

Research on Parliamentary Privilege
Concurrently Discuss Chinese
National People's Congressional Privilege

Dissertation

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Abstract

This thesis analyses parliamentary privilege. The privilege is an ancient parliamentary power. All of countries that have democratized or will soon have democratized provide them by own constitution. The purpose of the parliamentary privilege is to permit members of the legislature to speech freely and express their opinion of political position, and not worry about retaliation on the basis of political motives. The Parliament formulates itself its own rules of procedure and maintains the discipline of parliament itself and so on, in order to ensure that the parliament can independently, freely discharge of its duties and perform its functions. Parliamentary privilege, however, is often misunderstood by popular who believes that the privilege is the special protection of all of the elites of society. That is ironic, because privilege was originally produced as a whole of the protection of Parliament, and it protected members of parliament from the elites at that time. It may be said that parliamentary privilege is a special institutional arrangements based on the principles of democracy. Compared with other parliamentary powers, it is special because it is the defensive power of Parliament rather than an offensive power which the parliament must proactively exercise. After studying on the foundation in the theory of parliamentary privilege, the paper comprehensively discusses on the main elements of parliamentary privilege, the problems at the practice of parliamentary privilege and the development of privilege. Finally, it is to argument how to improve and perfect the relevant privilege systems of Chinese National People's Congress.

Key words: Parliamentary Privilege; The People's Congress system

The Privilege of Chinese National People's Congress; Improvement

CONTENTS

CHAPTER1. The Concept of Parliamentary Privilege	1
1 The Definition of Parliamentary Privilege	1
1.1 What is Parliamentary Privilege	1
1.2 Legal Basis of Parliamentary Privilege	4
2 Two Major Systems of Parliamentary Privilege.....	5
2.1 The British Model.....	5
2.1.1 Freedom of Speech	5
2.1.2 Ability to Punish Contempt	6
2.1.3 The British Influence	7
2.1.4 Parliamentary Privilege in British Model' s Nations	8
2.1.4.1 The United States	8
2.1.4.2 Canada.....	10
2.2 The French Model.....	11
2.2.1 Freedom of Speech	11
2.2.2 Freedom from Arrest.....	13
2.2.3 Punishment of Offences.....	14
2.2.4 The French influence	14
2.2.5 Parliamentary Privilege in French Model' s Nations.....	14
2.2.5.1 Germany	14
2.2.5.2 Japan.....	16
3 The Origin of Parliamentary Privilege	18
4 The Justification of Parliamentary Privilege	28
4.1 The Purpose of Parliamentary Privilege	28
4.2 Constitutional Functions	31
4.3 Separation of Powers	31
4.4 The Popular Sovereignty and Parliamentary Privilege.....	34
4.4.1 The Legislative Self-dealing	35
4.4.2 The Protectiong of the Rights of Citizens.....	35

4.5 Representation and Free Mandate	36
CHAPTER2. The Main Content of Parliamentary Privilege	40
5 The Freedom of Speech.....	41
5.1 The Concept of Freedom of Speech.....	41
5.2 The Scope of Freedom of Speech	45
5.2.1 Person	45
5.2.2 Time.....	47
5.2.3 Where	48
5.2.4 Material.....	50
5.3 Misuse of Freedom of Speech.....	53
6 Freedom from Arrest (Inviolability).....	56
6.1 The Origin of Freedom from Arrest.....	56
6.2 The Scope of Protection	59
6.2.1 Who is Protected.....	59
6.2.2 Time Frame	59
6.2.3 Restrictions Based on the Nature of the Offence	60
6.2.4 Restrictions Concerning Criminal Procedural Acts	60
6.2.5 Freedom from Arrest and Flagrate Delicto	62
6.3 The Procedure of Lifting Parliamentary Inviolability	63
6.3.1 Procedure Generally Observed.....	64
6.3.2 Decision Made by Courts and not by Parliament.....	65
6.3.3 The Right to Defence.....	66
6.3.4 Monitoring of Judicial Proceedings.....	67
6.3.5 Waiving Parliamentary Inviolability	68
6.3.6 Lifting of Inviolability Conditionally and Right to Request Suspension of Detention.....	68
6.3.7 Right of Detained Members to Attend Parliamentary Sitings....	69
7 Right of the House to Regulate Own Proceedings.....	70
7.1 Historical Background.....	70
7.2 The Main Content of Right to Regulate Own Proceedings.....	72
7.2.1 Review the Qualification of Members	72
7.2.2 The Right to Set up Rules of Procedure	76
7.3 Organizing Right of the House.....	79

8 The Power of Discipline.....	82
8.1 Disciplinary Sanctions	84
8.1.1 From a Call to Order to Censure with Temporary Expulsion.....	84
8.1.2 A Typically British Sanction: “Naming”	87
8.1.3 Subsidiary Sanctions	89
8.2 Who Imposes Sanctions.....	90
8.3 Contempt of Parliament	92
8.3.1 A Typical British Institution	92
8.3.2 Preventing from Interfering by the Executive or the General Public	93
8.3.3 A Weapon of Being Used Against Members of Parliament	95
CHAPTER3. Existing Some of Questions of Parliamentary Privilege.....	98
9 How to Understand Parliamentary Proceeding.....	98
9.1 Caucus Meetings and Parliamentary Proceeding	99
9.2 Parliamentary Proceeding and Parliamentary Committees, Other Bodies 101	
9.3 Parliamentary Proceeding and Effective Repetition.....	107
10 The Relation between Judicial Review and the Legislative Process	113
10.1The Legitimacy of Judicial Review and Its Limits.....	115
10.1.1 The Legitimacy of Judicial Review	115
10.1.2 The Boundaries of Judicial Review	118
10.2The Practice of Judicial Review to Legislative Process	119
10.2.1 The Practice in England	119
10.2.2 The Practice in America.....	124
10.2.3 The Practice in Germany	130
10.3The “Test of Necessity” of Judicial Review	133
11 Can Official Immunity be Applied to Members of Parliament.....	137
11.1Definition of Official Immunity	137
11.1.1 Judicial Privilege.....	138
11.1.2 Executive Privilege	139
11.2Attempts to Apply Official Immunity to Members of Congress.....	141
11.3A controversy about Whether or not Applying Official to Member of Parliament	144

16 The Connotations and Principles of China’ s National People’ s Congress System	185
16.1 The Connotation of the People’ s Congress System	185
16.1.1 The National People’ s Congress and the Local People’s Congresses at Different Levels are Instituted through Democratic Election	186
16.1.2 All Administrative, Judicial and Procuratorial Organs of the State are Created by the People’ s Congresses.....	186
16.1.3 The Principle of the Division of Functions and Powers between the Central and Local State Organs	187
16.1.4 People’ s Congress and its Standing Committee Exercise their Functions and Powers Collectively.....	188
16.2 The Principles of the People’ s Congress System.....	189
16.2.1 All Power Belongs to the People	189
16.2.2 Democratic Centralism	191
17 The Necessaries of the National People’ s Congress Privilege	193
17.1 In Order to Protecting The National People’ s Congress’ Status as the Highest Organ of State Power	193
Based on the People’ s Congress’ Representative Characteristics....	198
18 The Main Contents of China’ s National People’ s Congress Privilege	200
18.1 The Freedom of Speech of the Representatives of the National People’ s Congress	200
18.1.1 The Scope of Man’ s Protection.....	200
18.1.2 The Scope of the Event’ s Protection.....	200
18.1.3 The Time of the Protection	201
18.1.4 The Location of Protection	202
18.2 Freedom from Arrest of the Representatives of the National People’ s Congress	203
18.2.1 The Protection of the Person.....	204
18.2.2 The Protection of the Time	204
18.2.3 The Protection of the Way	204
18.3 The Power to Review Representative’ s Qualification	205
18.4 The Internal Organization and Management of the National People’ s Congress	206

18.4.1	The Convening of the Meeting.....	206
18.4.2	Rules of Procedural Matters	207
18.4.3	The Management of the Venue	207
18.4.4	The Right to Carry out Investigations	207
18.4.5	The Management of People’ s Deputies	208
18.4.6	The Right to Issue Records of Meetings	208
19	The Problems and Improvements in China’ s National People’ s	
	Congress Privileges System	209
19.1	The Improvement to Speech Immunity.....	209
19.1.1	The Protection is not Limited to the Deputies.....	210
19.1.2	The Expansion Explains of “Speeches”	211
19.1.3	The Meaning of “Meeting”	213
19.1.4	The Meaning of Dispensing the Legal Liability.....	215
19.2	Perfect Speech from Arrest	216
19.2.1	The Meaning of “Other Measures of Restriction of Personal Freedom”	216
19.2.2	Lifting the Freedom of Arrest.....	221
19.2.3	The Meaning of Flagrate Delicto and Reporting System.....	222
19.3	Establish a Disciplinary System of the National People’ s Congress..	224
	References:	I

CHAPTER1. The Concept of Parliamentary Privilege

1 The Definition of Parliamentary Privilege

1.1 What is Parliamentary Privilege

In the classical Roman law “privilegium” was used to indicate a law enacted for or against a single person, a meaning apparent from the etymology of the term. When Justinian conferred upon soldiers the right to make a testament without the usual formalities, the word was used to embrace a special class of persons upon whom rights were invested. This latter meaning was absorbed by the Canon law.¹ When in 1918 the revised Canon law became effective, Canon 63 defined a privilege as “A private law conceding a favor which dispenses the privileged person gives him obedience to some law, or gives him powers beyond those fixed by the ordinary provisions of law.”²

In modern parlance, the term “privilege” usually conveys the idea of a “privileged class”, with a person or group granted special rights or immunities beyond the common advantages of others.³ This word, taken its active sense, is a particular law, or a particular disposition of the law, which grants certain special prerogatives to some persons, contrary to common right. In its passive sense, it is the same prerogative granted by the same particular law.⁴

¹ Lewis C. Cassidy, *Privilege: Its Past and Present Content*, Miss. L.J., Vol. 2, 1930.

² Id.

³ Black’s Law Dictionary, 6th ed., 1990, p.1197, defines privilege as, “A particular and peculiar benefit or advantage enjoyed by a person, company, or class, beyond the common advantages of other citizens. An exceptional or extraordinary power or exemption. A peculiar right, advantage, exemption, power, franchise, or immunity held by a person or class, not generally possessed by others.”

⁴ John Bouvier, *A Law Dictionary: A Dapted to the Constitution and Laws of the United States of America and of the Several States of the American Union*, Revised Sixth Edition, p.185.

However, this is not the meaning of privilege in the parliamentary context. The concept of parliamentary privilege is often misunderstood to mean that politicians acquire personal privileges simply by being elected to Parliament. As a matter of fact, parliamentary privilege applies to Parliament as a whole rather than the individual members. It enables the House of Representatives, as the democratically elected House of the people, to go about its business, such as law making, without interference from outside.⁵ That is, the term “privilege” refers not to any special benefits or entitlements enjoyed by Members of Parliament but to the immunity from ordinary law that, together with the potential exercise of parliamentary powers, enables the Houses of Parliament to carry out their primary functions of legislating, debating and inquiring more effectively and independently.

“Parliamentary privilege” refers more appropriately to the rights and immunities that are deemed necessary for the House of Commons, as an institution, and its Members, as representatives of the electorate, to fulfil their functions. It also refers to the powers possessed by the House to protect itself, its Members, and its procedures from undue interference, so that it can effectively carry out its principal functions which are to inquire, to debate, and to legislate. In that sense, parliamentary privilege can be viewed as special advantages which Parliament and its Members need to function unimpeded.⁶

When properly invoked, the effect of the privilege is to insulate the person or the institution invoking it from interference from either the executive or the courts.

⁵ Parliamentary Privilege, <http://www.parliament.nz/NR/rdonlyres/2F8F3F69-41B0-43BD-AD6E-2F04D05BA8CA/51015/4parliamentaryprivilege2002091.pdf>.

⁶ Robert Marleau, Camille Montpetit, House of Commons Procedure and Practice, <http://www.parl.gc.ca/marleaumontpetit/DocumentViewer.aspx?DocId=1001&Sec=Ch03&Seq=1&Lang=E>.

It becomes a matter for the legislature, and for the legislature alone, to deal with and regulate the matters that fall within the parliamentary privilege umbrella. In this regard, therefore, the application of parliamentary privilege does reflect a separation between the legislature and the executive with respect to certain functions.

What is the parliamentary privilege? Parliamentary privilege consists of the rights and immunities which the two Houses of Parliament and their members and officers possess to enable them to carry out their parliamentary functions effectively. The classic definition of parliamentary privilege is found in Erskine May's *Treatise on the Law, Privileges, Proceedings and Usage of Parliament*:

Parliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively... and by Members of each House individually, without which they could not discharge their functions, and which exceeds those possessed by other bodies or individuals. Thus privilege, though part of the law of the land, is to a certain extent an exemption from the general law.⁷

These "peculiar rights" can be divided into two categories: Those extended to Members individually, and those extended to the House collectively. Each grouping can be broken down into specific categories. For example, in these countries, the rights and immunities accorded to Members individually may be categorized under the following headings: Freedom of speech; Freedom from arrest in civil actions; Exemption from jury duty; Exemption from attendance as a witness.

⁷ May, T.E., *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 22nd ed., London: Butterworths, 1997, p.69.

