. Besides, in the case of a superior Court of Record, it is for the court to consider whether any matter falls within its

own jurisdiction or not. Unlike a court of limited jurisdiction, the superior Court is entitled to determine for itself questions about its own

jurisdiction. "Prima facie", says Halsbury, "no matter is deemed to be beyond the jurisdiction of a superior court unless it is expressly shown to be

so, while nothing is within the jurisdiction of an inferior court unless it is expressly shown on the face of the proceedings that the particular matter is

within the cognizance of the particular court." (Halsbury's Laws of England, Vol., p.349) We cannot, therefore, accede to the proposition that in

passing the order for interim bail, the High Court can be said to have exceeded its jurisdiction with the result that the order in question is null and

void. Besides, the validity of the order has no relation whatever with the question as to whether in passing the order, the Judges have committed

contempt of the House.

139. There is yet one more aspect of this matter to which we may incidentally refer. We have already noticed that in the present case, when the

habeas corpus petition was presented before the Lucknow Bench at 2 P.M. on March 19, 1964, both parties appeared by their respective

Advocates and agreed that the application should be taken up at 3 P.M. the same day, and yet the House which was impleaded to the writ petition

and the other respondents to it for whom Mr. Kapur had appeared at the earlier stage, were absent at that time. That is how the Court directed

that notice on the petition should be issued to the respondents and released the petitioner on bail subject to the terms and conditions which have

already been mentioned; and it is this latter order of bail which has led to the subsequent developments. In other words, before taking the

precipitate action of issuing warrants against the Judges of the Lucknow Bench, the House did not conform to the uniform practice which the

House of Commons has followed for more than a century past and did not instruct its lawyer either to file a return or to ask for time to do so, and

to request that the Court should stay its hands until the return was filed. It is not disputed that whenever commitment orders passed by the House

of Commons are challenged in England before the Courts at Westminster, the House invariably makes a return and if the warrant issued by it is

general and unspeaking, it is so stated in the return and the warrant is produced. If this course had been adopted in the present proceedings, it

could have been said that the House in exercising its powers and privileges, conformed to the pattern which, by convention, the House of Commons

has invariably followed in England during the last century and more; but that was not done; and as soon as the House knew that an order granting

bail had been passed, it proceeded to consider whether the Judges themselves were not in contempt. On these narrow facts, it would be possible

to take the view that no question of contempt committed by the Judges arises. In view of the fact that Mr. Kapur had appeared before the Court at

2 P.M. on behalf of all the respondents and had agreed that the matter should be taken up at 3 P.M., it was his duty to have appeared at 3 P.M.

and to have either filed a return or to have asked for time to do so on behalf of the House. If the House did not instruct Mr. Kapur to take this step

and the Court had no knowledge as to why Mr. Kapur did not appear, it is hardly fair to blame the Court for having proceeded to issue notice on

the petition and granted bail to the petitioner. In these proceedings it is not necessary for us to consider what happened between Mr. Kapur and

the House and why Mr. Kapur did not appear at 3 P.M. to represent the House and the other respondents. The failure of Mr. Kapur to appear

before the Court at 3 P.M. has introduced an unfortunate element in the proceedings before the Court and is partly responsibly for the order

passed by the Court. One fact is clear, and that is that at the time when the Court issued native and released the petitioner on bail, it had no

knowledge that the warrant under which the petitioner had been sentenced was a general warrant and no suggestion was made to the Court that in

the cases of such a warrant the Court had no authority to make any order of bail. This fact cannot be ignored in dealing with the case of the House

that the Judges committed contempt in releasing the petitioner on bail.

140. But we ought to make it clear that we do not propose to base our answers on this narrow view of the matter, because questions 3 and 5 are

broad enough and they need answers on a correspondingly broad basis. Besides, the material questions arising from this broader aspect have been

fully argued before us, and it is plain that in making the present Reference, the President desires that we should render our answers to all the

questions and not exclude from our consideration any relevant aspect on the ground that these aspect would not strictly arises on the special facts

which have happened so far in the present proceedings.

141. In conclusion, we ought to add that throughout our discussion we have consistently attempted to make it clear that the main point which we

are discussing is the right of the House to claim that a general warrant issued by it in respect of its contempt alleged to have been committed by a

citizen who is not a Member of the House outside the four-walls of the House, is conclusive, for it is on that claim that the House has chosen to

take the view that the Judges, the Advocate, and the party have committed contempt by reference to the conduct in the habeas corpus petition

pending before the Lucknow Bench of the Allahabad High Court. Since we have held that in the present case no contempt was committed either

by the Judges, or the Advocate, or the party respectively, it follows that it was open to the High Court of Allahabad, and indeed it was its duty, to

entertain the petitions filed before it by the two Judges and by the Advocate, and it was within its jurisdiction to pass the interim orders prohibiting

the further execution of the impugned orders passed by the House.

142. Before we part with this topic, we would like to refer to one aspects of the question relating to the exercise of power to punish for contempt.

So far as the courts are concerned, Judges always keep in mind the warning addressed to them by Lord Atkin in *Andre Paul v. Attorney-General*

of Trinidad AIR 1936 P.C. 141. Said Lord Atkin "Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful even

though outspoken comments of ordinary men." We ought never to forget that the power to punish for contempt large as it is, must always be

exercised cautiously, wisely and with circumspection. Frequent or indiscriminate use of this power in anger of irritation would not help to sustain the

dignity or status of the court, but may sometimes affect it adversely. Wise Judges never forget that the best way to sustain the dignity and status of

their office is to deserve respect from the public at large by the quality of their judgments, the fearlessness, fairness and objectivity of their

approach, and by the restraint, dignity and decorum which they observe in their judicial conduct. We venture to think that what is true of the

Judicature is equally true of the Legislatures.

143. Having thus discussed all the relevant points argued before us and recorded our conclusions on them, we are now in a position to render our

answers to the five questions referred to us the President. Our answers are :-

(1) On the facts and circumstances of the case, it was competent for the Lucknow Bench of the High Court of Uttar Pradesh, consisting of N. U.

Beg and G. D. Sahgal JJ., to entertain and deal with the petition of Keshav Singh challenging the legality of the sentence of imprisonment imposed

upon him by the Legislative Assembly of Uttar Pradesh for its contempt and for infringement of its privileges and to pass orders releasing Keshav

Singh on bail pending the disposal of his said petition.

(2) On the facts and circumstances of the case, Keshav Singh by causing the petition to be presented on his behalf to the High Court of Uttar

Pradesh as aforesaid, Mr. B. Solomon Advocate, by presenting the said petition, and the said two Hon^{ble} Judges by entertaining and dealing with

the said petition and ordering the release of Keshav Singh on bail pending disposal of the said petition, did not commit contempt of the Legislative

Assembly of Uttar Pradesh.

(3) On the facts and circumstances of the case, it was not competent for the Legislative Assembly of Uttar Pradesh to direct the production of the

said two Hon^{ble} Judges and Mr. B. Solomon Advocate, before it in custody or to call for their explanation for its contempt.

(4) On the facts and circumstances of the case, it was competent for the Full Bench of the High Court of Uttar Pradesh to entertain and deal with

the petitions of the said two Hon^{ble} Judges and Mr. B. Solomon Advocate, and to pass interim orders restraining the Speaker of the Legislative

Assembly of Uttar Pradesh and other respondents to the said Legislative Assembly; and

(5) In rendering our answer to this question which is very broadly worded, we ought to preface our answer with the observation that the answer is

confined to cases in relation to contempt alleged to have been committed by a citizen who is not a member of the House outside the four-walls of

the legislative chamber. A judge of a High Court who entertains or deals with a petitions challenging any order or decision of a Legislature imposing

any penalty on the petitioner or issuing any process against the petitioner for its contempt, or for infringement of its privileges and immunities, or

who passes any order on such petition, does not commit contempt of the said Legislature; and the said Legislature is not competent to take

proceedings against such a Judge in the exercise and enforcement of its powers, privileges and immunities. In this answer, we have deliberately

omitted reference to infringement of privileges and immunities of the House which may include privileges and immunities other than those with which

we are concerned in the present Reference.

Sarkar, J.

144. This matter has come to us on a reference made by the President under Art. 143 of the Constitution. The occasion for the reference was a

sharp conflict that arose and still exists between the Vidhan Sabha (Legislative Assembly) of the Uttar Pradesh State Legislature, hereinafter

referred to as the Assembly, and the High Court of that State. That conflict arose because the High Court had ordered the release on bail of a

person whom the Assembly had committed to prison for contempt. The Assembly considered that the action of the Judges making the order and

of the lawyer concerned in moving the High Court amounted to contempt and started proceedings against them on that basis, and the High Court,

thereupon, issued orders restraining the Assembly and its officers from taking stamps in implementation of the view that the action of the Judges

and the lawyer and also the person of whose behalf the High Court had been moved amounted to contempt.

145. A very large number of parties appeared on the reference and this was only natural because of the public importance of the question involved.

These parties were divided into two broad groups, one supporting the Assembly and the other, the High Court.

146. I shall now state the actual facts which gave rise to the conflict. The Assembly had passed a resolution that a reprimand be administered to

one Keshav Singh for having committed contempt of the Assembly by publishing a certain pamphlet libelling one of its members. No question as to

the legality of this resolution arises in this case and we are concerned only with what followed. Keshav Singh who was a resident of Gorakhpur, in

spite of being repeatedly required to do so, failed to appear before the Assembly which held its sittings in Lucknow, to receive the reprimand

alleging inability to procure money to pay the fare for the necessary railway journey. He was thereupon brought under the custody of the Marshal

of the Assembly in execution of a warrant issued by the Speaker in that behalf and produced at the Bar of the House on March 14, 1964. He was

asked his name by the Speaker repeatedly but he would not answer any question at all. He stood with his back to the Speaker showing great

disrespect to the House and would not turn round to face the Speaker though asked to do so. The reprimand having been administered, the

Speaker brought to the notice of the Assembly a letter dated March 11, 1964, written by Keshav Singh to him, in which he stated that he

protested against the sentence of reprimand and had absolutely no hesitation in calling a corrupt man corrupt, adding that the contents of his

pamphlet were correct and that a brutal attack had been made on democracy by issuing the ""Nadirshahi Firman"" (warrant) upon him. Keshav

Singh admitted having written that letter. The Assembly thereupon passed a resolution that ""Keshav Singh be sentenced to imprisonment for seven

days for having written a letter worded in language which constitutes contempt of the House and his misbehavior in view of the House."" A general

warrant was issued to the Marshal of the House and the Superintendent, District Jail, Lucknow which stated, ""Whereas the Assembly has

decided that Shri Keshav Singh be sentenced to simple imprisonment for seven days for committing the offence of the contempt of the

Assembly, it is accordingly ordered that Keshav Singh be detained in the District Jail, Lucknow for a period of seven days."" The warrant did not

state the facts which constituted the contempt. Keshav Singh was thereupon taken to the Jail on the same day and kept imprisoned there. On March

19, 1964, B. Solomon, an advocate, presented a petition to a Bench of the High Court of Uttar Pradesh then constituted by Beg and Sahgal JJ.,

which sat in Lucknow, for a writ of habeas corpus for the release of Keshav Singh alleging that he had been deprived of his personal liberty

without any authority of law and that this detention was mala fide. This Bench has been referred to as the Lucknow Bench. This petition was

treated as having been made under Art. 226 of the Constitution and s. 491 of the Code of Criminal Procedure. On the same date the learned

Judges made an order that Keshav Singh be released on bail and that the petition be admitted and notice be issued to the respondents named in it.