The rights and powers of the House as a collectivity may be categorized as follows: the power to discipline, that is, the right to punish (by incarceration) persons guilty of breaches of privilege or contempt, and the power to expel Members guilty of disgraceful conduct; the regulation of its own internal affairs; the authority to maintain the attendance and service of its Members; the right to institute inquiries and to call witnesses and demand papers; the right to administer oaths to witnesses; the right to publish papers containing defamatory material.

We understand that these two groupings represent all the privileges extended to Members of Parliament and the House of Commons collectively and interlace with one another. In most instances a clear connection exists between these individual immunities and collective powers.⁸ For example, the right to freedom of speech in Parliament is the basis of the power of the House to regulate its own proceedings, as well as to control the publication of its debates and proceedings.⁹ The further point is also made that those privileges which are collective in nature (possessed by each House) are generally “powers”; whereas those enjoyed by individual members are generally.¹⁰ To differentiate them is, therefore, to study and interpret.

1.2 Legal Basis of Parliamentary Privilege

In the great majority of countries, parliamentary privilege is guaranteed by the Constitution. There are also exceptional. Such as, in New Zealand, the Russian Federation and Sri Lanka, parliamentary privilege is established by another legal instrument. In Sri Lanka by act of parliament, in New Zealand by statute law, in

⁸ H.Evans ed, *Oggers’ Australian Senate Practice*, 11th ed., Department of the Senate 2004, pp.30-1.

⁹ E.Campbell, *Parliamentary Privilege in Australia*, Melbourne: Melbourne University Press, 1966, pp.74-5.

¹⁰ G.Carney, *Members of Parliament: Law and Ethics*, Prospect 2000, pp.160-1.

the Russian Federation by a federal law on the status of the Deputy of Council of Federation and the status of Deputy of the state Duma of the Federal Assembly of Russian Federation. In the United Kingdom and Canada, freedom of speech is not explicitly codified.¹¹

2 Two Major Systems of Parliamentary Privilege

2.1 The British Model

The features of the law of privilege applying in the United Kingdom have evolved over a very long time. Actions by each House of the Parliament, monarch governments and courts have created a significant body of law, and a body of law which naturally reflects the political history of the country.

2.1.1 Freedom of Speech

The privilege of freedom of speech is set out most famously in Article 9 of the Bill of Rights (1689). A privilege of freedom of speech, however, appears to have been enjoyed by the House of Commons since at least the later years of the 15th century.¹² Though the immunity is now often thought of in terms of the protection it gives members and other participants in ‘proceedings in Parliament’ from being sued for defamation, its existence grew out of protracted conflict between the Parliament and the Crown,¹³ and the conflict in which the right of the Crown to cause members to be called to account for their statements in Parliament was disputed and resisted. The provisions of Article 9: That the freedom of speech and

¹¹ Robert Myttenaere, Report of Parliamentary Privilege, adopted at the Moscow Session, September, 1998.

¹² May, T.E., Erskine May’s Treatise on The Law, Privileges, Proceedings and Usage of Parliament, 23rd ed., London, 2004, p.79.

¹³ See, the Section of “Origin of Parliamentary Privilege” in the Paper.

debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament confirmed Parliament's claims, and had the formal and explicit agreement of the Crown. The provision has been characterised as much a political settlement as a statutory rule and as a safeguard in the separation of powers.¹⁴

Other immunities of members Freedom from arrest for members of the British Parliament was recognised as long ago as 1340.¹⁵ The immunity is limited to civil matters and its reach has been clarified and qualified by legislation.¹⁶ This immunity is also part of the law of the land and as such it cannot be waived. Another 'personal' privilege enjoyed by British members is the exemption from compulsory attendance as witnesses, whether in civil or criminal proceedings.¹⁷ The general immunity of members from jury service was ended by legislation in 2003.¹⁸

2.1.2 Ability to Punish Contempt

Each House of the British Parliament has long held the power to try contempt. This power is said to derive from the 'medieval concept of Parliament as primarily a court of justice. As such it was more readily recognized in respect of the House of Lords, but the House of Common was recognized as having the power to fine and imprison offenders. Persons punished by the House have

¹⁴ H.Evans ed., Odgers' Australian Senate Practice, 11th ed., Department of the Senate 2004, p.33.

¹⁵ May, 23rd ed., (2004), p.83.

¹⁶ May, 23rd ed., (2004), p.83.

¹⁷ May, 23rd ed., (2004), p.125.

¹⁸ May, 23rd ed., (2004), p.125.

included members and others, including sheriffs, magistrates and judges.¹⁹ This capacity was seen as very important to the House's ability to defend the Parliament. Its significance lies in the breadth of offences which could be punished: there was no list or closed set of actions which could be subject to punishment by the House. This power has been described as a "quintessentially British institution".²⁰

2.1.3 The British Influence

Principal features of the British model are seen in many parliaments, but primarily in nations which were once British colonies or possessions.²¹ This group includes nations as diverse as the India, the United States of America, New Zealand, Canada, Malaysia, Singapore, South Africa and Malta.²² In some cases the constitutional law itself sets out similar provisions, and in others there are links in constitutional and other laws. In some cases there have been no such explicit provisions or links, and at common law the provisions available were limited to those of 'reasonable necessity'.²³ Considerable adaptation has taken place in many jurisdictions.

The parliament of Scotland and the National Assembly for Wales, two of the most recently established parliaments, are interesting examples of adaptation. The

¹⁹ May, 23rd ed., (2004), p.92.

²⁰ Marc Van der Hulst, *The Parliamentary Mandate*, IPU, 2000, p.129.

²¹ Marc Van der Hulst, *The Parliamentary Mandate*, IPU, 2000, pp.66, 130.

²² Bernard Wright, *Patterns of Change-Parliamentary Privilege*,
<http://www.aph.gov.au/HOUSE/PUBS/occpub/privileges.pdf>.

²³ Gareth Griffith, *Principles, Personalities, Politics: Parliamentary Privilege Cases in NSW*,
[http://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/0/ABD1B841CB387720CA256ECF000CAADE/\\$File/bg01-04.pdf](http://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/0/ABD1B841CB387720CA256ECF000CAADE/$File/bg01-04.pdf).

laws establishing these bodies do not tie their privileges and immunities to Westminster, but instead of setting out in detail the provisions which apply. In each case, statements made during proceedings in parliament are absolutely privileged for the purposes of defamation: that they cannot form the basis of an action in defamation. But actions such as incitement to racial hatred are not protected. Proceedings are subject to the law of contempt of court (that is, conduct that tends to interfere with the course of justice in certain proceedings), although the usual provision of strict liability for contempt of court does not apply to publications made in the course of proceedings in relation to a bill or subordinate legislation, or to the extent that they consist of a fair and accurate report of proceedings, made in good faith. These legislative bodies have not been given the broad power to punish contempt.²⁴

2.1.4 Parliamentary Privilege in British Model's Nations

2.1.4.1 The United States

In Article I, Section 6, the United States Constitution (1787) provides that Members of Congress: Shall in all cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other place. The “Arrest and Speech or Debate” clause cited above sets out the federal legislative immunity scheme in the United States. Specifically, Congressmen enjoy immunity from civil arrest when going to and from or while in legislative session, as well as immunity for their “legislative acts,” defined broadly to

²⁴ Government of Wales Act 1998, S.77; Scotland Act 1998, S. 41; Scottish Parliament Business Bulletin,38/1999, <http://www.scottish.parliament.uk>; The ACT Legislative Assembly, another relatively recent parliament, has not been given the power to punish contempts.

encompass “things generally done in a session of the House by one of its Members in relation to the business before Congress.”

The notion of privilege in the United States derives from the concern on the part of the English Parliament with retaliation against or intimidation of Members of Parliament by the Monarch. But there are differences between the American and English forms of government. While the English parliament ought to preserve its absolute deliberative and legislative supremacy over the Crown within a balance of powers system, the American insist on a system of separation of powers and the three branches of government are co-equal. Therefore, parliamentary privileges in United States aim at protecting parliament and its members against threats and intimidation from the Executive and to a small degree the judicial branches of government. Thus, it is regarded as a key element of the separation of powers among the branches of the United States government.²⁵

Individual Members of Congress enjoy a very limited immunity from arrest and imprisonment when they are acting pursuant to their roles as Members of Congress and engaged in legislative activity.²⁶ The federal courts have generally been very restrictive in interpreting this privilege so as to ensure it remains a very narrow and restricted immunity.²⁷ Indeed, the privileges don't make the members of parliament “super citizens, immune from criminal responsibility.”²⁸ Members

²⁵ See, Robert J. Reinstein, Harvey. A. Silvergate, *Legislative Privilege and the Separation of Powers*, Harv. L. Rev., Vol. 86, 1973.

²⁶ See, Bradford E. Biegon, *Presidential Immunity in Civil Actions: An Analysis Based Upon Text, History and Blackstone's Commentaries*, Va. L. Rev., Vol. 82, 1996.

²⁷ See, The Fourth Section of the Paper.

²⁸ *United States v. Brewster*, 408 U.S. 501, 516 (1972).

of Congress, like all other U.S. citizens, are subject to arrest for criminal acts²⁹ and are not immune from civil process. The courts have been reluctant to give, and have not given, a blanket immunity for Members of Congress.³⁰

Article I of the Constitution also bestows upon each chamber the power to regulate and discipline its members.

2.1.4.2 Canada

The British Parliament gave the Canadian Parliament the authority to create its own parliamentary immunity laws provided they did not exceed those then enjoyed by the House of Commons at Westminster.³¹ Accordingly, the Canadians adopted those privileges and immunities enjoyed by the House of Commons when Canada's Constitution Act, 1867 was passed into law.³² Parliamentary privileges are considered part of the general public law of Canada.³³ Both Houses of Parliament have the authority to enforce these privileges and to discipline Members who breach them.³⁴ Parliamentary privilege is regarded "not [as a means] to further the selfish interests of the Member of Parliament but to protect him from harassment in and out of the House in his legitimate activities in

²⁹ See, *Gravel v. United States*, 408 U.S. 606 (1972); *Williamson v. United States*, 207 U.S. 425 (1908).

³⁰ See, Matthew R. Walker, Note, *Constitutional Law: Narrowing the Scope of Speech or Debate Clause Immunity - United States v. McDade*, 28 F.3d 283 (3rd Cir. 1994).

³¹ See, Joseph Maingot, *Parliamentary Privilege in Canada*, Butterworths, 1982.

³² See, *Senate and House of Commons Act*, R.S.C., ch. S-8, 4 (1970) (Can.).

³³ Joseph Maingot, *Parliamentary Privilege in Canada*, Butterworths, 1982, p.12; *Senate and House of Commons Act*, R.S.C. 1970, ch. S-8, 5 (1970) (Can.).

³⁴ See, Joseph Maingot, *Parliamentary Privilege in Canada*, Butterworths, 1982, pp.152-84.

carrying on the business of the House...”³⁵ Reflecting the Anglo-American democratic traditions discussed earlier, the definitive quality attributed to privilege in Canada is its “ancillary character or subordinate nature -- it is a means to accomplish a purpose or fulfil a function the Member enjoys all the the immunity necessary to perform his parliamentary work.”³⁶ The courts only intervene in matters of privilege if a particular privilege, having been invoked by a Member, is either non-existent or improperly interpreted.³⁷

While carrying on official business, Canadian MPs enjoy freedom of speech, freedom from being subpoenaed to court proceedings as a witness or a juror, freedom from molestation, and freedom from arrest in civil actions. Members are otherwise subject to the criminal law.³⁸ The principle behind this grant of immunity is to protect the Parliament from incurring the displeasure of the Crown, not to shield parliamentarians from lawsuits.

2.2 The French Model

In the French system members enjoy the critical immunity of freedom of speech, but the expression of the immunity is different from the British model. There are differences in respect of the immunity of members’ persons and significantly in respect of the ability to punish contempts.

2.2.1 Freedom of Speech

³⁵ Roman Corp. Ltd. et al. v. Hudson's Bay Oil and Gas Co. Ltd. et al., [1972] 23 D.L.R. (3d), pp.292, 299, affirmed on other grounds, [1973] 36 D.L.R. (3d) 413.

³⁶ See, Joseph Maingot, *Parliamentary Privilege in Canada*, Butterworths, 1982, p.13.

³⁷ *Stockdale v. Hansard*, 112 Eng. Rep.1112 (1839), stands for the proposition that courts decide the nature and extent of parliamentary privilege.

³⁸ See, Joseph Maingot, *Parliamentary Privilege in Canada*, Butterworths, 1982, pp.105, 219.

Members of the French Parliament have long been immune from action on account of their statements in Parliament. The relevant term is best translated into English in this context as ‘non-accountability’.³⁹ The Clerk of the French Senate has observed that this immunity was a legacy of a tradition created over past centuries by the British Parliament.⁴⁰ The effect of the immunity is that members cannot be prosecuted or tried elsewhere on account of their statements or votes in Parliament.⁴¹ It has been set out in successive French constitutions, Article 26 of the 1958 Constitution providing: No Member of Parliament may be prosecuted, searched for, detained or be subject to judgment on the basis of opinions of opinions expressed or votes cast by him in the exercise of his duties.⁴² Courts have been required to determine issues such as whether the repetition outside parliament by members, or by broadcast, of remarks made in Parliament are protected by force of this provision (they have been found not to be protected).⁴³

It is notable that the form of words “...No Member may be prosecuted...” is in contrast to the Bill of Rights with its reference to the activity “proceedings in Parliament”. This may mean that questions such as whether other persons (for example committee witnesses) were covered by the immunity were more open

³⁹ Mme Ponceau, Privileges and Immunities in Parliament, The Association of Secretaries General of Parli-aments (ASGP) meeting 17-19, October, 2005, <http://www.asgp.info/Resources/Data/Documents/MSUMEOMVPXKTACUJDEWNDNORPOBTYP.pdf>.

⁴⁰ Id.

⁴¹ Id.

⁴² Id.

⁴³ Id.

there. In the event, however, court decisions have recognised the protection of witnesses.⁴⁴

2.2.2 Freedom from Arrest

In France the immunity of the member's person has been recognized since the formation of the National Assembly, on 23 June, 1789 the Assembly declaring "the person of each deputy shall be inviolable".⁴⁵ The justification of such a provision is the protection of deputies from actions by the crown/executive.⁴⁶ Thinking on the extent and application of the immunity has apparently developed considerably, in the last several years particularly with regard to the interests (and tolerance) of others.⁴⁷

One constant element has remained: Parliament has had a role in the application of the immunity. In essence, and other than in criminal cases, where a member is captured red-handed or in respect of final sentencing, parliamentary approval is required for the arrest or detention of a member.⁴⁸ The approval is given by the Bureau (Managing Group) of the House. One advantage of this is that confidentiality may be maintained, at least for a period.⁴⁹

⁴⁴ Marc Van der Hulst, *The Parliamentary Mandate*, IPU, 2000, pp. 67-8.

⁴⁵ Marc Van der Hulst, *The Parliamentary Mandate*, IPU, 2000, p.79.

⁴⁶ Mme Ponceau, *Privileges and Immunities in Parliament*, The Association of Secretaries General of Parli-aments (ASGP) meeting, 17-19 October 2005, <http://www.asgp.info/Resources/Data/Documents/MSUMEOMVPXKTACUJDEWNDNORP OBTYP.pdf>.

⁴⁷ Id.

⁴⁸ Id.

⁴⁹ Id.

An indication of the political and parliamentary sensitivity of these matters is given in the statement of one Senator: “To gnaw at inviolability is to hand over parliamentarians to the vengeance and arbitrary decisions of those who, with complete impunity, profit from the weakness of a state terrorised by excessive media coverage in order to set themselves up as a power independent of the law itself and to launch a concerted attack on the authorities and principles of the Republic. One can even bar parliamentarians from attending sittings on the grounds that they have to answer judges’ summons”.⁵⁰

2.2.3 Punishment of Offences

Despite their authority in matters such as the immunity of members’ persons, the houses of the French Parliament have never enjoyed the broad capacity to punish offences (contempt) possessed by the House of Commons.⁵¹

2.2.4 The French influence

As would be expected, the key provisions of the French model appear to have had their greatest influence in continental Europe and in former French colonies.

2.2.5 Parliamentary Privilege in French Model’s Nations

2.2.5.1 Germany

In practice, German legislators enjoy limited immunity that protects them from being prosecuted for performing their legislative duties and expressing political opinions.⁵² The German Constitution, the Basic Law or Grundgesetzes,

⁵⁰ Id.

⁵¹ Marc Van der Hulst, *The Parliamentary Mandate*, IPU, 2000, pp.129-30.

⁵² See, Klein, *Indemnitat und Immunitat*, in: Schneider & Zeh, *Parlamentsrecht und Parlamentspraxis in der Bundesrepublik Deutschland*, Walter de Gruyter ed., 1989, S.555ff.

protects the German legislature (Bundestag) from undue influence by other branches of government.⁵³ This immunity regime only applies to Members of the Bundestag. Members of the Bundesrat, which is composed of Members who are appointed and removed by the Land governments, and do not enjoy any parliamentary immunity. Article 46 of the Basic Law reads:

A deputy may not at any time be subjected to court proceedings or disciplinary action or otherwise called to account outside the Bundestag for a vote cast or statement made by him in the Bundestag or in any of its committees. This provision does not apply to defamatory insults.

A deputy may not be called to account or arrested for a punishable offense without permission of the Bundestag, unless he is apprehended during commission of the offense or in the course of the following day.

The permission of the Bundestag shall also be necessary for any other restriction of the personal liberty of a deputy for the initiation of proceedings against a deputy under Article 18.⁵⁴

Any criminal proceedings or any proceedings under Article 18 against a deputy, any detention, or any other restriction of his personal liberty shall be suspended at the demand of the Bundestag.

⁵³ See, Currie, *The Constitution of the Federal Republic of Germany*, University of Chicago Press, 1994, p.111.

⁵⁴ Artikel 18, Wer die Freiheit der Meinungsäußerung, insbesondere die Pressefreiheit (Artikel 5 Absatz 1), die Lehrfreiheit (Artikel 5 Absatz 3), die Versammlungsfreiheit (Artikel 8), die Vereinigungsfreiheit (Artikel 9), das Brief-, Post- und Fernmeldegeheimnis (Artikel 10), das Eigentum (Artikel 14) oder das Asylrecht (Artikel 16a) zum Kampfe gegen die freiheitliche demokratische Grundordnung mißbraucht, verwirkt diese Grundrechte. Die Verwirkung und ihr Ausmaß werden durch das Bundesverfassungsgericht ausgesprochen.

Members of the Bundestag may not be questioned elsewhere about what they have said or done in the Bundestag. Defamatory insults are, however, specifically exempted from this protection. A deputy may not be arrested for a criminal offense without the permission of the Bundestag, unless the deputy is arrested during the commission of the crime or the next day. The Bundestag will in practice routinely waive the immunity of Members of Parliament at the request of prosecutors except in purely political cases. The Bundestag has waived immunity so a Member could face charges for attempting to rig an election, perjury, embezzlement, treason and bribery.

2.2.5.2 Japan

The Japanese Constitution of 1946 authorizes two basic immunities for Diet Members. Article 51 exempts parliamentarians from all liability for speeches, debates, and votes cast inside the House.⁵⁵ Article 50 forbids the arrest or detention of a parliamentarian while the Diet is in session.⁵⁶ MPs may be arrested without the House's approval when they are caught in flagrante delicto, and if a Member is apprehended when the Diet is not in session, notice attached to a copy of the arrest warrant must be delivered to the President of the House to which the subject Member belongs. The parliamentarian may be freed, however, upon the demand of the particular House.

⁵⁵ Article 51, Members of both Houses shall not be held liable outside the House for speeches, debates or votes cast inside the House.

⁵⁶ Article 50, Except in cases as provided for by law, members of both Houses shall be exempt from apprehension while the Diet is in session, and any members apprehended before the opening of the session shall be freed during the term of the session upon demand of the House.

The Diet Law of 1947 (Kokkai Ho) delineates the scope of Members' parliamentary immunity, as well as the process for lifting it.⁵⁷ When the Diet is in session, the public prosecutor must petition a judge to issue a warrant for the arrest of a parliamentarian. If the judge finds it reasonable to arrest the MP, he will then ask the Cabinet to submit a request for approval of the arrest to the Diet.⁵⁸ Specifically, the Prime Minister representing the Cabinet asks the Chairperson of the House to which the Member belongs to approve the arrest. The House then holds a hearing which includes both parties and either approves or denies the request.⁵⁹ A full vote of the House is required to strip a parliamentarian of his immunity from arrest.⁶⁰

It is rare that Japanese prosecutors petition to lift a parliamentarian's immunity as most politicians voluntarily cooperate with prosecutors when faced with allegations of criminal activity in order to avoid bad press. To date, sixteen requests for arrest have been made and fourteen were approved. All sixteen were involved corruption, bribery, fraud, and embezzlement. Of the two requests that were rejected, one was made during the last few days of the session and the other concerned a suspect Member who accepted the examination of the prosecutor of his own free will. The most recent case concerning the lifting of parliamentary

⁵⁷ Unpublished memorandum from Thomas W. Simon, Professor, Illinois State University, to Catherine L. Newcombe, (Feb. 2, 1996) (on file with the authors) (describing Japanese Parliamentary Immunity Procedures). Quoted Scott P. Boylan, Catherine L. Newcombe, *Parliamentary Immunity: A Comparison Between Established Democracies and Russia: A Crisis of Democratic Legitimacy for Russia*, *Journal of International Legal Studies*, Vol. 3, 1997.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See, *Japan Prosecutors Mull Arrest of Lawmaker-Report*, Reuters World Service, Mar. 7, 1994.

immunity involved Toshio Yamaguchi, the former Minister of Labor.⁶¹ He was suspected of numerous breaches of trust in public contract matters.

3 The Origin of Parliamentary Privilege

The origins of parliamentary privilege are to be found chiefly in ancient practice, asserted by Parliament and accepted over time by the Crown and the courts as the law and custom of Parliament. Some of the Commons ancient privileges, such as freedom from arrest, were claimed from the Sovereign and upheld with his consent.⁶² Other privileges were established by Parliament itself.

Therefore, it is necessary to fully understand the parliamentary privilege to trace back to its origins in England. In England the origins of Parliament can be traced to early medieval feudal institutions and thought, but it was not until after the Norman conquest of England in 1066 A.D., that the institution of the Curia Regis established a central assembly of Normans, exercising undifferentiated, executive, judicial and legislative authority, which prepared the way for the ultimate emergence of the institution of modern parliament with its clearly differentiated and distinguishable making authority.

Parliament began its early history in England as a judiciary body, the highest judiciary in the country.⁶³ As a judiciary body, the highest court of the land, and a concomitant assertion that lower courts could not entertain actions challenging the

⁶¹ Id.

⁶² See, Erskine May, 22nd ed., pp.72-78.

⁶³ Alexander J. Cella, The Doctrine of Legislative Privilege of Freedom Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts, Suffolk U. L. REV., Vol. 2, 1968.

propriety of deliberations in a higher court.⁶⁴ In addition to freedom of speech, it also includes freedom from civil arrest and the right to punish members and outsiders for contempt, rights which also derived from judicial antecedents.⁶⁵ Given this judicial origin, the initial scope of the privilege was necessarily limited to protecting the speeches and debates of members of Parliament from the interference of private persons through the courts.

By the 14th century the parliament had developed two distinct Houses, the Commons and the Lords. The Commons involved representatives from counties, towns and cities, the Lords already consisted of members of the nobility and clergy. The lord continued to exercise its power of judiciary.

Professor Carl Wittke elucidated this point and he wrote:

It is by no means an exaggeration to say that these judicial characteristics colored and influenced some of the great struggles over privilege in and out of Parliament to the very close of the nineteenth century. It is not altogether certain whether they have been entirely forgotten even now. Nowhere has the theory that Parliament is a court---the highest court of the realm, often acting in a judicial capacity and in a judicial manner---persisted longer than in the history of privilege of Parliament.⁶⁶

With the appearance of the Common House, Parliament slowly began to assert a greater role for itself in legislative areas, and gradually became conscious of itself as a sovereign legislative. The parliament shifts the emphasis of its

⁶⁴ Id.

⁶⁵ Id.

⁶⁶ See, Carl Wittke, *The History of Parliamentary Privilege in England*, New York, Da Capo Press, 1970.

activity away from judicial and administrative matters to legislative matters, which were traditionally seen as affairs of the Crown.⁶⁷ To no surprise, the Crown was angered by this intrusion of Parliament into such affairs as “royal succession and religion”⁶⁸ areas generally dealt with by the Crown.⁶⁹

In ancient the Crown often used various methods to intimidate Members of parliament, including arrest and arraignment before the Star Chamber or direct committal to the tower of London. The Crown also turned to the Courts to enforce its pleasure.

In contrary to Parliament made an effort to assert and solidify certain rights and privileges they believed they were entitled to as an independent legislative body. As was custom since approximately 1377, at the beginning of every new legislative session, the Speaker of the House in Parliament would deliver to the King a “Speaker’s Petition.”⁷⁰ The Speaker’s Petition restated Parliament’s rights and privileges that the King was to respect.

But the privilege was not able to prevent the detention or arrest of Members at the order of the Crown. In history of the parliament of England some of Members were imprisoned without trial while the House was not sitting or after the dissolution of Parliament.

⁶⁷ Alexander J. Cella, *The Doctrine of Legislative Privilege of Freedom Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts*, Suffolk U. L. REV., Vol. 2, 1968.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See, Carl Wittke, *The History of Parliamentary Privilege in England*, New York, Da Capo Press, 1970.

In Richard II (1396-1397), Thomas Haxey, a member of the Commons, was condemned in Parliament as a traitor for having offered a bill to reduce the expenditures of the royal household.

The death sentence was not carried out during Richard's reign. On the accession of his successor, Henry IV, Haxey petitioned the King in Parliament to reverse the judgment as being "encountre droit et la course quel avoit este devant en Parlement"

(against the law and system which had existed before in Parliament).

The petition was granted in 1399. And, in the same year, the Commons petitioned the King directly to reverse the judgment. This was done. And the judgment was annulled.⁷¹

A more significant case arose in the reign of Henry VIII (in 1512). Richard Strode, a Member of Parliament, had been prosecuted in the courts and imprisoned for having proposed bills to regulate the Cornwall tin industry. Parliament passed an act annulling the judgment against him and declared void all suits and proceedings against Strode and every other Member of Parliament "for any bill, speaking, or declaring of any matter concerning the Parliament, to be communed and treated of, be utterly void and of none effect."