Keshav Singh was promptly released on bail. This order interfered with the sentence of imprisonment passed by the House by permitting Keshav

Singh to be released before he had served the full term of his sentence. On March 21, 1964, the Assembly passed a resolution stating that Beg J.,

B. Solomon and Keshav Singh had committed contempt to of the House and that Keshav Singh be immediately taken into custody and kept

confined in the District Jail for the remaining term of his imprisonment and that Beg J., Sahgal J. and B. Solomon be brought in custody before the

House, and also that Keshav Singh be brought before the House after he had served the remainder of his sentence. Warrants were issued on

March 23, 1964 to the Marshal of the House and the Commissioner of Lucknow for carrying out the terms of the resolution. On the same day,

Sahgal J. moved a petition under Art. 226 of the Constitution in the High Court of Uttar Pradesh at Allahabad for a writ of certiorari quashing the

resolution of the Assembly of March 21, 1964 and for other necessary writs restraining the Speaker and the Marshal of the Assembly and the

State Government from implementing that resolution and the execution of the orders issued pursuant to the resolution. The petition however did not

mention that he warrants had been issued. That may have been because the warrants were issued after the petition had been presented, or the

issue of the warrant was not known to the petitioner. This petition was heard by all the Judges of the High Court excepting Sahgal and Beg JJ. and

they passed an order on the same day directing that the implementation of the resolution be stayed. Similar petitions were presented by B. Solomon

and Beg J. and also by other parties, including the Avadh Bar Association, and on some of them similar orders, as on the petition of Sahgal J.,

appear to have been made. On March 25, 1964, the Assembly recorded an observation that by its resolution of March 21, 1964 it was not its

intention to decide that Beg J., Sahgal J., B. Solomon and Keshav Singh had committed contempt of the House without giving them a hearing, but

it had required their position and it resolved that the question may be decided after giving an opportunity to the above-named persons according to

the rules to explain their conduct. Pursuant to this resolution, notices were issued on March 26, 1964 to Beg J., Sahgal J. and B. Solomon

informing them that ""they may appear before the Committee at 10 A.M. on April 6, 1964 to make their submissions"". The warrants issued on

March 23, 1964, which had never been executed, were withdrawn in view of these notices. The present reference was made on March 26, 1964

and thereupon the Assembly withdrew the notices of March 26, 1964 stating that in view of the reference the two Judges and Solomon and

Keshav Singh need not appear before the Privilege Committee as required.

147. These facts are set out in the recitals contained in the order of reference. There is however one dispute as to the statement of facts in the

recitals. It is there stated that the Assembly resolved on March 21, 1964 that the two Judges, Solomon and Keshav Singh ""committed, by their

actions aforesaid, contempt of the House."" The words ""actions aforesaid"" referred to the presentation of the petition of Keshav Singh of March 19,

1964 and the order made thereon. It is pointed out on behalf of the Assembly that the resolution does not say what constituted the contempt. This

contention is correct.

148. The main question in this reference is whether the Assembly has the privilege of committing a person for contempt by a general warrant, that

is, without stating the facts which constituted the contempt, and if it does so, have the courts of law the power to examine the legality of such a

committal? In other words, if there is such a privilege, does it take precedence over the fundamental rights of the detained citizen. It is said on

behalf of the Assembly that it has such a privilege and the interference by the court in the present case was without jurisdiction. The question is then

of the privilege of the Assembly, for if it does not possess the necessary privilege, it is not disputed, that what the High Court has done in this case

would for the present purposes be unexceptionable.

149. First then as to the privileges of the Assembly. The Assembly relies for purpose on clause (3) of Art. 194 of the Constitution. The first three

clauses of that article may at this stage be set out.

150. Art. 194(1) Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of the Legislature,

there shall be freedom of speech in the Legislature of every State.

(2) No member of the Legislature of a State shall be liable to any proceedings in any Court in respect of anything said or any vote given by him in

the Legislature or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of a House of such

a Legislature of any report, paper, votes or proceedings.

(3) In other respects, the powers, privileges and immunities of a House of the Legislature of a State, and of the members and the committees of a

House of such Legislature, shall be such as may from time to time be defined by the Legislature by law, and, until so defined, shall be those of the

House of Commons of the Parliament of the United Kingdom, and of its members and committees, at the commencement of this Constitution.

151. Article 105 contains identical provisions in relation to the Central Legislature. It is not in dispute that the Uttar Pradesh Legislature has not

made any law defining the powers, privileges and immunities of its two Houses. The Assembly, therefore, claims that it has those privileges which

the House of Commons in England had on January 25, 1950.

152. I would like at this stage to say a few general words about ""powers, privileges and immunities"" of the House of Commons or its members.

First I wish to note that it is not necessary for our purposes to make a distinction between ""privileges"", ""powers"" and ""immunities"". They are no

doubt different in the matter of their respective contents but perhaps in no otherwise. Thus the right of the House to have absolute control of its

internal proceedings may be considered as its privilege, its right to punish one for contempt may be more properly described as its power, while

the right that no member shall be liable for anything said in the sake of convenience, describe them all as ""privileges"". Next I note that this case is

concerned with privileges of the House of Commons alone, and not with those of its members and its committees. I stress however that the

privileges of the latter two are in no respect different from those of the former except as to their contents.

153. The nature of the privileges of the House of Commons can be best discussed by referring to May's Parliamentary Practice, which is an

acknowledged work of authority on matters concerning the English Parliament. It may help to observe here that for a long time now there is no

dispute as to the nature of the recognised privileges of the Commons.

154. I start to explain the nature of the privileges by pointing out the distinction between them and the functions of the House. Thus the financial

powers of the House of Commons to initiate taxation legislation is often described as its privilege. This, however, is not the kind of privilege of the

House of Commons to which clause (3) of Art. 194 refers. Privileges of the House of Commons have a technical meaning in English Parliamentary

Law and the article uses the word in that sense only. That technical sense has been described in these words : "certain fundamental rights of each

House which are generally accepted as necessary for the exercise of its constitutional functions." (May's Parliamentary Practice, 16th ed. p. 42) A

point I would like to stress now is that it is of the essence of the nature of the privileges that they are ancillary to the essence of the House of

Commons. Another thing which I wish to observe at this stage is that "[s]ome privileges rest solely upon the law and custom of Parliament, while

others have been defined by statute. Upon these grounds alone all privileges whatever are founded" (Ibid, p.44). In this case we shall be

concerned with the former kind of privilege only. The point to note is that this variety of privilege derives its authority from the law and custom of

Parliament. This law has been given the name of Lex Parliamenti. It owes its origin to the custom of parliament. It is, therefore, different from the

common law of England which, though also based on custom, is based on a separate set of custom, namely, that which prevails in the rest of the

realm. This difference in the origin had given rise to serious disputes between Parliament and the courts of law but they have been settled there for

many years now and except a dispute as to theory, the recurrence of any practical dispute is not considered a possibility. So Lord Coleridge C.J.

said in *Bradlaugh v. Gossett* (1884) L.R. 12 Q.B.D. 271.

Whether in all cases and under all circumstances the Houses are the sole judges of their own privileges, in the sense that a resolution of either

House on the subject has the same effect for a court of law as an Act of Parliament, is a question which it is not now necessary to determine. No

doubt, to allow any review of parliamentary privilege by a court of law may lead, has led, to very grave complications, and might in many

supposable cases end in the privileges of the Commons being determined by the Lords. But, to hold the resolutions of either House absolutely

beyond inquiry in a court of law may land us in conclusions not free from grave complications too. It is enough for me to say that it seems to me

that in theory the question is extremely hard to solve; in practice it is not very important, and at any rate does not now arise.

155. This passage should suffice to illustrate the nature of the dispute. It will not be profitable at all, and indeed I think it will be "mischievous", to

enter upon a discussion of that dispute for it will only serve to make turbid, by raking up impurities which have settled down, a stream which has

run clear now for years. Furthermore that dispute can never arise in this country for here it is undoubtedly for the courts to interpret the

Constitution and, therefore, Art. 194(3). It follows that when a question arise in this country under that article as to whether the House of

Commons possessed a particular privilege at the commencement of the Constitution, that question must be settled, and settled only, by the courts

of law. There is no scope of the dreaded ""dualism"" appearing here, that is, courts entering into a controversy with a House of a Legislature as to

what its privileges are. I think what I have said should suffice to explain the nature of the privileges for the purposes of the present reference and I

will now proceed to discuss the privileges of the Assembly that are in question in this case, using that word in the sense of rights ancillary to the

main function of the legislature.

156. The privilege which I take up first is the power to commit for contempt. It is not disputed that the House of Commons has this power. All the

decided cases and text-books speak of such power. ""The power of commitment is truly described as the "keystone of parliamentary privilege"....

without it the privileges of Parliament could not have become self-subsistent, but, if they had not lapsed, would have survived on sufferance."" (May,

p. 90) In *Burdett v. Abbott* 104 E.R. 501 Lord Ellenborough C.J. observed,

Could it be expected that the Speaker with his mace should be under the necessity of going before a grand jury to prefer a bill of indictment

for the insult offered to the House ? They certainly must have the power of self-vindication and self-protection in their own hands

157. The possession of this power by the House of Commons is, therefore, undoubted.

158. It would help to appreciate the nature of the power to commit for contempt to compare it with breach of privilege which itself may amount to

contempt. Thus the publication on the proceedings of the House of Commons against its orders is a breach of its privilege and amounts to

contempt. All contempts, however, are not breaches of privilege. Offences against the dignity or authority of the House though called ""breaches of

privilege"" are more properly distinguished as contempts. Committing to prison for contempts is itself a privilege of the House of Commons whether

the contempt is committed by a direct breach of its privilege or by offending its dignity or authority. (May, p.43) ""The functions, privileges and

disciplinary powers of a legislative body are thus closely connected. The privileges are the necessary complement of the functions, and the

disciplinary powers of the privileges."" (Ibid.) I may add that it is not in dispute that power to commit for contempt may be exercised not only

against a member of the House but against an outsider as well. (Ibid., p. 91)

159. It was contended on behalf of the High Court that the power of the House of Commons to commit for contempt was not conferred by clause

(3) of Art. 194 on the Houses of a State Legislature because our Constitution has to be read along with its basic scheme providing for a division of

power and the power of commit to prison for contempt being in essence a judicial power, can under our Constitution be possessed only by a

judicial body, namely, the courts and not by a legislative body like the Assembly. It was, therefore contended that Art. 194(3) could not be read as

conferring judicial powers possessed by the House of Commons in England as one of its privileges on a legislative body and so the Assembly did

not possess it.