But, notwithstanding this recognition, the right of free speech continued to be considered, more or less, as an *act of grace* on the part of the King. For a long

⁷¹ Léon R. Yankwich, The Immunity of Congressional Speech. Its Origin, Meaning and Scope, University of Pennsylvania Law Review, Vol. 99, 1951.

time, English courts could not agree whether the Act of 1512 was general or special.⁷²

Peter Wentworth case is also important lawsuit. During the legislative sessions of 1558, Parliament repeatedly vocalized its displeasure with Queen Elizabeth's views regarding succession.⁷³ The Queen was unhappy with Parliament's open involvement in areas of government that had traditionally belonged to the Crown. The Queen ordered the end of further discussion of the issue.⁷⁴ Mr. Wentworth saw this order from the Queen as a violation of Parliament's privilege of free speech and openly questioned the actions of the Queen despite her attempt to stop its further deliberation on the subject.⁷⁵

By 1575, Parliament had again caught the attention of the Queen.⁷⁶ This time Parliament was deliberating on an issue involving religion. The Queen, as might be expected, lashed out at Parliament for its intrusion into areas strictly dealt with by the Crown. Once again, Mr. Wentworth began vocalizing his displeasure in what he saw as the Queen's intrusion into Parliament's freedom of speech.⁷⁷ In response, state officials attempted to interrogate Mr. Wentworth. Through a committee that was appointed by Parliament, Mr. Wentworth was questioned

⁷² Léon R. Yankwich, *The Immunity of Congressional Speech. Its Origin, Meaning and Scope*, University of Pennsylvania Law Review, Vol. 99, 1951.

⁷³ See, Alexander J. Cella, *The Doctrine of Legislative Privilege of Freedom Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts*, Suffolk U. L. REV., Vol.2, 1968.

⁷⁴ See, Id.

⁷⁵ See, Id.

⁷⁶ See, Id.

⁷⁷ See, Id.

regarding his disrespect towards the Queen and his inflammatory remarks.⁷⁸ Wentworth took the position that if the committee were conducting its hearing on behalf of the Crown, he would refuse to answer any of its questions since it had no authority to question him. On the other hand, if this committee were acting as a committee of the House of Commons, he would then willingly answer its questions since only such a duly constituted body had any authority to examine him.⁷⁹

In 1621, King James I attempted to put an end to Parliament's intrusion into the affairs of the Crown.⁸⁰ He gave Parliament a verbal warning that he was not to be crossed and that he would have no fear in punishing any attempt by Parliament to challenge him.⁸¹ After a series of communications between King James and Parliament over their respective privileges, "James dissolved the Parliament giving as one of his major reasons that the House of Commons 'either sat silent, or spent the time in disputing of privileges...'"⁸² Following the dissolution of Parliament, King Charles I in 1629 prosecuted three members for their statements made in Parliament some eight years earlier.⁸³ The King regarded these prior

⁷⁸ Terence M. Fitzpatrick, *The Speech or Debate Clause: Has the Eighth Circuit Gone Too Far?*, UMKC L.Rev., Vol. 68, 2000.

⁷⁹ See, Alexander J. Cella, *The Doctrine of Legislative Privilege of Freedom Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts*, Suffolk U. L. REV., Vol. 2, 1968.

⁸⁰ See, *Id.*

⁸¹ See, *Id.*

⁸² Terence M. Fitzpatrick, *The Speech or Debate Clause: Has the Eighth Circuit Gone Too Far?*, UMKC L. Rev., Vol. 68, 2000.

⁸³ See, Alexander J. Cella, *The Doctrine of Legislative Privilege of Freedom Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts*, Suffolk U. L. REV., Vol. 2, 1968.

statements as “dangerous, libellous, and seditious.”⁸⁴ Once again the members of Parliament attempted to assert their privilege of speech. The three accused members of the House of Commons challenged the jurisdiction of the Court of King’s Bench to try them, asserting that their offenses, if any, were punishable by Parliament, and by Parliament alone, and that no other court was competent or had jurisdiction to try them for speeches made in Parliament. “Words spoken in Parliament, which is a superior court,” they asserted, “cannot be questioned in this court, which is inferior.”⁸⁵

The men were found guilty by a court that was predominately appointed by the King. They were imprisoned and levied large pecuniary damages. This incident was one of the most influential in the eventual downfall of King Charles I.⁸⁶ At the same time, it unified Parliament in its opposition to intrusions by the Crown and Parliament’s need for a more concrete privilege of speech. After an ensuing Civil War in England, the House of Commons publicly declared the prosecutions of the three Parliament members a violation against the privileges afforded their members.⁸⁷

By this time the speech or debate privilege, for all intents and purposes, was a fully functioning privilege of Parliament.⁸⁸ However, it was not until the prosecution of Sir William Williams that the speech or debate privilege was

⁸⁴ Id.

⁸⁵ Id.

⁸⁶ See, Id.

⁸⁷ Carl Wittke, *The History of Parliamentary Privilege in England*, New York, Da Capo Press, 1970, p.30.

⁸⁸ Terence M. Fitzpatrick, *The Speech or Debate Clause: Has the Eighth Circuit Gone Too Far?*, *UMKC L. Rev.*, Vol.68, 2000.

officially recorded in the laws of England as a privilege for its Parliamentary members.⁸⁹ At the time, Williams was the Speaker of the House under the reign of King Charles II.⁹⁰

In 1668, Williams and other members of Parliament received documents that exposed the King's efforts to replace Protestantism, as the official religion of England, with Catholicism. Many of these documents and their details became a part of the journals of Parliament. Later, with the permission of both other Parliament members and the source of one of the documents, Parliament published one of the documents detailing this "popish plot" of the King.⁹¹ Charles II knew better at this point than to challenge the members of Parliament in their deliberations.⁹² It was not until King James II took the throne that Williams was brought up on charges for the publishing of those documents in Parliament.

The King based this prosecution on the legal argument that prior history and cases had carefully and narrowly defined the free speech privilege to provide absolute immunity only for speeches, debates and votes within the walls of Parliament. In response, Parliament asserted that the privilege encompassed all of

⁸⁹ Robert J. Reinstein & Harvey A. Silverglate, *Legislative Privilege and the Separation of Powers*, HARV. L. REV., Vol. 86, 1973.

⁹⁰ See, *Id.*

⁹¹ See, Robert J. Reinstein & Harvey A. Silverglate, *Legislative Privilege and the Separation of Powers*, HARV. L. REV., Vol. 86, 1973, (citing 9 H.C. JOUR. 630-95 (1680)).

⁹² Robert J. Reinstein, Harvey A. Silverglate, *Legislative Privilege and the Separation of Powers*, HARV. L. REV., Vol. 86, 1973.

the ordinary and necessary functions of the legislature and that the publication of proceedings was such a function.⁹³

Soon after, a revolution ensued in England in 1689 which led to the exile of James II. The end of the revolution brought with it the adoption of the English Bill of Rights, which contained the long awaited Speech or Debate Clause, “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.”⁹⁴ The adoption of the speech or debate clause was intended to cover not just those things done by representatives while physically present inside Parliament, but instead to “encompass all of the ordinary and necessary functions of the legislature...”⁹⁵ Free speech in the House was finally established and protected from interference either by the Crown or the courts.

Therefore, it may be said that parliamentary privilege emerged out of centuries of struggle between King and Commons in England culminating in the Bill of Rights of 1689. Freedom of speech, the most important right enjoyed by Members of the British House of Commons, was contained in Article 9 of the Bill. The passage of the Act was a great victory for democracy not only in Britain but also in whole world as almost nationals are inheritors of the spirit the Bill of Rights.

⁹³ See, Robert J.Reinstein, Harvey A. Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV., Vol. 86, 1973, (citing *Proceedings Against Sir William Williams*, 13 HOW. ST. TR. 1377-79, 1410-15(1684-1695)).

⁹⁴ Robert J. Reinstein & Harvey A. Silverglate, *Legislative Privilege and the Separation of Powers*, HARV. L. REV., Vol. 86, 1973, (citing 1 W. & M. Sess. 2, c. 2 (1689)).

⁹⁵ Robert J. Reinstein & Harvey A. Silverglate, *Legislative Privilege and the Separation of Powers*, HARV. L. REV., Vol. 86, 1973.

In the late seventeenth century and the first half of the eighteenth century, some claims of the House as to what constituted privilege went too far.⁹⁶ The privilege of freedom from arrest in civil matters was sometimes applied not only to Members themselves, but also to their servants. In addition, Members sought to extend their privilege from hindrance or molestation to their property, claiming a breach of privilege in instances of trespassing and poaching. Such practices were eventually curtailed by statute because they clearly became a serious obstruction to the ordinary course of justice.⁹⁷ Thus, privilege came to be recognized as only that which was absolutely necessary for the House to function effectively and for the Members to carry out their responsibilities as Members.

In the midst of their occasional excesses, parliament acknowledged that a balance had to be maintained between the need to protect the essential privileges of Parliament and, at the same time, to avoid any risk that would undermine the interests of the nation. In this connection, it was agreed in 1704 that neither House of Parliament had any power, by any vote or declaration, to create for themselves any new privileges not warranted by the known laws and customs of Parliament. Since then, neither House alone has ever sought to lay claim to any new privilege beyond those petitioned for by Speakers or already established by precedent and law.⁹⁸

The nineteenth century witnessed numerous cases of privilege, which helped to determine the bounds between the rights of Parliament and the responsibility of

⁹⁶ Robert Marleau, Camille Montpetit, House of Commons Procedure and Practice, <http://www.parl.gc.ca/marleaumontpetit/DocumentViewer.aspx?DocId=1001&Sec=Ch03&Seq=3&Lang=E>.

⁹⁷ May, 22nd ed., p.75

⁹⁸ May, 22nd ed., p.81.

the courts.⁹⁹ Perhaps the most famous of the court cases was Stockdale versus Hansard. In 1836, a publisher, John Joseph Stockdale, sued Hansard, the printer for the House of Commons, for libeling on account of a report published by order of the House. Despite numerous resolutions of the House protesting the court proceedings and the committal to prison of Stockdale by the House, the courts refused to acknowledge the claims of the House. “Lord Denman denied... that the *lex parliamenti* (the Law of Parliament) was a separate law, unknown to the judges of the common law courts. Either House considered individually was only a part of the High Court of Parliament, and neither could bring an issue within its exclusive jurisdiction simply by declaring it to be a matter of privilege. Any other proposition was ‘abhorrent to the first principles of the constitution.’ ”¹⁰⁰ In the end, the situation was partially resolved by the enactment of the Parliamentary Papers Act 1840, which gave statutory protection to papers published by order of either House.

4 The Justification of Parliamentary Privilege

4.1 The Purpose of Parliamentary Privilege

Parliamentary privilege refers to the bundle of powers, rights and immunities ‘necessary’ for the effective performance of parliamentary functions. It is necessary “to protect legislators in the discharge of their legislative and deliberative functions, and the legislative assembly’s work in holding the government to account for the conduct of the country’s business.”¹⁰¹

⁹⁹ May, 22nd ed., pp.160-62.

¹⁰⁰ May, 22nd ed., p.162.

¹⁰¹ Canada (House of Commons)v. Vaid[2005]1 SCR 667, at para. 41.

Without the protection afforded by parliamentary privilege, members would be handicapped in performing their parliamentary duties, and the authority of Parliament itself in confronting the executive and as a deliberative forum would be diminished. As Griffith and Ryle state: Parliamentary privilege, even though seldom mentioned in debates, underpins the status and authority of all Members of Parliament. Without this protection individual Members would be severely handicapped in performing their parliamentary functions, and the authority of the House itself, in confronting the Executive and as a forum for expressing the anxieties of the citizen, would be correspondingly diminished.¹⁰²

Parliamentary privilege, in essence, is essential to the conduct of Parliament's business, as it is to the maintenance of its authority and independence. At issue is the integrity and autonomy of the institution itself. While certain rights and immunities, notably those attached to the freedom of speech in parliamentary proceedings, are bestowed upon Members individually, they do not exist for their personal benefit. Parliamentary privilege exists rather to protect the Houses "themselves collectively and their members when acting for the benefit of their House, against interference, attack or obstruction".¹⁰³

Without parliamentary privileges, parliament could not discharge their functions efficiently and effectively. These privileges have developed to allow Parliament to proceed with the business of making legislation and reviewing the activities of the Executive without illegitimate interference.

Parliamentary privileges, therefore, are grounded in the doctrine of necessity. The content and extent of these privileges have evolved with reference to their

¹⁰² R Blackburn, A Kennon eds, Griffith and Ryle of Parliament: Functions, Practice and Procedures, Sweet and Maxwell, 2003, p.123.

¹⁰³ CR Munro, Studies in Constitutional Law, London, Butterworths, 1987, p.136.

necessity. The privileges of Parliament include those rights, which are absolutely necessary for the execution of its power.

It is important to bear in mind that the purpose of parliamentary privilege is to secure the proper dignity, efficiency and independence of the legislature and not to protect individuals from due process. This legal institution is not a personal immunity; it is an occupational immunity, which is provided to ensure that the duties of representatives may carry out perfectly. This immunity is not meant to place a Member of Parliament above the law, but to protect him from possible groundless proceedings or accusations that may be politically motivated; thus it is not a discriminatory institution.¹⁰⁴

The parliamentary privilege protects the legislative branch from interference by the executive and judicial branches. The purpose is derived directly from the separation of powers doctrine. The privilege also relieves the parliament and their members from the burden of defending themselves in court, allowing them to concentrate on their legislative activities.

Another theoretical basis to justify parliamentary privilege is a definite and unquestionable rule in jurisprudence necessary to override other important interests. The free expression of opinion and facts in Parliament is so important to our democratic way of life that this freedom (protected by absolute privilege) overrides any private right or interest of the person who might be defamed.¹⁰⁵ In other words, the privilege protects statements made in circumstances where the

¹⁰⁴ Seyed Doraid Mousavi Mojab, A Review of Parliamentary Privilege with an Approach to Iranian Legal System, http://www.kentlaw.edu/jicl/articles/spring2005/s2005_seyed_mousavi.pdf.

¹⁰⁵ Padfield, C. F., Law Made Simple, 7th ed., England, Made Simple Books, 1988, p.241.

public interest in securing a free expression of fact or opinion outweighs the private interest of the person about whom the statements are made.¹⁰⁶

4.2 Constitutional Functions

If parliamentary privilege is set in a broader constitutional context, the justification for parliamentary privilege is that the freedom to control their own proceedings and the freedom of speech in Parliament are necessary if the Houses of Parliament are to fulfill their constitutional functions effectively, that is, to inquire, debate and legislate. In *Vaid* case, the supreme court of Canada said that parliamentary privilege is necessary “to protect legislator in discharge of their legislative and deliberative functions, and the legislative assembly’s work in government to account for the conduct of the country’s business.”¹⁰⁷

The UK Joint Committee had this to say:

Without this protection, Members of Parliament would be handicapped in performing their parliamentary duties, and the authority of Parliament itself in confronting the executive and as a deliberative forum would be diminished.¹⁰⁸

4.3 Separation of Powers

Any system of government based on separation of powers contains inherent friction, and clashes between the legislative and executive branches over their respective prerogatives are inevitable.¹⁰⁹ Parliamentary privilege can be located

¹⁰⁶ Keenan, Denis, Smith and Keenan’s *English Law*, thirteen ed., England, Longman, 2000, p.526.

¹⁰⁷ *Canada (House of Commons) v. Vaid* [2005] SCC 30, at para. 41.

¹⁰⁸ Joint Committee on Parliamentary Privilege, p.8.

¹⁰⁹ Reinstein, Silverglate, *Legislative Privilege and the Separation of Powers*, Harv. L.Rev., Vol. 86, 1973.

within what has been called the ‘rough’ doctrine of the separation of powers. As Lamer CJ in *New Brunswick Broadcasting v. Nova Scotia* said “given its historical development, it is fair to say that its [parliamentary privilege] source is constitutional in the most fundamental sense in that it has everything to do with the relationship between the different branches of government.”¹¹⁰

David McGee also indicate: “Privilege is part of the way in which the separation of powers is delineated...and a principal means of effecting a *modus vivendi* between the legislature and the other two branches of government...Parliamentary privilege...helps preserve Parliament’s freedom from outside control and to give it and its members the legal tools and confidence they will need to perform their constitutional functions.”¹¹¹

Historically, in 17th century England, parliamentary privilege was political, not legal, in origin, forged in the conflict between Parliament, the Executive and the courts. The fundamental rights of the House of Commons were asserted against the prerogatives of the Crown and the authority of the courts. The assertion of privilege was a declaration of its independence from the other branches of government.¹¹²

McHugh J in *Egan v Willis* stated: The view of the Tudor and Stuart monarchs was that the House of Commons was summoned only to vote on the appropriations asked of them, to approve legislation submitted to them and to express opinions on matters of policy only when asked. The House of Commons

¹¹⁰ [1993]1 SCR 319.

¹¹¹ David McGee, *The Scope of Parliamentary Privilege*, NZLJ, Vol. 84, 2004.

¹¹² Gareth Griffith, *Parliamentary Privilege: First Principles and Recent Applications*, www.parliament.nsw.gov.au/WEB_FEED/PHWebContent.nsf/PHPages/LibraryPublications.

would not have become the powerful institution that it is if the views of those monarchs had prevailed. The importance of Parliament under the Westminster system is in no small part due to the seemingly inconsequential right of the House of Commons to control its business.¹¹³

In contemporary terms it is sometimes said that the focus is on the relationship between Parliament and the courts – on the separation of judicial and legislative power - with parliamentary privilege operating “now as a constraint on the judicial arm of government”.¹¹⁴

One might ask whether this particular separation of powers continues to be ‘necessary’ now that the courts are recognised to be independent of the Executive. Do the same constitutional first principles apply in contemporary circumstances as in the past? Are the same immunities required or, stating the issue in another way, should the immunities relating to freedom of speech in Parliament be placed on a different constitutional basis?

A further consideration is that, as the earlier statements from Vaid show, parliamentary privilege also serves to assert Parliament’s independence from the modern day Executive. Parliament’s immunities prevent incursions into parliamentary freedoms, by commissions of inquiry, police questioning or other means. Its powers facilitate the scrutiny of the Executive on behalf of the electorate.

Parallels can also be drawn with the prerogative powers. Like parliamentary privilege, the prerogative consists of special rules that “evolved to enable public

¹¹³ (1998) 195 CLR 424, p.478.

¹¹⁴ Mees v Roads Corporation (2003) 128 FCR 418, at para.78.

bodies to perform their functions”.¹¹⁵ In both cases the rules were customary in origin, and were developed and decided in special courts – the Star Chamber or Privy Council where the prerogative powers were concerned, the High Court of Parliament in the case of parliamentary privilege. Dicey wrote:

Between “prerogative” and “privilege” there exists a close analogy: the one is the historical name for the discretionary authority of the Crown; the other is the historical name for the discretionary authority of each House of Parliament.¹¹⁶

At odds as the two doctrines were historically, there may yet be parallels to draw between the ways the courts have brought both species of discretionary powers more and more under the rule of the general law.

4.4 The Popular Sovereignty and Parliamentary Privilege

Principle of the popular sovereignty ensures that the interpretation of parliamentary privilege as far as possible to enable Members of parliament to subject to the people, as also the people in the implementation of the political mandate. Such an ideal picture of the total can be interpreted from several aspects as follows:

a. Parliamentary Privilege Ensures the Integrating between the Legislators and the People

Parliamentary privilege should not be used to make legislators and the people separated, in accordance with the principle of the popular sovereignty, the people are the masters of the legislative service, the servant has no right to set up the legislative process to protect the freedom to oppose their own masters.

¹¹⁵ C Munro, Studies in Constitutional Law, Butterworths, 1987, p.136.

¹¹⁶ A.V. Dicey, Introduction to the Study of the Law of the Constitution, 6th ed., Macmillan, 1902, p.371.

Parliamentary privilege does not relieve legislators' responsibility to the people. What in parliament is not held accountable does not mean that it does not hold. The people through elections can removed their own representatives with who is not satisfied. It can be regarded as representative of the people to hold accountable. But it must be pointed out that the people are sovereign only refers to the collective capacity of the people, single person can interfere in the sovereignty of the people collectively, if these people were allowed on the intention to guide the affairs of the people, legislators carrying disturb.¹¹⁷

4.4.1 The Legislative Self-dealing

The popular sovereignty shows that there should be strong safeguards against legislative self-dealing. When legislators in accordance with their own interests rather than the interests of the people of action, will result in self-dealing.¹¹⁸ The privilege does not have to be interpreted so that legislators rooted in the permit office or injustice help their friends or associates. For example, when the privilege provides very strong protection of the incumbent legislators of speech, it should not be interpreted as opponents of freedom of expression can be reduced. Similarly, the boards of each House can determine the power of the electoral dispute should not be used as in the House to exclude those who hold different views on political instrument.

4.4.2 The Protectiong of the Rights of Citizens

The popular sovereignty means that the rights of citizens must be protected. The best means of power which prevent violation of individual rights from the

¹¹⁷ See, Josh Chafetz, *Democracy's Privileged Few: Legislative Privilege and Democratic Norms in the British and American Constitutions*, Yale University Press, 2007, pp.17-18.

¹¹⁸ See, Josh Chafetz, *Democracy's Privileged Few: Legislative Privilege and Democratic Norms in the British and American Constitutions*, Yale University Press, 2007, p.18.

Government is to ensure the separation of powers among the three branches of national government. As Madison put it, “the accumulation of all power, legislative, executive and judicial, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”¹¹⁹ But it does not require the legislative, executive and judicial that should be completely unrelated. Parliamentary privilege should be such a construct to protect the separation of powers and checks and balances between the departments of delicate balance. This means that the other department cannot be violated in the field of parliamentary privilege matters. However, Freedom also means that Parliament should not be the definition of the scope of their own privileges.¹²⁰

4.5 Representation and Free Mandate

One of the fundamental principles of representative democracy is the “free mandate”. This means: After the representatives are elected, MPs become legally independent of the voters. They cannot be directed or held to account and they cannot be recalled for their activities or votes. In carrying out their mandate, they represent the entire people. As such, they establish their positions in Parliament freely, according to their consciences and convictions, and they vote accordingly.

Just as parliamentarians are not representatives of only part of the population, so also they are precluded from defending special interests, deputies and senators exercise their mandates freely and are not bound by any undertakings given before their election or instructions received from voters during their mandate. That is,

¹¹⁹ James Madison, Alexander Hamilton, John Jay, *The Federalist papers*, Penguin Classic, 1987, p.155.

¹²⁰ Josh Chafetz, *Democracy’s Privileged Few: Legislative Privilege and Democratic Norms in the British and American Constitutions*, Yale University Press, 2007, p.18.

the free mandate also means that the MP must be also independent of his party, cannot be forced to represent the opinion of the party and is under no obligation to declare obedience. According to the principle, the fact that the MP was elected is what gives the MP legitimacy; he is not tied to the party.

Members of parliament are subject only to their conscience and are not bound by any instructions or directives. This ideal, however, corresponds little to political realities. At the same time, the overwhelming majority of MPs are members of some party factions - by their own choices. They also win their parliamentary seats as a candidate or with the support of some party (or parties). The interests of MPs in their re-election make them dependent on their party and parliamentary group. Therefore, we can speak of a bound mandate. In carrying out his parliamentary work, the MP is dependent on the faction in many respects, for example, with regard to which parliamentary offices he can take, which committees he sits on and which other duties he is given to.

This circumstance comes into conflict with the principle of the free mandate. The members of parliament are consequently depicted not as free representatives but as puppets on their parties' stings. Gerhard Leibholz, an early judge of the Supreme Constitutional Court in the Federal Republic of Germany, presented his theory on party state. In accordance with the theory, the conditions of mass democracy have replaced liberal-representative parliamentarism. Parties are now the substitute of direct democracy in big modern states, from the general will, and appear as the mouthpiece of the organized people.¹²¹ In other words, the parliament becomes a machine controlled by the party. Leibholz creates an invariable tension between the free mandates of Art. 38 and Art.28 of the Basic

¹²¹ Vgl. Gerhard Leibholz, *Strukturprobleme Der Modernen Demokratie*, Karlsruhe: C. F. Müller, 1967.

law, which establishes parties as the major participants in forming of the political will of the people, and claims that this tension can only be and has been resolved in favor of the parties' predominance. Art.38 in thus rendered obsolete.¹²²

Under modern democracy system, however, parties are the indispensable place for articulation, selection, and aggregation of interests and so on. It is universally acknowledged that the political parties in representative democracy play an essential role as intermediaries between the people and the institutions of political decision.¹²³ In order to prove the reasonability of that the party or parliamentary group binds on the Member of Parliament, there are many of scholars propose of lots of opinions, such as, "rahmen-gebundenen Mandate",¹²⁴ "generellen Mandat",¹²⁵ "parlamentarischen Mandat".¹²⁶

To solve the conflict between free mandate and the bound of political parties in modern democracy, therefore, could contribute to note that the parties in accordance with the wishes of the Basic Law and in accordance with the constitutional concept of representative democracy element only one serving and not overpowering dominating role in the political process.¹²⁷ The German Basic

¹²² Gary W. Copeland, Samuel C. Patterson, *Parliaments in the Modern World: Changing Institutions*, University of Michigan Press, 1994, p.35.

¹²³ H. Maurer, *Staatsrecht*, München, 1999, S.334ff.

¹²⁴ Vgl. Acherberg, *Das rahmengebundene Mandate, Überlegungen zur Möglichkeit der Bindung des Abgeordneten an das Parteiprogramm*, Berlin, 1975, passim.

¹²⁵ Oppermann, *Das parlamentarische Regierungssystem des Grundgesetzes*, Walter de Gruyter, 1975, S.51ff.

¹²⁶ H.-P. Schneider, *Das parlamentarische System*, in: E. Benda/W. Maihofer/H.-J. Vogel (Hrsg.), *Handbuch des Verfassungsrechts der Bundesrepublik Deutschland*, 2.Aufl., 1984, S.553.