160. This contention of the High Court is, in my view, completely without foundation; both principle and authority are against it. This Court has on

earlier occasions observed that the principle of separation of powers is not an essential part of our Constitution : see for example 281647 . Again

the Constitution is of course supreme and even if it was based on the principle of separation of powers, there was nothing to prevent the

Constitution-makers, if they so liked, from conferring judicial powers on a legislative body. If they did so, it could not be said that the provision

concerning it was bad as our Constitution was based on a division of powers. Such a contention would of course be absurd. The only question,

therefore, is whether our Constitution-makers have conferred the power to commit on the Legislatures. The question is not whether they had the

power to do so, for there was no limit to their powers. What the Constitution-makers had done can, however, be ascertained only from the words

used by them in the Constitution that they made. If those words are plain, effect must be given to them irrespective of whether our Constitution is

based on a division of power or not. That takes me to the language used in clause (3) of Art. 194. The words there appearing are ""the powers,

privileges and immunities of a House ... shall be those the House of Commons"". I cannot imagine more plain language than this. That language can

only have one meaning and that is that it was intended to confer on the State Legislatures the powers, privileges and immunities which the House of

Commons in England had. There is no occasion here for astuteness in denying words their plain meaning by professing allegiance to a supposed

theory of division of powers. So much as to the principle regarding the application of the theory of division of powers.

161. This question is further completely concluded by the decision of this Court in Pt. M. S. M. Sharma v. Shri Sri Krishna Sinha [1959] Supp. 1

S.C.R. 806 I will have to refer to this case in some detail later. There Das C.J., delivered the majority judgment of the constitution bench consisting

of five Judges and Subba Rao J. delivered his own dissenting opinion. Das C.J., proceeded on the basis that the Houses of a State Legislature had

the power to commit for contempt. It was, therefore, held that there was nothing in our Constitution to prevent a legislative body from possessing

judicial powers. On this point Subba Rao J. expressed no dissent. Further, the Judicial Committee in England has in two cases held that under

provisions, substantially similar to those of Art. 194(3) of our Constitution, the power of the House of Commons to commit for contempt had been

conferred on certain legislative bodies of some of the British Colonies. In the *Speaker of the Legislative Assembly of Victoria v. Glass* (1869) 3

L.R.P.C. 560 it was held that a statute stating, ""The Legislative Council of Victoria shall hold, enjoy exercise such and the like privileges,

immunities and powers as were held, enjoyed and exercised by the Commons Houses of the Legislature of the Australian Colony of Victoria

the judicial power to commit for contempt. In *Queen v. Richards* 92 C.L.R. 157 it was held that s. 49 of the Commonwealth of Australia

Constitution Act, 1901 which provided that ""the powers, privileges and immunities of the Senate and the House of Representatives ... shall be such

as are declared by the Parliament, and until declared, shall be those of the Commons House of Parliament of the United Kingdom ..."", conferred

on the Houses judicial powers of committing a person to prison for contempt. It was observed by Dixon C.J.

This is not the occasion to discuss the historical grounds upon which these powers and privileges attached to the House of Commons. It is

sufficient to say that they were regarded by many authorities as proper incidents of the Legislative function, notwithstanding the fact that considered

more theoretically - perhaps one might even say, scientifically - they belong to the judicial sphere. But our decision is based upon the separation of

powers is not a sufficient reason for giving to these words, which appear to us to be so clear, a restrictive or secondary meaning which they do not

properly bear."" 92 C.L.R. 157

162. The similarity in the language of the provisions in the Australian Constitution and our Constitution is striking. It was said however that they

were not the same for under s. 49 the Australian Houses might by resolution declare the privileges whereas in our case the privileges had to be

defined by law and that in Australia there were no fundamental rights. I confess I do not follow this argument at all. The question is not how the

privileges are declared in Australia or what effect fundamental rights have on privileges, but as to the meaning of the words which in the two

statutes are identical. In *Richard's case* 92 C.L.R. 157 an application was made to the Judicial Committee for leave to appeal from the judgment

of Dixon C.J. but such leave was refused, Viscount Simonds observing that the judgment of the Australian High Court ""is unimpeachable"" : *Queen*

v. Richards 92 C.L.R. 157. Reference may also be made to *Fielding v. Thomas* [1896] A.C. 600 for the interpretation of a similar provision

conferring the privileges of the Commons on the Legislature of Nova Scotia in Canada. It would, therefore, appear that Art. 194(3) conferred on

the Assembly the power to commit for contempt and it possessed that power.

163. The next question is as to the privilege to commit by a general warrant. There is no dispute in England that if the House of Commons commits

by general warrant without stating the facts which constitute the contempt, then the courts will not review that order (See *Burdett v. Abbot* 3 E.R.

1289; May's Parliamentary Practice 16th ed. p. 173). It was however said on behalf of the High Court that this power of the English House of

Commons was not one of its privileges but it was possessed by that House because it was a superior court and, therefore, that power, not being a

privilege, has not been conferred on the State Legislatures by Art. 194(3) of our Constitution. It is not claimed by the Assembly that it is a superior

court and has, therefore, a power to commit for contempt by a general warrant. I would find nothing to justify such a claim if it had been made.

This takes me to the question, is the power to commit by a general warrant one of the privileges of the House of Commons, or, is it something

which under the common law of England that House possessed because it was a superior court ?

164. I find no authority to support the contention that the power to commit by a general warrant with the consequent deprivation of the jurisdiction

of the Courts of law in respect of that committal is something which the House of Commons had because it was a superior court. First, I do not

think that the House of Commons was itself ever a court. The history of that House does not support such a contention. Before proceeding further

I think it necessary to observe that we are concerned with the privileges of the House of Commons as a separate body though no doubt a

constituent part of the British Parliament which consists also of the King and the House of Lords. The privileges however with which we are

concerned are those which the House of Commons claims for itself alone as an independent body and as apart from those possessed by the

Houses of Lords. Indeed it is clear that the privileges of the two Houses are not the same : May Ch. III. It may be that in the early days of English

history the Parliament was a court. The House of Commons, however, does not seem to have been a part of this Court. In medieval times the legal

conception was that the King was the source of all things; justice was considered to flow from him and, therefore, the court of justice was attached

to the King. The King's Court thus was a court of law and that is the origin of what is called "the High Court of Parliament". The history of the

High Court of Parliament has been summarised in Potter's outlines of English Legal History (1958 ed.) and may be set out as follows : The King's

Council, under its older title of Curia Regis, was the mother of the Common law courts, but still retained some judicial functions even after the

common law courts had been well-established. (p. 78). Later however in the 14th and 15th centuries it came to hold that appeals from the King's

Bench lay to the Parliament and not to the Council. But Parliament had a great deal of work to do and could find little time for hearing petitions or

even for hearing writs of Error from the King's Bench and this jurisdiction fell into abeyance in the 15th century. It would appear, however, that of

this Parliament, Commons were no part. In 1485 it was held by all the Judges that the jurisdiction in Error belonged exclusively to the House of

Lords and not to the whole Parliament. Professor Holdsworth states in explanation of this fact that it was not quite forgotten that the jurisdiction

was to the King and his Council in Parliament whereas the Commons were never part of his Council, the King in his Council in Parliament meaning

only the King and the House of Lords; p. 95. It is also interesting to point out that when the Commons deliberated apart, they sat in the chapter-

house or the refectory of the Abbot of West-minister; and they continued their sittings in that place after their final separation; May p. 12. The

separation referred to is the separation between the House of Lords and the House of Commons. It may also be pointed out that when it is said

that laws in England are made by the King in Parliament, what happens is that the Commons go to the Bar of the Houses of Lords where the King

either in person, or through someone holding a commission from him, assents to an Act. All this would show that the House of Commons when it

sits as a separate body it does not sit in Parliament. So sitting it is not the High Court of Parliament. I wish here to emphasize that we are in this case

concerned with the privileges of the House of Commons functioning as a separate body, that is, not sitting in parliament. May observes at p. 90,

Whether the House of Commons be, in law, a court of record, it would be difficult determine :"" In Anson's Law of the Constitution, 5th ed. Vol.

1 at p. 197, it has been stated that ""Whether or not the House of Commons is a court of record, not only has it the same power of protecting itself

from insult by commitment for contempt, but the Superior Courts of Law have dealt with it in this matter as they would with one another, and have

accepted as conclusive its statement that a contempt has been committed, without asking what that contempt may have been."" I think in this state

of the authorises it would at least be hazardous to hold that the House of Commons was a court of record. If it was not, it cannot be said to have

possessed the power to commit for its contempt by a general warrant as a court of record.

165. I now proceed to state how this right of the House of Commons to commit by a general warrant has been dealt with by authoritative textbook

writers in England. At p. 173, after having discussed the tussle between the Commons and the Courts in regard to the privileges of the former and

having stated that in theory there is no way of resolving the real point at issue should a conflict between the two arise. May observes, ""In practice

however there is much more agreement on the nature and principles of privilege than the deadlock on the question of jurisdiction would lead one to

expect."" He then adds, ""The courts admit :- (3) that the control of each House, over its internal proceedings is absolute and cannot be interfered

with by the courts. (4) That a committal for contempt by either House is in practice within its exclusive jurisdiction, since the facts constituting the

alleged contempt need not be stated on the warrant of committal."" So May treats the right of the House of Commons to commit by a general

warrant as one of its privileges and not something to which it is entitled under the common law as of right as a Court of Record. In Cases on

Constitutional Law by Keir and Lawson, (4th ed.) p. 126, it is stated that among the undoubted privileges of the House of Commons is "the power

of executing decisions on matters of privilege by committing members of Parliament, or any other individuals, to imprisonment for contempt of the

House. This is exemplified in the case of Sheriff of Middlesex." That is a case where the House of Commons had committed the Sheriff of

Middlesex for contempt by a general warrant, the Sheriff having in breach of the orders of the House carried out an order of the King's Bench

Division, which he was bound to do and that Court held that it had no jurisdiction to go into the question of the legality of the committal by the

House : see Sheriff of Middlesex 113 E.R. 419. In Halsbury's Laws of England, Vol. 28 p. 467, it is stated that the Courts of law will not enquire

into the reasons for which a person is adjudged guilty of contempt and committed by either House by a warrant which does not state the causes of

his arrest. This observation is made in dealing with the conflict between the House of Commons and the courts concerning the privileges of the

former and obviously treats the power to issue a general warrant as a matter of the privilege of the House. Lastly, in Dicey's Constitutional Law

(10th ed.) at p. 58 in the footnote it is stated.