¹²⁷ Maihofer, *Prinzipien freiheitlicher Demokratie*, in: E. Benda/W. Maihofer/H.-J. Vogel (Hrsg.), *Handbuch des Verfassungsrechts der Bundesrepublik Deutschland*, 2.Aufl., 1984, S.487f.

law furnished the political parties with a proper position and function in the constitution of state. Article 21 GG provides: “the political parties shall help form the political will of the people...Their internal organization shall conform to democratic principles...seek to impair or abolish the free democratic basic order or to endanger the existence of Federal Republic of Germany shall be unconstitutional.”

In Germany, members of Parliament resign from the party or are expelled from the party after the meeting should not lose its eligible members.¹²⁸

In addition to, parliamentary privilege can protect the free mandate. For example, indemnity exempts the MPs from criminal, civil and disciplinary liability for remarks made in parliament. Immunity protects the MPs against judicial and police measures.

¹²⁸ Vgl. H.Maurer, Staatsrecht I-Grundlagen, Verfassungsorgane, Staatsfunktionen, 3.Aufl., München, 2003, § 13 Rn. 64.

CHAPTER2. The Main Content of Parliamentary Privilege

As to be mentioned above, Parliamentary privilege includes a wide variety of disparate matters as they pertain to Members individually and to the assembly collectively. For individual Members in variety countries, it mainly includes freedom of speech without being called to account in the courts in respect of proceedings in, but not outside, the assembly; freedom not to answer to court subpoenas when the assembly is in session; exemption from jury duty; and freedom from obstruction, interference, intimidation and molestation, including intimidation by the Speaker.¹²⁹ In contrast to the privileges of individual Members, which are finite, the privileges of the House as a collectivity do not lend themselves to specific definition.¹³⁰ The privileges needed by the House to perform its constitutional duties require the power to protect itself and punish any transgressions against it. Much like a court of law, the parliament enjoys very wide latitude in maintaining its dignity and authority through its exercise of contempt power, which is inherent to any superior court. In other words, the House may through its orders consider any misconduct to be contempt and may deal with it accordingly. This area of parliamentary law is therefore extremely fluid and most valuable for the House to be able to meet novel situations. As a collectivity, the House has a certain number of rights which it claims or which have been accorded to it by statute. For example, the House in Canada claims the right to institute inquiries into any matter, requires the attendance of witnesses, and orders the production of documents; the Parliament of Canada Act confers the right to administer oaths to witnesses. The rights and powers of the House as a

¹²⁹ See, Robert Marleau, Camille Montpetit, House of Commons Procedure and Practice, <http://www.parl.gc.ca/marleaumontpetit/DocumentViewer.aspx?DocId=1001&Sec=Ch03&Seq=1&Lang=E>.

¹³⁰ Maingot, Parliamentary Privilege in Canada, McGill-Queen's University Press, 2nd ed., 1997, p.179.

collectivity may be categorized as follows: The power to discipline; The regulation of its own internal affairs; The authority to maintain the attendance and service of its Members; The right to institute inquiries and to call witnesses and demand papers; The right to administer oaths to witnesses; The right to publish papers containing defamatory material.¹³¹ The two most dominant rights or powers are the power to discipline and the right of the House to regulate its own internal affairs.

In the paper, I only want to discuss significant parliamentary privilege, that's, freedom of speech, freedom from arrest, right of the House to regulate own proceedings and the power of discipline.

5 The Freedom of Speech¹³²

5.1 The Concept of Freedom of Speech

By far, the most important right accorded to Members of the House is the exercise of freedom of speech in parliamentary proceedings. It has been described as:

... a fundamental right without which they would be hampered in the performance of their duties. It permits them to speak in the House without inhibition, to refer to any matter or express any opinion as they see fit, to say what they feel needs to be

¹³¹ See, Robert Marleau, Camille Montpetit, House of Commons Procedure and Practice, <http://www.parl.gc.ca/marleaumontpetit/DocumentViewer.aspx?DocId=1001&Sec=Ch03&Seq=1&Lang=E>.

¹³² See, Marc Van der Hulst, The Parliamentary Mandate, Geneva: Inter-Parliamentary Union, 2000, pp.65-77.

said in the furtherance of the national interest and the aspirations of their constituents.¹³³

The concept of freedom of speech has been defined as the protection members of parliament enjoy from legal action resulting from an opinion expressed or vote cast. Thus defined, the concept of freedom of speech is known in all the countries which have collaborated in this study, even if important differences exist in the field of application.¹³⁴

According to the view of American scholars, freedom of speech serves three distinct but related functions. The first addresses separation of powers concerns: it is dangerous to give the executive and judiciary power over the legislature by allowing them to question legislators in court. Second is congress's informing function: the Houses have an obligation to communicate with their constituents, that is, their sovereign masters, for the purpose of both providing them with information about the workings of their government and receiving information from them so as to make the government work according to their wishes. The third function of legislative freedom of speech is to give legislators some "breathing room", that is, to prevent rash of suits that would interfere with their ability to do their jobs.¹³⁵

In the great majority of countries, the freedom of speech is guaranteed by the Constitution. However, there are also some of exceptions. For example, in New

¹³³ Special Committee on the Rights and Immunities of Members, First Report, presented to the House on April 29, 1977 (Journals, pp.720-29).

¹³⁴ Robert Myttenaere, Moscow Session (September 1998), The Immunities of Members of Parliament, <http://www.asgp.info/Resources/Data/Documents/UJJICUIPKRGKNWTBNCAMS ZFAGOKNXL.pdf>.

¹³⁵ See, Josh Chafetz, Democracy's Privileged Few: Legislative Privilege and Democratic Norms in the British and American constitutions, Yale University Press, 2007, p.90.

Zealand, the Russian Federation and Sri Lanka parliamentary privilege is established by another legal instrument. In Sri Lanka by Act of Parliament, New Zealand by statute law, in the Russian Federation by a federal law on the status of the Deputy of the Council of Federation and the status of the Deputy of the State Duma of the Federal Assembly of the Russian Federation.¹³⁶

As already mentioned, the history of freedom of speech is inextricably bound up with the constitutional history of the United Kingdom. It developed in parallel with the occasionally fierce and protracted struggle between the House of Commons and the Crown.

The origins of freedom of speech may be traced back to the British Parliament's session in early 1397, when the House of Commons adopted an act denouncing the scandalous behaviour of the court of Richard II, King of England, and the enormous financial burden it entailed. Thomas Haxey, MP, was tried and sentenced to death for treason as the instigator of an act aimed directly against the King and his court. However, as a result of pressure from the House of Commons, the sentence was not carried out and he was granted a pardon by the King. This incident led the House of Commons to consider the question of the right of parliamentarians to discuss and deliberate quite independently and freely without any interference from the Crown.¹³⁷

Almost three hundred years later, freedom of speech established as a principle in the House of Commons at the beginning of the sixteenth century, was

¹³⁶ See, Robert Myttenaere, Moscow Session (September 1998), The Immunities of Members of Parliament, <http://www.asgp.info/Resources/Data/Documents/UJJICUIPKRGKNWTBNCAMS ZFAGOKNXL.pdf>.

¹³⁷ See, The First Chapter of the Paper.

reaffirmed in Article 9 of the 1689 Bill of Rights,¹³⁸ which expressly stipulated that discussions and acts by MPs were exempt from all forms of interference or contestation from outside Parliament.

Today, it is still customary for Speakers, following their election at the start of the new session, to assert their rights before the House of Lords on behalf of the House of Commons, by humbly petitioning that the ancient and uncontested rights of the House of Commons be reaffirmed, particularly freedom of speech.¹³⁹

The majorities of Commonwealth countries have been influenced by British tradition and have adopted similar provisions.¹⁴⁰ But the principle of freedom of speech is not confined to the Commonwealth. The rule whereby parliamentarians cannot be prosecuted for opinions expressed or votes cast in exercise of their mandates exists in one form or another in almost all other countries.¹⁴¹

Therefore, the freedom of speech is not only relatively homogeneous but also a highly stable principle throughout the world. Most countries indicate that there have been no recent amendments to the relevant legislation.

The freedom of speech of Members in the House, in fact, is the essential prerequisite for the efficient discharge of their parliamentary duties, in the absence of which, they may not be able to speak out their mind and express their views in the

¹³⁸ Article 9 of the 1689 Bill of Rights, “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.” http://www.constitution.org/eng/eng_bor.htm.

¹³⁹ Erskine May, 22th ed., pp.70-4.

¹⁴⁰ Marc Van der Hulst, *The Parliamentary Mandate*, Geneva: Inter-Parliamentary Union, 2000, p.74.

¹⁴¹ *Id.*

House without any fear. Importance of this right for the Members of Parliament is underlined by the immunity accorded to them from civil or criminal proceedings in a court of law for having made any speech/ disclosure or any vote cast inside the House or a committee thereof. Any investigation outside Parliament, of anything that a member says or does in the discharge of his parliamentary duties amounts to a serious interference with the member's freedom of speech in the House. Therefore, to attack a member or to take or even threaten to take any action against him including institution of legal proceedings on account of anything said or any vote given by him on the floor of the House would amount to a gross violation of the privilege of a member.

5.2 The Scope of Freedom of Speech

The scope of freedom of speech may be viewed from four different angles: Whom is the protection for? When does protection begin and end? Is the protection only within the precincts of Parliament or also beyond? What acts are covered by freedom of speech?

5.2.1 Person

Obviously, members of parliament are the prime beneficiaries in the case of freedom of speech, together with ministers who are also parliamentarians (in countries where the two offices are not incompatible).

In a number of countries— primarily but not exclusively those with a British parliamentary tradition (Canada, Netherlands, Switzerland, New Zealand),¹⁴² “protection is broader and extends to all persons taking part in parliamentary debates (such as ministers, even if they are not Members of parliament) or

¹⁴² Marc Van der Hulst, *The Parliamentary Mandate*, Geneva: Inter-Parliamentary Union, 2000, p.75.

participating in the proceedings”.¹⁴³ This is the case in Australia and the United Kingdom for example, where freedom of speech extends to everybody involved in the proceedings of parliament (officials, witnesses, lawyers, petitioners).¹⁴⁴ Ireland has recently adopted an amendment to its legislation providing for freedom of speech for witnesses summoned to appear before parliamentary committees. Such witnesses enjoy total immunity and may not be prosecuted for words spoken during committee meetings. In Kenya, Namibia, Sri Lanka, Zambia and to some extent in Bangladesh, protection also extends to parliamentary officials. In the Philippines, Members’ assistants are also protected.¹⁴⁵

In countries that are more influenced by French tradition, nonaccountability applies, in principle, only to parliamentarians.¹⁴⁶ It should be noted, however, that, pursuant to the Act of 29 July 1881 concerning freedom of the press, French case

¹⁴³ Myttenacre, R., *The Immunities of Members of Parliaments Constitutional and Parliamentary Information*, ASGP, 1998, p.104.

¹⁴⁴ Robert Myttenaere, *Moscow Session (September 1998), The Immunities of Members of Parliament*, <http://www.asgp.info/Resources/Data/Documents/UJJICUIPKRGKNWTBNCAMS ZFAGOKNXL.pdf>.

¹⁴⁵ See, *Id.*

¹⁴⁶ See, Article 26 of Constitution of France, No Member of Parliament shall be prosecuted, investigated, arrested, detained or tried in respect of opinions expressed or votes cast in the performance of his official duties.

No Member of Parliament shall be arrested for a serious crime or other major offence, nor shall he be subjected to any other custodial or semi-custodial measure, without the authorization of the Bureau of the House of which he is a member. Such authorization shall not be required in the case of a serious crime or other major offence committed *flagrante delicto* or when a conviction has become final.

The detention, subjecting to custodial or semi-custodial measures, or prosecution of a Member of Parliament shall be suspended for the duration of the session if the House of which he is a member so requires.

The House concerned shall meet as of right for additional sittings in order to permit the application of the foregoing paragraph should circumstances so require.

law recognises that protection also extends to witnesses appearing before parliamentary committees of inquiry.¹⁴⁷

5.2.2 Time

In some countries, “Members of parliament enjoy protection from the time of their election, on condition that the election is not subsequently declared invalid.”¹⁴⁸ This is the case in many countries with a French parliamentary tradition (Belgium, Italy)¹⁴⁹ and in many of the new democracies of Eastern Europe (Czech Republic, Estonia, Poland, Slovenia).¹⁵⁰ In other countries (including Mali, Russian Federation),¹⁵¹ protection is granted after the member’s election has been validated. In some cases, the oath-taking ceremony is the point of departure for protection. Freedom of speech applies only during sittings in a number of countries with a British parliamentary tradition (Australia, United Kingdom) and in Egypt, The Former Yugoslav Republic of Macedonia, Malaysia and the Philippines.¹⁵² Needless to say, Members in these countries enjoy non-accountability only with effect from the first sitting. In many other countries,

¹⁴⁷ Paris Court of Appeal, 16 January 1984; “It is considered that the statements of witnesses before a committee of inquiry enjoy the immunity applicable to reports and documents published by order of the National Assembly and the Senate, except for defamatory or injurious statements that have no bearing on the parliamentary inquiry or are made with malicious intent.” Quoted Marc Van der Hulst, *The Parliamentary Mandate*, IPU, 2000, p.75.

¹⁴⁸ See, Robert Myttenaere, Moscow Session (September 1998), *The Immunities of Members of Parliament*, <http://www.asgp.info/Resources/Data/Documents/UJJICUIPKRGKNWTBNCAMS ZFAGOKNXL.pdf>.

¹⁴⁹ Marc Van der Hulst, *The Parliamentary Mandate*, Geneva: Inter-Parliamentary Union, 2000, p.76.

¹⁵⁰ See, Robert Myttenaere, Moscow Session (September 1998), *The Immunities of Members of Parliament*, <http://www.asgp.info/Resources/Data/Documents/UJJICUIPKRGKNWTBNCAMS ZFAGOKNXL.pdf>.

¹⁵¹ *Id.*

¹⁵² *Id.*

protection is afforded in all circumstances, regardless of whether parliament is in session. This rule is applied, inter alia, by certain Nordic countries (Denmark, Finland, Norway¹⁵³), countries influenced by French tradition (Gabon, Guinea, Italy, Mali, Spain) as well as Austria, Greece, Kenya, Kuwait, Mongolia, Poland, Romania, the Russian Federation, Switzerland, Sri Lanka and Thailand.¹⁵⁴

In all the cases considered, the freedom of speech ends with the expiry of a member's term of office or the dissolution of parliament. It remains valid, however, for words spoken and votes cast during the exercise of his or her mandate. Moreover, non-accountability is subject to no time limit in the case of parliamentary proceedings and votes that are published in various forms.

5.2.3 Where

In most countries,¹⁵⁵ the enjoyment of freedom of speech is related to the exercise of a parliamentary mandate rather than to the place in which the contested statements were made. Therefore, the privilege of freedom of speech is not limited in space, since it exists both within and outside parliament. On the other hand, acts that are unrelated to the exercise of a parliamentary mandate are excluded from nonaccountability, even if they occur within the precincts of parliament.

In a number of countries (Bangladesh, Cyprus, Egypt, Estonia, Finland, Germany, India, Kenya, Malaysia, Namibia, Norway, Philippines, United

¹⁵³ Id.

¹⁵⁴ Id.

¹⁵⁵ See, Marc Van der Hulst, *The Parliamentary Mandate*, Geneva: Inter-Parliamentary Union, 2000, p.77.

Kingdom, Zambia),¹⁵⁶ freedom of speech applies only within the parliament buildings and all other locations are excluded. For example, in the English “the privilege is limited by a strict definition of ‘proceedings in Parliament’ confining them to ‘everything said or done by a Member in the exercise of his functions as a Member in a Committee of either House, as well as everything said or done in either House in the transaction of parliamentary business’ ”. MPs remain responsible, like any other citizen, for what they do outside proceedings in Parliament, even where their actions relate to matters connected with their parliamentary functions, such as constituency duties.¹⁵⁷

Thus, letters written on behalf of constituents to Ministers, Government Departments or public bodies would be unlikely to be considered by the courts of law as enjoying parliamentary privilege. The restriction in terms of location is sometimes even stricter: in Malaysia and Thailand, the non-accountability privilege is restricted to the floor of the assembly,¹⁵⁸ in Bangladesh and Zambia to the floor of the assembly and committees,¹⁵⁹ in South Africa to words spoken from the rostrum and statements from the floor of the House or in committee.¹⁶⁰

¹⁵⁶ See, Robert Myttenaere, Moscow Session (September 1998), The Immunities of Members of Parliament, <http://www.asgp.info/Resources/Data/Documents/UJJICUIPKRGKNWTBNCAMS ZFAGOKNXL.pdf>.

¹⁵⁷ See, Parliamentary Immunity in the Member States of the European Community and in the European Parliament, Luxembourg, European Parliament, 1993, pp.101, 104-105.

¹⁵⁸ See, Robert Myttenaere, Moscow Session (September 1998), The Immunities of Members of Parliament, <http://www.asgp.info/Resources/Data/Documents/UJJICUIPKRGKNWTBNCAMS ZFAGOKNXL.pdf>.

¹⁵⁹ Id.

¹⁶⁰ Id.

In Sweden, non-accountability is limited to acts related to normal parliamentary activities, such as the plenary sittings and meetings of the Riksdag's organs (committees, electoral committee, conference of Presidents), but does not apply to the Board of Administration, the auditors, or the committee that checks the validity of ballots.¹⁶¹

5.2.4 Material

Words spoken are from the floor of the house or elsewhere. Statements from the floor of the house or in committee, bills or proposed resolutions, votes, written or oral questions and interpellations are universally viewed as being eligible for protection under the heading of freedom of speech.

In most countries, the same applies to suspensions of sittings, but there are some exceptions (Australia, Croatia, Czech Republic, Egypt, Gabon, Germany, Ireland, Kenya, Malaysia, New Zealand, Norway, Republic of Korea, Slovenia, Thailand, The Former Yugoslav Republic of Macedonia).¹⁶² While words spoken in the course of activities by political groups also enjoy the protection of parliamentary non-accountability in quite a few countries (Belarus, Belgium, Burkina Faso, Gabon, Germany, Greece, Guinea, Hungary, Mongolia, Portugal, Romania, Russian Federation, The former Yugoslav Republic of Macedonia, Uruguay),¹⁶³ this privilege is not recognised in most countries, particularly those with a British parliamentary tradition.

¹⁶¹ See, Marc Van der Hulst, *The Parliamentary Mandate*, Geneva: Inter-Parliamentary Union, 2000, p.70.

¹⁶² See, Robert Myttenaere, *Moscow Session (September 1998), The Immunities of Members of Parliament*, <http://www.asgp.info/Resources/Data/Documents/UJJICUIPKRGKNWTBNCAMS ZFAGOKNXL.pdf>.

¹⁶³ *Id.*

Reproduction of words spoken in parliament. In most countries, a member cannot be held accountable for words or votes recorded in official parliamentary publications (minutes and other records of sittings drafted by parliamentary departments).¹⁶⁴ Opinions are divided, however, on the question of whether members of parliament may invoke the privilege of non-accountability when they repeat, in the press or other publications, words they have spoken in the assembly.¹⁶⁵ In some countries, protection extends without restriction to the repetition outside parliament of words spoken in parliament. In most countries, however, members cannot claim non-accountability in such situations. In the United Kingdom, for example, MPs repeating words spoken during parliamentary proceedings outside the context of Parliament “would not be protected from actions for defamation, although the Courts would not allow evidence of proceedings within the House to be used in support of an action in respect of other words or actions of a Member outside Parliament”.¹⁶⁶ Verbal or written communications between an MP and a minister, or between two MPs, on subjects with a close bearing on proceedings in the House or in committee would nevertheless generally be considered to fall within the protected ambit of freedom of speech.

Words spoken are during debates on radio or television or at political gatherings. In a small number of countries (such as Russian Federation), participation in

¹⁶⁴ Marc Van der Hulst, *The Parliamentary Mandate*, Geneva: Inter-Parliamentary Union, 2000, p.78.

¹⁶⁵ Myttenacre, R., *The Immunities of Members of Parliaments Constitutional and Parliamentary Information*, ASGP, 1998, p.107.

¹⁶⁶ *Parliamentary Immunity in the Member States of the European Community and in the European Parliament*, Luxembourg, European Parliament, 1993, p.101.

televised or radio debates and interviews is protected by freedom of speech.¹⁶⁷ Generally, however, words spoken during debates on radio or television are not protected, although the rule is qualified in some circumstances. According to French case law, non-accountability is not applicable to words spoken by parliamentarians in a radio interview or to reports drafted by parliamentarians in the context of a mission undertaken for the Government.¹⁶⁸ In Australia, non-accountability is not applicable either to radio or television broadcasts. However, an exception is made for “compulsory” records of parliamentary proceedings on radio and television. The Parliamentary Proceedings Broadcasting Act of 1946 affords immunity from judicial proceedings ensuing from the (unedited) broadcasting of parliamentary proceedings by the Australian Broadcasting Corporation.¹⁶⁹ Qualified immunity from prosecution exists in respect of fragmentary records (in the form of extracts), which are deemed to be “privileged” unless the words spoken display malicious intent or are inspired by inadmissible motives (e.g. publicity for political parties or in the context of an electoral campaign, satire or mockery, commercial motives). In Namibia, parliamentary non-accountability does not apply to televised or radio debates, unless they take place “at the request of Parliament”.¹⁷⁰ In Poland, non-accountability does not apply to debates or interviews, unless they are “indissociable” from parliamentary

¹⁶⁷ Marc Van der Hulst, *The Parliamentary Mandate*, Geneva: Inter-Parliamentary Union, 2000, p.78.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ See, Robert Myttenaere, *Moscow Session (September 1998), The Immunities of Members of Parliament*, <http://www.asgp.info/Resources/Data/Documents/UJJICUIPKRGKNWTBNCAMS ZFAGOKNXL.pdf>.

proceedings.¹⁷¹ In Italy, words spoken during an interview may be accorded privileged status if they bear some relationship to parliamentary activities.¹⁷²

Political gatherings are usually excluded from the scope of parliamentary non-accountability, but there are some exceptions.

5.3 Misuse of Freedom of Speech

The privilege of freedom of speech is an extremely powerful immunity and may also be misused. The Speakers in some country's parliament have started to caution Members about its misuse.¹⁷³ For example, Speaker Fraser urged¹⁷⁴ Members to take the greatest care in framing questions concerning conflict of interest guidelines. Since the question raised affected the very nature of Members' rights and immunities, he spoke at length about the importance of freedom of speech and the need for care in what Members said: There are only two kinds of institutions in this land to which this awesome and far-reaching privilege [of freedom of speech] extends — Parliament and the legislatures on the one hand and the courts on the other. These institutions enjoy the protection of absolute privilege because the overriding need to ensure that the truth can be told, that any questions can be asked, and that debate can be free and uninhibited. Absolute privilege ensures that those performing their legitimate functions in these vital institutions of Government shall not be exposed to the possibility of legal action. This is necessary in the national interest and has been considered necessary under

¹⁷¹ Id.

¹⁷² Id.

¹⁷³ See, Robert Marleau, Camille Montpetit, House of Commons Procedure and Practice, <http://www.2parl.gc.ca/MarleauMontpetit/DocumentViewer.aspx?DocId=1001&Sec=Ch00&Seq=1&Lang=E>.

¹⁷⁴ Id.

our democratic system for hundreds of years. It allows our judicial system and our parliamentary system to operate free of any hindrance.

Such a privilege confers grave responsibilities on those who are protected by it. The consequences of its abuse can be terrible. Innocent people could be slandered with no redress available to them. Reputations could be destroyed on the basis of false rumour. All Hon. Members are conscious of the care they must exercise in availing themselves of their absolute privilege of freedom of speech. That is why there are long-standing practices and traditions observed in this House to counter the potential for abuse.¹⁷⁵

In a ruling following a point of order, Speaker Parent in the Canada's parliament emphasized the need for Members to use great care in exercising their right to speak freely in the House: "... paramount to our political and parliamentary systems is the principle of freedom of speech, a member's right to stand in this House unhindered to speak his or her mind. However when debate in the House centres on sensitive issues, as it often does, I would expect that members would always bear in mind the possible effects of their statements and hence be prudent in their tone and choice of words".¹⁷⁶

Speakers have also stated that although there is a need for Members to express their opinions openly in a direct fashion, it is also important that citizens'

¹⁷⁵ Debates, May 5, 1987, pp.5765-6.

¹⁷⁶ Debates, September 30, 1994, p.6371. On September 27, 1994, Svend Robinson (Burnaby-Kingsway) raised a point of order concerning remarks made by Roseanne Skoke (Central Nova) during second reading debate on Bill C-41 (Criminal Code Amendment (sentencing)) on September 20, 1994. Speaker Parent gave his ruling on September 30, stating that although he realized there existed a profound difference of opinion between the two Members, he acknowledged that the remarks made by Ms. Skoke were within the context of debate and not directed at any particular Member. See Debates September 20, 1994, pp. 5912-3; September 27, 1994, pp. 6183-4.

reputations are not unfairly attacked. In a ruling on a question of privilege,¹⁷⁷ Speaker Fraser in the Canada's parliament also expressed his concern that an individual who was not a Member of the House had been referred to by name and noted that this concern had also been shared by some Members who had participated in the discussion of the question of privilege. He then went on to say: "But we are living in a day when anything said in this place is said right across the country and that is why I have said before and why I say again that care ought to be exercised, keeping in mind that the great privilege we do have ought not to be abused."¹⁷⁸

In a later ruling following a point of order,¹⁷⁹ Speaker Fraser observed that the use of suggestive language or innuendo with regard to individuals or an individual's associations with others can provoke an angry response which inevitably leads the House into disorder. The Speaker stated that he was heartened by Members' comments and a general sense of the necessity to maintain decorum, for the sake of the House and the viewing public. Specifically referring to individuals outside the Chamber, he agreed with a suggestion that the House consider constraining itself " ... in making comments about someone outside this

¹⁷⁷ The Speaker ruled on a question of privilege raised by Harvie Andre (Minister of Consumer and Corporate Affairs) on May 21, 1987, concerning questions asked by Ian Waddell (Vancouver-Kingsway) which, in the Minister's view, implied that he was in a possible conflict of interest situation. The Speaker ruled that he was satisfied that there was no accusation directed against the Minister. See Debates, May 21, 1987, pp.6299-306; May 26, 1987, pp. 6375-6.

¹⁷⁸ Id.

¹⁷⁹ This ruling was given on December 3, 1991, following a point of order raised by Nelson Riis (Kamloops) on November 28, 1991, concerning remarks about the President of the Public Service Alliance of Canada made by Felix Holtmann (Portage-Interlake) during "Statements by Members". See Debates, November 28, 1991, pp. 5498-9, 5509-10; December 3, 1991, pp. 5679-82.