Parliamentary privilege has from the nature of things never been the subject of precise legal definition. One or two points are worth notice as being

clearly established.

(1) Either House of Parliament may commit for contempt; and the courts will not go behind the committal and enquire into the facts constituting the

alleged contempt provided that the cause of the contempt is not stated.

166. I thus find that writers of undoubted authority have treated this power to commit by a general warrant with the consequent deprivation of the

court's jurisdiction to adjudicate on the legality of the imprisonment, as a matter of privilege of the House and not as a right possessed by it as a

superior court.

167. I now proceed to refer to recent decisions of the Judicial Committee which also put the right of the House of Commons to commit by a

general warrant on the ground of privilege. The first case which I will consider is Glass's (1869) L.R. 3 P.C. 560 case. There the Legislative

Assembly of the Colony of Victoria by a general warrant committed Glass to prison for contempt and the matter was brought before the court on a

habeas corpus petition. I have earlier stated that under certain statutes the Assembly claimed the same privileges which the House of Commons

possessed. The Supreme Court of Victoria held in favour of Glass. The matter was then taken to the Judicial Committee and it appears to have

been argued there that "the privilege is the privilege of committing for contempt merely; that the judging of contempt without appeal, and the power

of committing by a general Warrant, are mere incidents or accidents applicable to this Country, and not transferred to the Colony." The words "this

Country"" referred to England. Lord Cairns rejected this argument with the following observations : ""The ingredients of judging the contempt, and

committing by a general Warrant, are perhaps the most important ingredients in the privileges which the House of Commons in this Country

possesses; and it would be strange indeed if, under a power to transfer the whole of the privileges and powers of the House of Commons, that

which would only be a part, and a comparatively insignificant part, of this privilege and power were transferred."" (p. 573). He also said, (p. 572)

Beyond all doubt, one of the privileges and one of the most important privileges of the House of Commons - is the privilege of committing for

contempt and incidental to that privilege, it has, as has already been stated, been well-established in this Country that the House of Commons have

the right to be the judges themselves of what is contempt, and to commit for that contempt by a Warrant, stating that the commitment is for

contempt of the House generally, without specifying what the character of the contempt is. It would, therefore, almost of necessity follow, that the

Legislature of the Colony having been permitted to carry over to the Colony the privileges, immunities, and powers of the House of Commons, and

having in terms carried over all the privileges and powers exercised by the House of Commons at the Statute, there was carried over to the

Legislative Assembly of the Colony the privilege or power of the House of Commons connected with contempt - the privilege or power, namely,

of committing for contempt, of judging itself of what is contempt, and of committing for contempt by a Warrant stating generally that a contempt

had taken place."" In Richard's case 92 C.L.R. 157 the power to commit by a general warrant was considered as a privilege of the House and the

observations of Lord Cairns in Glass's (1869) L.R. 3 P.C. 600 case were cited in support of that view. As I have already said this view was

upheld by the Judicial Committee : Queen v. Richard 92 C.L.R. 171. It is of some interest to note that Dixon C.J. was of the opinion, as I have

earlier shown, that the power to commit was scientifically more properly a judicial power but nonetheless he found that it was a privilege technically

so called of the House of Commons and so transferred to the Australian Houses by s. 49 of the Australian Constitution Act of 1901. It is also

necessary to state here that this case was of the year 1955 and shows that the view then held was that the right to commit by a general warrant

was a privilege of the House. I am pointing out this only because it has been suggested that even if it was a privilege, it had been lost by desuetude.

These cases show that that is not so. Fielding v. Thomas [1896] A.C. 600 also takes the same view.

168. It was said that the decisions of the Judicial Committee were not binding on us. That may be so. But then it has not been shown that they are

wrong and, therefore, they are of value at least as persuasive authorities. The fact that the decisions of the Judicial Committee are not binding on us

judgments of a superior court is however to no purpose. The real question for our decision is whether the House of Commons possessed a certain

privilege. We may either have to take judicial notice of that privilege or decide its existence as a matter of foreign law. It is unnecessary to decide

which is the correct view. If the former, under s. 57 of the Evidence Act a reference to the authorised law reports of England would be legitimate

and if the latter, then again under s. 38 of that Act a reference to these reports would be justified. So in either case we are entitled to look at these

reports and since they contain decisions of one of the highest Courts in England, we are not entitled to say that what they call a privilege of the

House of Commons of their country is not a privilege unless other equally high authority taking a contrary view is forthcoming.

169. I now come to some of the English case on which the proposition that the right to commit by a general warrant is not a matter of privilege of

the House of Commons but a right which it possessed as a superior court is, as I understood the argument of learned advocate for the High Court,

based. I will take the cases in order of date. It will not be necessary to refer to the facts of these cases and it should suffice to state that each of

them dealt with the right of the House of Commons to commit by a general warrant. First, there is *Burdett v. Abbot* 104 E.R. 501. In this case, in

the first court judgments were delivered by Ellenborough C.J. and Bayley J. With regard to this case, Anson in his book at p. 189 says, "It is

noticeable that in the case of *Burdett v. Abbot* while Bayley J. rests the claim of the House to commit on its parity of position with the Courts of

Judicature, Lord Ellenborough C.J. rests his decision on the broader ground of expediency, and the necessity of such a power for the maintenance

of the dignity of the House." Ellenborough C.J., therefore, according to Anson, clearly does not take the view that the House of Commons is a

court and all that Bayley J. does, according to him, is to put the House of Commons in parity with a Superior Court. If the House of Commons

was a court, there, of course, was no question of putting it in parity with one. There was an appeal from this judgment to the House of Lords and in

that appeal after the close of the arguments, Lord Eldon L.C. referred the following question to the Judges for their advice, "Whether, if the Court

of Common Pleas, having adjudged an act to be a contempt of Court, had committed for the contempt under a warrant, stating such adjudication

generally without the particular circumstances, and the matter were brought before the Court of King's Bench, by return to a writ of habeas corpus

the return setting forth the warrant, stating such adjudication of contempt generally; whether in that case the Court of King's Bench would

discharge the prisoner, because the particular facts and circumstances, out of which the contempt arose, were not set forth in the warrant" : *Burdett*

v. Abbot 3 E.R. 1289. The Judges answered the question in the negative. Upon that Lord Eldon delivered his judgment with which the other

members of the Court agreed, stating that the House of Commons had the power to commit by a general warrant. I am unable to hold that this

case shows that Lord Eldon came to that conclusion because the House of Commons was a superior court. It seems to me that Lord Eldon

thought that the House of Commons should be treated the same way as one superior court treated another and wanted to find out how the courts

treated each other. I shall later show that this is the view which has been taken of Lord Eldon's decision in other cases. But I will now mention that

if Lord Eldon had held that the House of Commons was a court, a constitutional lawyer of Anson's eminence would not have put the matter in the

way that I have just read from his work.

170. Then I come to the case of *Stockdale v. Hansard* 112 E.R. 1112. That case was heard by Lord Denman C.J., Littledale J., Patteson J. and

Coleridge J. Lord Denman said, (p. 1168),

Before I finally take leave of this head of the argument, I will dispose of the notion that the House of Commons is a separate Court, having

exclusive jurisdiction over the subject-matter, on which, for that reason, its adjudication must be final. The argument placed the House herein on a

level with the Spiritual Court and the Court of Admiralty. Adopting this analogy, it appears to me to destroy the defence attempted to the present

action we are now enquiring whether the subject-matter does fall within the jurisdiction of the House of Commons. It is contended that they

can bring it within their jurisdiction by declaring it so. To this claim, as arising from their privileges, I have already stated my answer : it is perfectly

clear that none of these Courts could give themselves jurisdiction by adjudging that they enjoy it.

171. Clearly Lord Denman did not proceed on the basis that the Commons was a court. In fact he refers to the right ""as arising from this privilege.

Then I find Littledale J. observing at p. 1174 : ""But this proceeding in the House of Commons does not arise on adverse claims; there are no

proceedings in the Court; there is no Judge to decide between the litigant parties making a declaration of what they say belongs to them."" So

Littledale J. also did not consider the Commons as a court. Then came Patteson J. who stated at p. 1185, ""The House of Commons by itself is not

the court of Parliament."" Then again at p. 1185 he observes :

I deny that mere resolution of the House of Lords would be binding upon the Courts of Law, much less can a resolution of the House of

Commons, which is not a Court of Judicature for the decision of any question either of law or fact between litigant parties, except in regard to the

election of its members, be binding upon the Courts of Law.

172. Lastly I come to Coleridge J. He stated at p. 1196 : ""But it is said that this and all other Courts of Law are inferior in dignity to the House of

Commons, and that therefore it is impossible for us to review its decision. This argument appears to me founded on a misunderstanding of several

particulars; first, in what sense it is that this Court is inferior to the House of Commons; next in what sense the House is a Court at all

173. Then at p. 1196 he stated :

In truth, the House is not a Court of Law at all, in the sense in which that term can alone be properly applied here; neither originally, nor by

appeal, can it decide a matter in litigation between two parties; it has no means of doing so; it claims no such power; powers of enquiry and of

accusation it has, but it decides nothing judicially, excepts. As to them no question of degree arises between Courts;

174. The observations of Coleridge J. are of special significance for the reasons hereafter to appear. It is obvious that neither Patteson J. nor

Coleridge J. thought that the House of Commons was a Court or possessed any power as such.

175. Next in order of date is the case of the Sheriff of Middlesex 113 E.R. 419. Lord Denman, C.J. said at p. 426 :

Representative bodies must necessarily vindicate their authority by means of their own; and those means lie in the process of committal for

contempt. This applies not to the Houses of Parliament only, but [as was observed in *Burdett v. Abbot* (14 East, 138)], to the Courts of Justice,

which, as well as the Houses, must be liable to continual obstruction and insult if they were not entrusted with such powers. It is unnecessary to

discuss the question whether each House of Parliament be or be not a Court; it is clear that they cannot exercise their proper functions without the

power of protecting themselves against interference. The test of the authority of the House of Commons in this respect, submitted by Lord Eldon to

the Judges in *Burdett v. Abbot* (5 Dow, 199) was whether, if the Court of Common Pleas had adjudged an act to be a contempt of Court, and

committed for it, stating the adjudication generally, the Court of King's Bench, on a habeas corpus setting forth the warrant, would discharge the

contempt were not stated. A negative answer being given, Lord Eldon, with the concurrence of Lord Erskine (who had before been adverse to the

exercise of the jurisdiction), and without a dissentient voice from the House, affirmed the judgment below. And we must presume that what any

Court, much more what either House of Parliament, acting on great legal authority, takes upon it to pronounce a contempt, is so.

176. This observation would support what I have said about the judgment of Lord Eldon in *Burdett v. Abbot* 3 E.R. 1289. Denman C.J. did not

think that Lord Eldon considered the House of Commons to be a Court for the himself found it unnecessary to discuss that question. Then why he

thought that the House of Commons must possess the right to commit by a general warrant was one of expediency and of confidence in a body of

that stature Coleridge J. observes at p. 427,

It appears by precedents that the House of Commons have been long in the habit of shaping their warrants in that manner. Their right to

adjudicate in this general form in cases of contempt is not founded on privilege, but rests upon the same grounds on which this Court or the Court

of Common Pleas might commit for a contempt without stating a cause in the commitment. Lord Eldon puts the case in this manner in *Burdett v.*

Abbot 5 Dow 165.

177. Great reliance is placed on this observation of Coleridge J. but I think that is due to a misconception. Coleridge J. at p. 427 expressly affirms

all that had been said by him and the other Judges in *Stockdale v. Hansard* 112 E.R. 1112. As I have earlier shown, he had there said that ""in

truth, the House is not a Court of Law at all."" therefore when he said that the right to adjudicate in the general form was not founded on privilege,

whatever he might have meant he did not mean that it was founded on the House of Commons being a court. I think what he meant was that it was

a right which the House of Commons had to possess in order to discharge its duties properly and, therefore, not something conceded to it as a sign

of honour and respect. He might also have meant that the power was not something peculiar to the House as it was also possessed by the courts

for the same reason of expediency, and, therefore, it was not a privilege, a term which has been used in the sense of something which the

Parliament Possessed and which exceeded those possessed by other bodies or individuals : Cf. May 42.

178. Then comes the case of *Howard v. Gossett* 116 E.R. 139. It will be enough to refer to the judgment of the Court of Exchequer Chamber in

appeal which begins at p. 158. That judgment was delivered by Parke B. who observed at p. 171 :

the warrant of the Speaker is, in our opinion, valid so as to be a protection to the officer of the House, upon a principle which as it applies to the

process and officers of every Superior Court, must surely be applicable to those of the High Court of Parliament and each branch of it.

179. Here again the House is treated as being entitled to the same respect as a superior court, but it is not being said that the House is a superior

court.

180. Lastly, I come to *Bradlaugh v. Gossett* (1884) L.R. 12 Q.B.D. 271 in which at p. 285 Stephen J. said, ""The House of Commons is not a

Court of justice."" I am unable to see how these authorities can be said to hold that the power of the House of Commons to commit by a general

warrant is possessed by it because it is a superior court.

181. It was then said that even if the right to commit by a general warrant cannot be said to have been possessed by the House of Commons

because it was superior court, the observations in the cases on the subject, including those to which I have already referred, would establish that

the right springs from some rule of comity of courts, or of presumptive evidence or from an agreement between the courts of law and the House or

lastly from some concession made by the former to the latter. I at once observe that these cases do not support the contention and no text-book has

taken the view they do or that right is anything but privilege. The contention further seems to me to be clearly fallacious and overlooks the basic

nature of privilege of the House of Commons. I have earlier stated the nature of the privilege but I will repeat it here. All privileges of the House of

Commons are based on law. That law is known as *lex Parliamenti*. Hence privileges are matters which the House of Commons possesses as of

right. In *Stockdale v. Hansard* 112 E.R. 1112 all the Judges held that the rights of the House of Commons are based on *lex Parliamenti* and that

law like any other law, is a law of the land which the courts are entitled to administer.

182. Now if the privilege of committing by a general warrant is a right enforceable in law which belongs to the House of Commons, it cannot be a

matter controlled by the rule of comity of courts. Comity of courts is only a self-imposed restraint. It is something which the court on its own

chooses not to do. It is really not a rule of law at all. It creates no enforceable right. A "right" to the privilege cannot be based on it. Besides there

is no question of comity of courts unless there are two courts, each extending civility or consideration to the other. Here we have the House of

Commons and the courts of law. The former is not a court and the latter needs no civility or consideration from the House for its proper

functioning. Here there is no scope of applying any principle of comity of courts.

183. Next as to the privilege being really nothing more than a rule of presumption that a general warrant of the House of Commons imprisons a

person legally, so that the question of the legality of the committal need not be examined by a court of law, I suppose it is said that this is a

presumption which the law requires to be made. If it is not so, then the right of the House would depend on the indulgence of the judge concerned

and, therefore, be no right at all. That cannot be, nor is it so. What then? If it is a presumption of law, what is the law on which the presumption is

based? None has been pointed out and so I know, none exists unless it be *lex Parliamenti*. Once that is said, it really becomes a matter of

privilege for the *lex Parliamenti* would not create the presumption except for establishing a privilege. A right created by *lex Parliamenti* is a

privilege. This I have earlier said in discussing the nature of privileges.

184. Lastly, has the right its origin in agreement between the House of Commons and the courts of law, or in a concession granted by the latter to

the former? This is novel argument. I have not known of any instance where a right, and therefore, the law on which it is based, is created by an

agreement with courts. Courts do not create laws at all, least of all by agreement; they ascertain them and administer them. For the same reason,

courts cannot create a law by concession. A court has no right to concede a question of law unless the law already exists. I find it impossible to

imagine that any parliamentary privilege which creates an enforceable right could be brought into existence by agreement with courts or by a

concession made by them.

185. Before I part with the present topic I will take the liberty of observing that it is not for us to start new ideas about the privileges of the House

of Commons, ideas which had not ever been imagined in England. Our job is not to start an innovation as to privileges by our own researches. It

would be unsafe to base these novel ideas on odd observations in the judgments in the English cases, torn out of their context and in judgments in

the English cases, torn out of their context and in disregard of the purpose for which they were made. What I have quoted from these cases will at

least make one pause and think that these cases can furnish no sure foundation for a novel theory as to the right of the House of Commons to

commit by a general warrant. Researches into old English history are wholly out of place in the present context and what is more, are likely to lead

to misconception. To base our conclusion as to lead to misconceptions. To base our conclusion as to the privileges on researches into antiquities,

will furthermore be an erroneous procedure for the question is what the privileges of the House of Commons were recognised to be in 1950.

Researches into the period when these privileges were taking shape can afford no answer only by ascertaining whether the right under discussion

was treated as a privilege of the House of Commons by authoritative opinion in England in the years preceding 1950.

186. I then come to the conclusion that the right to commit for contempt by a general warrant with the consequent deprivation of jurisdiction of the

courts of law to enquire into that committal is a privilege of the House of Commons. That privilege is, in my view, for the reasons earlier stated,

possessed by the Uttar Pradesh Assembly by reasons of Art. 194(3) of the Constitution.

187. It is then said that even so that privilege of the Assembly can be exercised only subject to the fundamental right of a citizen guaranteed by the

Constitution. That takes me to Sharma's case [1959] Supp. 1 S.C.R. 806. As I read the judgment of the majority in that case, they seem to me to

hold that the privileges of the House of Commons which were conferred on the House of a State Legislature by Art. 194(3), take precedence over

fundamental rights. The facts were these. A House of the Bihar Legislature which also had made no law defining its privileges under Art. 194(3),

had directed certain parts of its proceedings to be expunged but notwithstanding this the petitioner published a full account of the proceedings in his

paper including what was expunged. A notice was thereupon issued to him by the House to show cause why steps should not be taken against him

for breach of privileges of the House. The privilege claimed in that case was the right to prohibit publication of its proceedings. The petitioner, the

Editor of the paper, then filed a petition under Art. 32 of the Constitution stating that the privilege did not control his fundamental right of freedom

of speech under Art. 19(1)(a), and that, therefore, the House had no right to take proceedings against him. He also disputed that the House of

Commons had the privilege which the Bihar Assembly claimed. The majority held that the House possessed the privilege to prohibit the publication

of its proceedings and that privilege was not subject to the fundamental right of a citizen under Art. 19(1)(a). Subba Rao J., took a dissentient view

and held that fundamental rights take precedence over privileges and also that the House did not possess the privilege of prohibiting the publication

of its proceedings. With the latter question we are not concerned in the present case. In the result Sharma's ([1959] Supp. 1 S.C.R. 806) petition

was dismissed.

188. On behalf of the High Court two points have been taken in regard to this case. It was first said that the majority judgment required

reconsideration and then it was said that in any event, that judgment only held that the privilege there claimed took precedence over the

fundamental right of the freedom of speech and not that any other privilege took precedence over fundamental rights. I am unable to accept either

of these contentions.

189. On behalf of the Assembly it has been pointed out that in a reference under Art. 143 we have no jurisdiction to set aside an earlier decision of

this Court, for we have to give our answers to the questions referred on the law as it stands and decision of this Court so long as it stands of course

lays down the law. I am unable to say that this contention is idle. It was said on behalf of the High Court that in 281647 question arose whether a

decision of the Federal Court which under our Constitution has the same authority as our decisions, was right. It may be argued that this case does

not help, for the question posed, itself required the reconsideration of the earlier judgment. I do not propose to discuss this matter further, for I do

not feel so strongly in favour of the contention of the Assembly that I should differ from the view of my learned brothers on this question.

190. I feel no doubt, however, that the majority judgment in Sharma's case [1959] Supp 1 S.C.R. 806 was perfectly correct when it held that

privileges were not subject to fundamental rights. I have earlier set out the first three clauses of Art. 194. The first clause was expressly made

subject to the provisions of the Constitution - whatever the provisions contemplated were - while the third clause was not made so subject. Both

the majority and the minority judgments are agreed that the third clause cannot, therefore, be read as if it had been expressly made subject to the

provisions of the Constitution. For myself, I do not think that any other reading is possible. Clause (3) of Art. 194 thus not having been

expressly made subject to the other provision of the Constitution, how is a conflict between it and any other provisions of the Constitution which

may be found to exist, to be resolved? The majority held that the principle of harmonious construction has to be applied for reconciling the two

and Art. 194(3) being a special provision must take precedence over the fundamental right mentioned in Art. 19(1)(a) which was a general

provision : (p. 860). Though Subba Rao J. said that there was no inherent inconsistency between Art. 19(1)(a) and Art. 194(3), he nonetheless

applied the rule of harmonious construction. He felt that since the legislature had a wide range of powers and privileges and those privileges can be

exercised without infringing the fundamental rights, the privilege should yield to the fundamental right. This construction, he thought, gave full effect

to both the articles : (pp. 880-1). With great respect to the learned Judge, I find it difficult to follow how this interpretation produced the result of

both the articles having effect and thus achieving a harmonious construction.

191. Ex facie there is no conflict between Arts. 194(3) and 19(1)(a), for they deal with different matters. The former says that the State

Legislatures shall have the powers and privileges of the English House of Commons while Art. 19(1)(a) states that every citizen shall have full

freedom of speech. The conflict however comes to the surface when we consider the particular privileges claimed under Art. 194(3). When Art.

194(3) says that the State Legislatures shall have certain privileges, it really incorporates those privileges in itself. therefore, the proper reading of

Art. 194(3) is that it provides that the State Legislatures have, amongst other privileges, the privilege to prohibit publication of its proceedings. It is

only then that the conflict between Arts. 194(3) and 19(1)(a) can be seen; one restricts a right to publish something while the other says all things

may be published. I believe that is how the articles were read in Sharma's case [1959] Supp. 1 S.C.R. 806 by all the Judges. If they had not done

that, there would have been no question of a conflict between the two provisions or of reconciling them.

192. Now if Art. 19(1)(a) is to have precedence, then a citizen has full liberty to publish whatever he likes; he can publish the proceedings in the

House even though the House prohibited their publication. The result of that reading however is to wipe out that part of Art. 194(3) which said that

the State Legislatures shall have power and privilege to prohibit publication of their proceedings. That can hardly be described as harmonious

reading of the provisions, a reading which gives effect to both provisions. It is a reading which gives effect to one of the provisions and treats the

other as if it did not exist.

193. It is true that if Art. 19(1)(a) prevailed, it would not wipe out all the other privileges of the House of Commons which had to be read in Art.

194(3). Thus the right of the House to exclude strangers remained intact even if the right to prohibit publication of proceedings was destroyed by

Art. 19(1)(a). But this is to no purpose as there never was any conflict between the right to exclude strangers and the freedom of speech and no

question of reconciling the two by the rule of harmonious construction arose. When one part of a provision alone is in conflict with another

provision, the two are not reconciled by wiping out of the statute book the conflicting part and saying that the two provisions have thereby been

harmonised because after such deletion the rest of the first and the whole of the second operate. We are concerned with harmonising two

conflicting provisions by giving both the best effect possible and that is not done by cutting the gordian knot by removing the conflicting part out of

the statute.

194. I agree that in view of the conflict between Art. 194(3) and Art. 19(1)(a), which arise in the manner earlier stated, it has to be resolved by

harmonious construction. As I understand the principle, it is this. When the Legislature - here the Constitution - enacted both the provisions they

intended both to have effect. If per chance it so happens that both cannot have full effect, then the intention of the legislature would be best served

by giving the provisions that interpretation which would have the effect of giving both of them the most efficacy. This, I believe, is the principle

behind the rule of harmonious construction. Applying that rule to Sharama's case [1959] Supp. 1 S.C.R. 806, if the privilege claimed by the

Legislature under Art. 194(3) of prohibiting publication of proceedings was given full effect, Art. 19(1)(a) would not be wiped out of the

Constitution completely, the freedom of speech guaranteed by the last mentioned article would remain in force in respect of other matters. If, on

the contrary Art. 19(1)(a) was to have full effect, that is to say, a citizen was to have liberty to say and publish anything he liked, then that part of

Art. 194(3) which says that the House can prohibit publication of its proceedings is completely destroyed, it is as if it as if it had never been

intended or be the proper reading of the Constitution. That to my mind, can hardly have been intended or be the proper reading of the

Constitution. I would for these reasons say that the rule of harmonious construction supports the interpretation arrived at by the majority in

Sharma's case 1959] Supp. 1 S.C.R. 806.

195. Subba Rao J. gave another reason why he thought that fundamental rights should have precedence over the privileges of the Legislature and

on this also learned counsel for the High Court relied in the present case. Subba Rao J. said that that part of Art. 194(3) under which the State

Legislature claimed the same privilege as those of the House of Commons in English, which has been called the second part of this clause, was

obviously a transitory provision because it was to have effect until the Legislature made a law defining the privileges as the Constitution-makers

must have intended it to do. He added that if and when the Legislature made a law that would be subject to the fundamental rights and it would be

strange if provisions which were transitory were read as being free of those rights. The majority in Sharma's case [1959] Supp. 1 S.C.R. 806. no

doubt said without any discussion that the law made under Art. 194(3) would be subject to all fundamental right. Learned advocate for the

Assembly however contended before us that that view was not justified. In the present case it seems to me it makes no difference whatever view is

taken. Assume that the law made by a Legislature defining its privileges has to be subject to fundamental rights. But that will be so only because

Art. 13 says so. Really the law made under Art. 194(3) is not to be read as subject to fundamental rights; the position is that if that law is in conflict

with any fundamental right, it is as goods as not made at all. That is the effect of Art. 13. The argument that since the laws made under Art. 194(3)

are subject to fundamental rights, so must the privileges conferred by the second part of clause (3) be, is therefore based on a misconception.

Article 13 makes a law bad if it conflicts with fundamental rights. It cannot be argued that since Art. 13 might make laws made under clause (3) of

Art. 194 void, the privileges conferred by the second part of that clause must also be void. Article 13 has no application to a provision in the

Constitution itself. It governs only the laws made by a State Legislature which Art. 194(3) is not. therefore, I do not see why it must be held that

because a law defining privileges if made, would be void if in conflict with fundamental rights, the privileges incorporated in Art. 194(3) - I have

already said that that is how the second part of Art 194(3) has to be read - must also have been intended to be subject to the fundamental rights. If

such was the intention, clause (3) would have started with a provision that it would be subject to the Constitution. The fact that in clause (1) the

words "subject to the provisions of this Constitution" occur while they are omitted from clause (3) is a strong indication that the latter clause was

not intended to be so subject. Furthermore, that could not have been the intention because then the privilege with which the present case is

concerned, namely, to commit for contempt by a general warrant without the committal being subjected to the review of the court, would be wiped

out of the Constitution for the fundamental right required that the legality of every deprivation of liberty would be examinable in courts.

196. It was also that fundamental rights are transcendental. I do not know what is meant by that. If they are transcendental that must have been

because the Constitution made them so. The Constitution no doubt by Art. 13 makes laws made by the Legislatures subject to fundamental rights,

but I do not know, nor has it been pointed out to us, in what other way the Constitution makes the fundamental rights transcendental. We are not

entitled to read into the Constitution things which are not there. We are certainly not entitled to say that a specific provision in the Constitution is to

have no effect only because it is in conflict with fundamental rights, or because the latter are from their nature, though not expressly made so,

transcendental.

197. Then as to the second part of Art. 194(3) being transitory, that depends on what the intention of the Constitution - makers was. No doubt it

was provided that when the law was made by the Legislature under the first part of Art. 194(3) the privileges of the House of Commons enjoyed

under the latter part of that provision would cease to be available. But I do not see that it follows from this that the second part was transitory.

There is nothing to show that the Constitution - makers intended that the Legislature should make its own law defining its privileges. The

Constitution - makers had before them when they made the Constitution in 1950, more or less similar provisions in the Australian Constitution Act,

1901 and they were aware that during fifty years, laws had not been made in Australia defining the privileges of the Houses of the Legislatures

there but the Houses had been content to carry on with the privileges of the House of Commons conferred on them by their Constitution. With this

example before them I have no reason to think that our Constitution-makers, when they made a similar provision in our Constitution, desired that

our Legislatures should make laws defining their own privileges and get rid of the privileges of the Houses of Commons conferred on them by the

second part of Art. 194(3). I think it right also to state that even if the rights conferred by the second part of Art. 194(3) were transitory, that

would not justify a reading the result of which would be to delete a part of it from the Constitution.

198. It is necessary to notice at this stage that in 273039 his Court held the arrest of a citizen under the Speaker's order for breach of privilege of

the Uttar Pradesh Assembly without producing him before a magistrate as required by Ar. 22(2) of the Constitution was a violation of the

fundamental right mentioned there. 273039 states no reason in support of the view taken. Subba Rao J., though he noticed this, nonetheless felt

bound by it. The majority did not do so observing that the decision there proceeded on a concession by counsel. In this Court learned Advocate

for the High Court said that there was no concession in the earlier case. I notice that Das C.J., who delivered the judgment of the majority in

Sharma's case [1959] Supp 1 S.C.R. 806 was a member of the Bench which decided 273039 . If the decision 273039 was not by concession at

least in the sense that the learned advocate was unable to advance any argument to support the contention that privilege superseded fundamental to

support the contention that privilege superseded fundamental right, it would be strange that the point was not discussed in the judgment. However

all this may be, in view of the fact that it does not seem from the judgment to have been contended in 273039 that the second part of Art. 194(3)

created privileges which took precedence over the fundamental rights, as the judgment does not state any reason in support of the view taken, for

myself I have no difficulty in not following 273039 especially as the majority in Sharma's case [1959] Supp. 1 S.C.R. 806 did not follow it.

199. It was also said that the privileges were only intended to make the Legislatures function smoothly and without obstruction. The main function

of the Legislatures, it was pointed out, was the making of laws and the object of the privileges was to assist in the due discharge of that function. It

was contended that if the laws made by a Legislature, for the making of which it primarily exists, are subject of fundamental rights, it is curious that

something which is ancillary to that primary function should be free of them. I find nothing strange in this. Laws made by a Legislature are subject to

fundamental rights because the Constitution says so. The privileges are not subject because they are conferred by the Constitution itself and have

neither been made so subject nor found on a proper interpretation to be such.

200. I believe I have now discussed all the reasons advanced in support of the view that the majority decision in Sharma's case [1959] Supp. 1

S.C.R. 806 was erroneous. As I have said, I am not persuaded that these reasons are sound.

201. In R. K. Karanjia v. The Hon'ble Mr. M. Anantasayanam Ayyangar, Speaker, Lok Sabha (W.P. No. 221 of 1961 unreported), which was

a petition under Art. 32 of the Constitution, a Bench of seven Judges of this Court was asked to reconsider the correctness of the majority decision

in Sharma's case [1959] Supp 1 S.C.R. 806 but it considered that decision to be correct and refused to admit the petition. This is another reason

for holding that Sharma's case [1859] Supp. 1 S.C.R. 806 as correctly decided.

202. I now come to the other contention concerning Sharma's case [1859] Supp. 1 S.C.R. 806. it was said that all that the majority judgment held

in that case was that the privilege of prohibiting publication of its proceedings conferred on a Legislature by the second part of clause (3) of Art.

194 was not subject to the fundamental right of freedom of speech guaranteed by Art. 19(1)(a). It was pointed out that that case did not say that

all the privileges under the second part of Art, 194(3) would take precedence over all fundamental rights. it was stressed that Das C.J. dealt with

the argument advanced in that case that Art. 21 as the arrest would be according to procedure established by law because the arrest and detention

would be according to rules of procedure framed by the House under Art. 208. It was contended that the majority therefore held that the

fundamental right guaranteed by Art. 21 would take precedence over the privilege to commit.

203. This contention is also not acceptable to me. No doubt Sharma's case ([1859] Supp. 1 S.C.R. 806) was concerned with the concerned with

the conflict between Art. 19(1)(a) and the privilege of the House under the second part of Art. 194(3) to prohibit publication of its proceedings

and, therefore, it was unnecessary to refer to the other fundamental rights. The reason, however, which led the majority to hold that the conflict

between the two had to be resolved by giving precedence to the privilege would be available the case of a conflict between many other privileges

and many other fundamental rights. Now that reason was that the resolve the conflict, the rule of harmonious construction had to be applied and

the result of that would be that fundamental rights, which in their nature were general, had to yield to the privileges which were special. The whole

decision of the majority in that case was that when there was a conflict between a privileges which were special. The whole decision of majority in

that case was that when there was a conflict between a privilege created by the second part of Art. 194(3) and a fundamental right, that conflict

should be resolved by harmonising the two. The decision would apply certainly to the conflict between the privilege of committal to prison for

contempt by a general warrant without the validity of that warrant being reviewed by a court of law and the fundamental rights guaranteed by Arts.

21, 22 and 32. The majority judgment would be authority for holding that the conflict should be resolved by a harmonious construction. Indeed

that was the view of the minority also. The difference was as to the actual construction.

204. Das C.J. no doubt said that there was no violation of Art. 21 in Sharma's case [1959] Supp. 1 S.C.R. 806 because the deprivation of liberty

was according to procedure established by law. That was to my mind, only an alternative reason, for he could have dealt with that point on the

same reason on which he said that the fundamental right under Art. 19(1)(a) must yield to the privilege of the House to prohibit publication of its

proceedings, namely, by the application of the rule of harmonious construction. He could have said by the same logic that he sued earlier, that the

fundamental right guaranteed by Art. 21 was general and the privilege to detain by a general warrant was a special provision and must, therefore,

prevail. I am unable to hold that by dealing with the argument based on Art. 21 in the manner he did, Das C.J. held that the fundamental right under

Art. 21 took precedence over the privilege of committal by a general warrant which the Legislature possessed under the second part of clause (3)

of Art. 194. If he did so, then there would be no reason why he should have held that fundamental right of freedom of speech should yield to the

House's privilege to stop publication of its proceedings. Another reason for saying that Das C.J. did not hold that Art. 21 took precedence over

the privilege to commit by a general warrant is the fact that he held that Reddy's case ([1959] Supp. 1 S.C.R. 806) was wrongly decided. That

case had held that Art. 22 have precedence, as Das C.J. must have held since he did not accept the correctness of 273039, no more could he

have held that Art. 21 would have precedence over the privilege to commit for contempt.

205. Some reference was made to cls. (1) and (2) of Art. 194 to show that Sharma's case [1959] Supp. 1 S.C.R. 806 decided that Art. 19(1)(a)

alone had to yield to the privilege conferred by the second part of clause (3) of Art. 194, but I do not think that the majority decision in Sharma's

case [1959] Supp. 1 S.C.R. 806 was at all based on those clauses, These clauses, it will be remembered, dealt with freedom of speech in the

House. Das C.J., referred to them only because some arguments, to which it is unnecessary now to refer, had been advanced on the basis of these

clauses for of showing that the privileges were subject to the fundamental right of freedom of speech. Both the minority and the majority judgments

were unable to accept these arguments. Indeed the question in that case concerned the power to affect a citizen's freedom of speech outside the

House and cls. (1) and (2) only deal with freedom of speech of a member in the House itself and with such freedom that case had nothing to do.

206. In this Court some discussion took place as to the meaning of the words ""subject to the provisions of the Constitution"" on clause (1) of Art.

194, These words can, in my view, only refer to the provisions of the Constitution laying down the procedure to be observed in the House for

otherwise cls. (1) and (2) will conflict with each other. I will now make a digression and state that learned advocate for the Assembly pointed out

that in Art. 194 the Constitution makers treated the liberty of speech of a member differently by expressly providing for it in cls. (1) and (2) and by

providing for other privileges, that is, privileges other than that of the freedom of speech in the House, in clause (3). He said that the reason was

that if the freedom of speech in the House was conferred by clause (3) it would be controlled by law made by the legislature and then the party in

power might conceivably destroy that freedom. The intention was that the freedom of speech in the House should be guaranteed by the

Constitution itself so as to be beyond the reach of any impairment by any law made by the legislature. I think that is the only reason why that

freedom was treated separately in the Constitution in cls. (1) and (2) of Art. 194. therefore those clauses have nothing to do with the case in hand.

Nor had they anything to do with decision in Sharma"s case. The result is that in my judgment Sharma"s case covers the present case and cannot

be distinguished from it.

207. For the reasons earlier stated I come to the conclusion that when there is a conflict between a privilege conferred on a House by the second

part of Art. 194(3) and a fundamental right, that conflict has to be resolved by harmonising the two provisions. It would be wrong to say that the

fundamental right must have precedence over the privilege simply because it is a fundamental right or for any other reason. In the present case the

conflict is between the privilege of the House to commit a person for contempt without that committal being liable to be examined by a court of law

and the personal liberty of a citizen guaranteed by Art. 21 and the right to move the courts in enforcement of that right under Art. 32 or Art. 226. If

the right to move the courts in enforcement of the fundamental right is given precedence, the privilege which provides that if a House commits a

person by a general warrant that committal would not be reviewed by courts of law, will lose all its effect and it would be as if that privilege had not

been granted to a House by the second part of Art. 194(3). This, in my view, cannot be. That being so, it would follow that when a House

commits a person for contempt by a general warrant that person would have no right to approach the courts nor can the courts sit in judgment over

such order of committal. It is not my intention to state that there may not be exceptions to the rule but I do not propose to enter into discussion of

these exceptions, if any, in the present case. The existence of those exceptions may be supported by the observations of Lord Ellenborough C.J. in

Burdett v. Abbot (1811) 14 East I. 152 : 104 E.R. 501). May at p. 159 puts the matter thus : ""Lord Ellenborough C.J., left open the possibility

that cases might arise in which the courts would have to decide on the validity of a committal for contempt where the facts displayed in the return

could by no reasonable interpretation be considered as a contempt.

208. I think I have now sufficiently discussed the law on the subject and may proceed to answer the questions stated in the order of reference.

209. Question No. 1. - Whether, on the facts and circumstances of the case, it was competent for the Lucknow Bench of the High Court of Uttar

Pradesh, consisting of the Hon"ble Shri Justice N. U. Beg and the Hon"ble Shri Justice G. D. Sahgal, to entertain and deal with the petition of Shri

Keshav Sing challenging the legality of the sentence of imprisonment imposed upon him by the Legislative Assembly of Uttar Pradesh for its

contempt and for infringement of its privileges and to pass order releasing Shri Keshav Singh on bail pending the disposal of his said petition.

210. This question should, in my opinion, be answered in the affirmative. The Lucknow Bench was certainly competent to deal with habeas corpus

petitions generally. The only point raised by the Assembly is that it has no jurisdiction to deal with such petitions when the detention complained of

is under a general warrant issued by the speaker. But the Lucknow Bench had to find out whether the detention of Keshav Singh was by such a

warrant before it could throw out the petition on the ground of want of jurisdiction. The petition did not show that the detention was under a

general warrant. That would have appeared when the Speaker of the Assembly and the jailor who were respondents to the petition made their

return. That stage had not come when the Lucknow Bench dealt with the petition and made orders on it. Till the Lucknow Bench was apprised of

the fact that the detention complained of was under a general warrant, it had full competence to deal with the petition and make orders on it. It was

said that the order for bail was illegal because in law release on bail is not permitted when imprisonment is for contempt. I do not think this is a fit

occasion for deciding that question of law for even if the order for bail was not justifiable in law that would not otherwise affect the competence of

the Bench to make the order. I do not suppose this reference was intended to seek an answer on the question whether in a habeas corpus petition

where the imprisonment is for contempt, the law permit a release on bail.

211. Question No. 2 - Whether, on the facts and circumstances of the case, Shri Keshav Singh by causing the petition to be presented on his

behalf to the High Court of Uttar Pradesh as aforesaid, Shri B. Solomon, Advocate, by presenting the said petition and the said two Hon"ble

Judges by entertaining and dealing with the said petition and ordering the release of Shri Keshav Singh on bail pending disposal of the said petition

committed contempt of the Legislative Assembly of Uttar Pradesh.

212. The first thing I observe is that the question whether there is a contempt of the Assembly is for the Assembly to determine. If that

determination does not state the facts, courts of law cannot review the legality of it. Having made that observation, I proceed to deal with the

question.

213. The question should be answered in the negative. I suppose for an act to amount to contempt, it has not only to be illegal but also wilfully

illegal. Now in the present case it does not appear that any of the person mentioned had any knowledge that the imprisonment was under a general

warrant. That being so, I have no material to say that the presentation of the petition was an illegal act much less a wilfully illegal act. No contempt

was, therefore, committed by the Hon"ble Judges or B. Solomon or Keshav Singh for the respective parts taken by them in connection with the

petition.

214. Question No. 3. - Whether on the facts and circumstances of the case, it was competent for the Legislative Assembly of Uttar Pradesh to

direct the production of the said two Hon"ble Judges and Shri B. Solomon,

215. Advocate, before it in custody or to call for their explanation for its contempt;

216. It will be remembered that, according to the recitals, the resolution of March 21, 1964 which directed the production of the Hon"ble Judges

in custody stated that they had committed contempt of the House by what they respectively did in connection with Keshav Singh's petition of

March 19, 1964 and that the Assembly disputes that the resolution so provided. We have however to answer the question on the facts as stated in

the order of reference and have no concern with what may be the correct facts. For one thing, it would not be competent for the Assembly to find

the Hon"ble Judges and B. Solomon to be guilty of contempt without giving them a hearing. Secondly, in the present case I have already shown

that they were not so guilty. That being so, it was not competent for the Assembly to direct their production in custody. It has to be noticed that in

the present case the Assembly had directed the question of the privilege of the House to ""cause persons to be brought in custody to the Bar to

answer charges of contempt"". See May p. 94. Furthermore, the Assembly had modified its resolution to have the Judges, Solomon and Keshav

Singh brought under custody and asked only for explanation from the Hon"ble Judges and B. Solomon for their conduct. therefore, strictly

specking, the question as to bringing them in custody before the House does not arise on the facts of the case.

217. As to the competence of the Assembly to ask for explanation from the two Judges and B. Solomon, I think it had. That is one of the

privileges of the House. As it has power to commit for contempt, it must have power to ascertain facts concerning contempt.

218. Question No. 4. - Whether, on the facts and circumstances of the case, it was competent for the Full Bench of the High Court of Uttar

Pradesh to entertain and deal with the petitions of the said two Hon"ble Judges and Shri B. Solomon, Advocate and to pass interim orders

restraining the Speaker of the Legislative Assembly of Uttar Pradesh and other Respondents to the said petitions from implementing the aforesaid

direction of the said Legislative Assembly;

219. I would answer the question in the affirmative. The Full Bench had before it petitions by the two Judges and B. Solomon complaining of the

resolution of the Assembly finding them guilty of contempt. I have earlier stated that on the facts of this case, they cannot be said to have been so

guilty. It would follow that the Full Bench had the power to pass the interim orders that it did.

220. Question No. 5. - Whether a Judge of a High Court who entertains or deals with a petition challenging any order or decision of a Legislature

imposing any penalty on the petitioner or issuing any process against the petitioner for its contempt or for infringement of its privileges and

immunities or who passes any order on such petition commits contempt of the said Legislature and whether the said Legislature is competent to

take proceedings against such a Judge in the exercise and enforcement of its powers, privileges and immunities.

221. This is too general a question and is not capable of a single answer; the answers would vary as the circumstances vary, and it is not possible

to imagine all the sets of circumstances. Nor do I think we are called upon to do so. As learned advocates for the parties said, this question to be

answered on the facts of this case. On those facts the question has to be answered in the negative.

222. I propose now to refer to an aspect of the case on which a great deal of arguments had been addressed at the bar. That concerns the liability

of a Judge for contempt. If I am right in what I have said earlier, a Judge has no jurisdiction to interfere with a commitment by a House under a

general warrant. If he makes an order which interferes with such a commitment, his action would be without jurisdiction. It would then be a nullity.

Any officer executing that order would be interfering with the committal by the House and such interference would be illegal because the order is

without jurisdiction and hence a nullity. If the House proceeded against him in contempt, a Court of Law could not, in any event, have given him

any relief based on that order. It may be that the Judge by making such an order would be committing contempt of the House for by it he would be

interfering with the order of the House illegally and wholly without jurisdiction. The question however to which I wish now to refer is whether the

judge, assuming that he has committed contempt, can be made liable for it by the House. In other words, the question is, has the Judge immunity

against action by the House for contempt committed by him ? If his order was legal, then, of course, he would not leave committed contempt and

question of immunity for him would not arise.

223. It was said on behalf of the High Court that even assuming that a Judge can commit contempt of a House, he has fully immunity. This was put

first on the scheme of the Constitution which, it was said, favoured complete judicial independence. It was next pointed out that under our

Constitution Judges cannot be removed from office except by the process of impeachment under Art. 124(4), that is, by the order of the President

upon an address by each House of Parliament supported by a certain majority. Reliance was then placed on Art. 211 of the Constitution which

prohibits discussion in the Legislature of the conduct of a Judge in the discharge of his duties and it was said that this indicated that a Judge cannot

be liable for contempt, because to make him so liable his duties and it was said that this indicated that a Judge cannot be liable for contempt,

because to make him so liable his conduct was to be discussed. It was however conceded that Art. 211 did not give an enforceable right in view

of Art. 194(2) but it was said to indicate the intention of the Constitution-makers that a Judge is to be immune from liability for contempt for the

Assembly.

224. The correctness of these contentions was challenged on behalf of the Assembly. With regard to the point of judicial independence, it was said

that it would hardly have been intended that a Judge should have immunity even though he deliberately committed contempt of a House. It was

pointed out that the contempt would be deliberate, because the Judge would know that in the case of a general warrant he had no jurisdiction to

proceed further.

225. As regards the argument based on the irremovability of Judges except in the manner provided, it was said that that had nothing to do with

immunity for contempt. It was pointed out that the Constitution provided for State autonomy and it could not have been intended that when a

Judge committed contempt of a State Legislature, the only remedy of that body would be to approach the Central Parliament with a request to

take steps for the removal of the Judge. That would also seriously impair the dignity of the State Legislature. The grant of relief in such a case

would be unlikely to be obtained particularly when the parties in power in the State and the center, were as might happen, different. The

irremovability of the Judges was not, it was said, intended to protect their deliberate wrongful act but only to secure their independence against

illegal interference from powerful influences. It was argued that the immunity of a Judge would also put the officers of the court who would be

bound to execute all his orders, in a helpless and precarious condition, for they have to carry out even illegal orders of the Judges and thereby

expose themselves to the risk of punishment legitimately imposed by an Assembly. It was lastly said that if independence of the Judges was

necessary for the good of the country, so was the independence of the Legislatures.

226. In regard to Art. 211, it was observed that it did not at all indicate an intention that the Judges would not be liable for contempt committed by

themselves. Its main object, it was contended, was to permit the freedom of speech guaranteed by Art. 194(1) to be restrained in a certain

manner. Furthermore, it was pointed out that Art. 211 would not bar a discussion unless it was first decided that that discussion related to the

conduct of a Judge in the discharge of his duties, a decision which would often be difficult to make and in any case the decision of the House would

not be open to question in a court of law, for it is Legislature has obtained under Art. 194(3) that it has absolute control of its internal proceedings :

(see *Bradlaugh v. Gosset*). On all these grounds it was contended that our Constitution did not confer any immunity on a Judge for an admitted

contempt committed by him. It was pointed out that in England judicial officers, including Judges of superior courts, did not have that immunity and

reference was made to *Jay v. Topham* (12 Howell's State Trials 821) and case of *Brass Crosby* (19 Howell's State Trials 1138).

227. I am not sure that I have set out all the arguments on this question but what I have said will give a fair idea of the competing contentions. For

the purpose of this case, I do not think it necessary to go into the merits of those contentions. The questions that arise on the facts of the reference

can, in my view, be answered without pronouncing on the question of immunity of Judges. It is often much better that theoretical disputes should be

allowed to lie buried in learned tracts and not be permitted to soil our daily lives. It would not require much strain to avoid in practice

circumstances which give rise to those disputes. In England they have done so and there is no reason why in our country also that would not

happen. I strongly feel that it would serve the interest of our country much better not to answer this question especially as it has really not arisen. I

do hope that it will never arise.

228. I think it right to mention that Mr. Verma appearing for the Advocate-General of Bihar raised a point that this reference was incompetent or

at least should not be answered. He said that a reference can be made by the President only when he needed the advice of this Court with regard

to difficulties that he might feel in the discharge of his duties. Mr. Verma's contention was that the questions in the reference related to matters

which did not concern the President at all. He said that the advice given by us on this reference will not solve any difficulty with which the President

may be faced. On the other side, it was contended that the President might consider the amendment of the Constitution in the light of the answers

that he might receive from this Court. Mr. Verma replied to this answer to his argument by saying that it was not for the President to consider

amendments of the Constitution and that it was not the object of Art. 143 that this Court should be consulted for the purpose of initiating

legislation. I am unable to say that Mr. Verma's contention is wholly unfounded but I do not propose to express an opinion on that question in the

present case.

229. Before I conclude, I must say that I feel extremely unhappy that the circumstances should have taken the turn that they did and that the

reference to this Court by the President should have been rendered necessary. With a little more tact, restraint and consideration for others, the

situation that has arisen could have been avoided. I feel no doubt that Beg and Sahgal JJ. would have dismissed the petition of March 19, 1964

after they had possession of the full facts. I regret that instead of showing that restraint which the occasion called for, particularly as the order of

imprisonment challenged was expressly stated to have been passed by a body of the stature of the Assembly for contempt shown to it, a

precipitate action was taken. No doubt there was not much time for waiting but Keshav Singh could not force the hands of the Court by coming at

the last moment. The result of the order of the Hon^{ble} Judges was to interfere with a perfectly legitimate action of the Assembly in a case where

interference was not justifiable and was certainly avoidable. On the other hand, the Assembly could have also avoided the crisis by practicing

restraint and not starting proceedings against the Judges at once. It might have kept in mind that the Judges had difficult duties to perform, that

often they had to act on imperfect materials, and errors were, therefore, possible. It could have realised that when it placed the facts before the

judges, its point of view would have been appreciated and appropriate orders made to undo what had been done in the absence of full materials.

Such an action of the Assembly would have enhanced its stature and prestige and helped a harmonious working of the different organs of the State.

230. I wish to add that I am not one of those who feel that a Legislative Assembly cannot be trusted with an absolute power of committing for

contempt. The Legislatures have by the Constitution been expressly entrusted with much more important things. During the fourteen years that the

Constitution has been in operation, the Legislatures have not done anything to justify the view that they do not deserve to be trusted with power. I

would point out that though Art. 211 is not enforceable, the Legislatures have shown an admirable spirit of restraint and have not even once in all

these years discussed the conduct of Judges. We must not lose faith in our people, we must not think that the Legislatures would misuse the

powers given to them by the Constitution or that safety lay only in judicial correction. Such correction may produce friction and cause more harm

than good. In a modern State it is often necessary for the good of the country that parallel powers should exist in different authorities. It is not

inevitable that such powers will clash. It would be defeatism to take the view that in our country men would not be available to work these powers

smoothly and in the best interests of the people and without producing friction. I sincerely hope that what has happened will never happen again

and our Constitution will be worked by the different organs of the State amicably, wisely, courageously and in the spirit in which the makers of the

Constitution expected them to act.