Chamber which would in fact be defamatory under the laws of our country if made outside the Chamber...¹⁸⁰

6 Freedom from Arrest (Inviolability)

6.1 The Origin of Freedom from Arrest

Like freedom of speech, freedom from arrest is a concept with deep roots in English history. This type of privilege, which protects members from arrest and assault, was demanded by the House of Commons as early as the fifteenth century. It was generally accepted in civil cases but protection against the monarch was more limited in scope until the political changes of the seventeenth century gave Parliament overriding authority. “Parliament made several attempts to balance the need for its Members to be free to attend to their duties without fear of arrest against the rights of members of the public in civil causes. Parts of two Acts which sought to strike this balance, the Privilege of Parliament Act 1603 and the Parliamentary Privilege Act 1737, are still on the Statute book.”¹⁸¹

While Members of the British Parliament have thus long enjoyed “freedom of speech” that protects them from arrest, this privilege was soon withdrawn in criminal cases.¹⁸² The only element which now remains is a duty imposed on the head of the local police force to inform the Lord Chancellor or the Speaker of any arrest that is followed by detention. If a Peer or Member is sentenced to a term of imprisonment, the court similarly informs the Lord Chancellor or the Speaker. A member can even be arrested in the precincts of the House in respect of a criminal

¹⁸⁰ Debates, December 3, 1991, p. 5681.

¹⁸¹ M.Crespo Allen, *Parliamentary Immunity in the Member States of the European Union and the European Parliament*, Brussels: European Parliament, ECPRD, 1999, p.100.

¹⁸² Erskine May, 22th ed., p.75.

offence.¹⁸³ Freedom of arrest thus protects a parliamentarian from arrest only in civil cases, i.e. in all cases other than criminal proceedings. While this was no doubt advantageous at a time when imprisonment for debt was not unusual, now that arrest or detention for civil offences is almost obsolete in the United Kingdom¹⁸⁴ and most other Commonwealth countries, this type of inviolability serves little purpose. It means, for example, that a writ or summons cannot be served on a Member within the precincts of Parliament without the latter's authorisation.

In America, Members of the Congress will “in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same ...”¹⁸⁵ As Thomas Jefferson explained, the purpose of the Arrest Clause was not to treat legislators as if they were above the law, but rather to shield the process of legislation from interference: “When a Representative is withdrawn from his seat by summons, the... people whom he represents lose their voice in debate and vote ...”¹⁸⁶ In *Long v. Instill*,¹⁸⁷ a libel case against Senator Huey P. Long of Louisiana, the Supreme Court held that the privilege against arrest does not include a privilege against being served with a summons while Congress is in session. Rather, the grant of immunity was limited to immunity from arrest.

¹⁸³ M. Crespo Allen, *Parliamentary Immunity in the Member States of the European Union and the European Parliament* (Brussels: European Parliament, ECPRD, 1999), p.100. In 1815, the House of Commons Committee on Privileges stated that the arrest of a Member had not violated parliamentary privilege, since he had been convicted of an indictable offence — even though he had been arrested within the Chamber itself.

¹⁸⁴ Erskine May, 22th ed., p.79.

¹⁸⁵ U.S. CONST. Art. I, § 6, cl. 1.

¹⁸⁶ John C. Grabow, *Congressional Investigations: Law and Practice*, Aspen Publishers, 1988, p.210.

The Supreme Court has limited Arrest Clause immunity to arrests in civil suits. In *Williamson v. United States*,¹⁸⁸ a congressman was convicted of a criminal misdemeanor. The Court held that the exception to Arrest Clause protection for “Treason, Felony and Breach of the Peace” was intended to encompass all criminal offenses, both felonies and misdemeanors. Citing *Williamson* in a later case, the Court explained, “When the Constitution was adopted, arrests in civil suits were still common in America. It is only to such arrests that the provision applies.”¹⁸⁹

In France,¹⁹⁰ following the 1789 revolution, it became necessary to guarantee both the non-accountability of parliamentarians for opinions expressed in the exercise of their duties and their inviolability. The latter was recognised in the Decree of 26 June 1790, which guaranteed protection for members of the Assembly against indictment without the latter’s authorisation. The 1791 Constitution, which contains the first constitutional provision governing immunity, establishes the basic principle underlying the regime: “The representatives of the Nation] may, in the case of criminal offences, be arrested in flagrante delicto or on presentation of an arrest warrant; but the Legislature shall be notified thereof forthwith; and the proceedings may not continue until the Legislature has decided whether or not the charge is founded.” As already stressed, the relatively broader scope of parliamentary inviolability in France is closely bound up with the pre-eminent position secured by the National Assembly through the revolution and

¹⁸⁷ 293 U.S. 76, 82 (1934).

¹⁸⁸ 207 U.S. 425 (1907).

¹⁸⁹ *Long v. Ansell*, 293 U.S. 76, 83 (1934).

¹⁹⁰ See, Marc Van der Hulst, *The Parliamentary Mandate*, Geneva: Inter-Parliamentary Union, 2000, pp.78-80.

with fear of the Executive, which was ubiquitous on the continent. It was this fear that gave rise to the principle whereby responsibility for establishing whether proceedings are fair and well-founded and not attributable to persecution on political or personal grounds lies with a committee that reports to the Assembly.

6.2 The Scope of Protection¹⁹¹

6.2.1 Who is Protected

Freedom from arrest applies only to members of parliament. However, among the countries covered by the UNDP(TheUnited Nations Development Programme) initiative, there is one important exception: Article 13 of the Law on the Status of Deputies in the Republic of Moldova stipulates that members of parliament are deemed to be exercising their functions throughout their mandate, and that any aggression against them is considered an insult (outrage) to be punished in accordance with the law.¹⁹² The same applies to family members (husband, wife, children and parents) if such aggression seeks to exert pressure on the parliamentarian concerned in connection with the exercise of his/her mandate. In addition to, in Germany, the president can also be safeguarded by freedom of arrest.¹⁹³

6.2.2 Time Frame

The time frame during which freedom from arrest is valid is usually the same as in the case of freedom of speech with one crucial exception. Contrary to the privilege of freedom of speech, freedom from arrest is only afforded for the duration of the mandate. Once it has expired, members of parliament may

¹⁹¹ See, Background Paper prepared by the Inter-Parliamentary Union, Parliamentary Immunity, <http://www.gopacnetwork.org/Docs/Global/IPU%20-%20UNDP%20Immunity%20Paper.pdf>.

¹⁹² See, Robert Myttenaere, Moscow Session (September 1998), The Immunities of Members of Parliament, <http://www.asgp.info/Resources/Data/Documents/UJJICUIPKRGKNWTBNCAMS ZFAGOKNXL.pdf>.

¹⁹³ Artikel 60, Abs.4, GG..

consequently be prosecuted for offences in respect of which parliament had not lifted immunity. The Standing Orders of Timor-Leste and Argentina provide specifically that, in the case of a refusal to lift inviolability, the prescription period of a crime is suspended.¹⁹⁴ However, there seems to be an exception to this rule in Iraq since Article 60 of the Constitution¹⁹⁵ stipulates that a member of the Council of Representatives may not be arrested after the legislative term without the consent of the Speaker, unless he/she is accused of a felony or is caught in flagrante delicto committing a felony. With respect to judicial proceedings pending at the time of taking up office, in the majority of countries they cannot be pursued without the explicit authorization of the assembly.

6.2.3 Restrictions Based on the Nature of the Offence

As regards restrictions based on the nature of the offence, there are many different practices. Some countries make no such distinction (Bolivia, Burundi, Cambodia, Lebanon),¹⁹⁶ others exclude protection for serious offences and others, on the contrary, take the view that immunity should apply in serious cases only and not for minor offences (for example Rwanda, where parliamentarians suspected of a serious felony enjoy protection).¹⁹⁷

6.2.4 Restrictions Concerning Criminal Procedural Acts

¹⁹⁴ See, Background Paper prepared by the Inter-Parliamentary Union, Parliamentary Immunity, <http://www.gopacnetwork.org/Docs/Global/IPU%20-%20UNDP%20Immunity%20Paper.pdf>.

¹⁹⁵ Iraqi Constitution, Art.60, C, “A Council of Representatives member may not be arrested after the legislative term of the Council of Representatives, unless the member is accused of a felony and with the consent of the speaker of the Council of Representatives to lift his immunity or if he is caught in flagrante delicto in the commission of a felony.”

¹⁹⁶ See, Robert Myttenaere, Moscow Session (September 1998), The Immunities of Members of Parliament, <http://www.asgp.info/Resources/Data/Documents/UJJICUIPKRGKNWTBNCAMSZFAGOKNXL.pdf>.

¹⁹⁷ Id.

In most countries, freedom from arrest (inviolability) precludes either the institution of legal proceedings and/or arrest and detention of a Member of Parliament without the consent of parliament.¹⁹⁸ As stated earlier, there is a clear tendency to restrict inviolability to the arrest and detention of members of parliament and to exclude from its scope the institution of criminal proceedings.¹⁹⁹ Among the countries covered by the UNDP initiative, Afghanistan, Iraq, Philippines, The Former Yugoslav Republic of Macedonia and Timor-Leste afford inviolability only for the arrest of a Member of Parliament.²⁰⁰ Such arrest is consequently subject to the consent of the parliament. In Argentina, the arrest of a member in the course of judicial proceedings (for the institution of which the consent of parliament is not required), is only possible with parliament's approval, as is the search of the house and workplace of the parliamentarian concerned and the interception of mail and telephone conversations. This is also the case in Georgia, where in addition to arrest or detention, the search of the home, car or workplace or any personal search of a member needs to be approved by the parliament.²⁰¹ In the other countries covered by the study (except of course those following British parliamentary tradition), the judicial authorities must seek parliament's permission not only to arrest but also to institute judicial proceedings. In Thailand, members may not be arrested, detained or summoned as suspects in

¹⁹⁸ See, Background Paper prepared by the Inter-Parliamentary Union, Parliamentary Immunity, <http://www.gopacnetwork.org/Docs/Global/IPU%20-%20UNDP%20Immunity%20Paper.pdf>.

¹⁹⁹ Id.

²⁰⁰ See, Robert Myttenaere, Moscow Session (September 1998), The Immunities of Members of Parliament, <http://www.asgp.info/Resources/Data/Documents/UJJICUIPKRGKNWTBNCAMS ZFAGOKNXL.pdf>.

²⁰¹ Georgia Constitution, Article 52, Section 2, Arrest or detention of a member of the Parliament, the search of his/her apartment, car, workplace or his/her person shall be permissible only by the consent of the Parliament, except in the cases when he/she is caught flagrante delicto which shall immediately be notified to the Parliament. Unless the Parliament gives the consent, the arrested or detained member of the Parliament shall immediately be released.

criminal cases without the consent of parliament. In addition, they may not be prosecuted on a criminal charge without the consent of parliament²⁰² unless the charge was brought under specific laws (electoral law, law on the Election Commission and law on political parties) provided that the trial proceedings do not prevent the member from attending the sittings of the House.

6.2.5 Freedom from Arrest and Flagrante Delicto

As a rule, freedom from arrest (inviolability) does not apply to cases of flagrante delicto and members of parliament, when caught in the process of committing a crime may be arrested just like anyone else. The notion is sometimes interpreted somewhat broadly. In Germany, for example, parliamentarians cannot invoke immunity if they are arrested the day after the offence is committed.²⁰³ There are some exceptions, however, as certain countries make distinctions based on the seriousness of the offence. Thus, in Iraq and Rwanda the flagrante delicto rule (arrest without consent of the parliament) applies only if a member is caught in the commission of a felony, in Serbia and Montenegro and The former Yugoslav Republic of Macedonia, Timor-Leste only in the case of a crime punishable by over 5 years' imprisonment, and in Argentina only if the parliamentarian is caught while committing a crime punishable by death or one that is infamante or afflictivo.²⁰⁴ In some countries, parliament must be informed of the flagrante arrest of a Member of Parliament (Yemen) and in others this right goes hand in hand with the right to request the (provisional)

²⁰² See, Thailand Constitution, Part 4, Section 131,
<http://www.asianlii.org/th/legis/const/2007/1.html#C06P04>.

²⁰³ Artikel 46, Abs.2, GG.

²⁰⁴ See, Robert Myttenaere, Moscow Session (September 1998), The Immunities of Members of Parliament, <http://www.asgp.info/Resources/Data/Documents/UJJICUIPKRGKNWTBNCAMS ZFAGOKNXL.pdf>

release of the parliamentarian concerned (Georgia, Lebanon, Thailand). In the Republic of Moldova, in cases of flagrante delicto a Member of Parliament can only be placed under house arrest for 24 hours with the prior consent of the Prosecutor General, who in turn must inform the Speaker of Parliament. The latter can order the release of the member concerned.²⁰⁵

Although flagrante delicto is a logical restriction on parliamentary inviolability because the validity of the prosecution cannot be questioned, given that the facts constituting the offence and the identity of the perpetrator are clearly established, it may serve as an ideal loophole for arresting a parliamentarian protected by immunity. As the experience of the IPU Committee on the Human Rights of Parliamentarians has shown, flagrante delicto is sometimes easily invoked even failing any ingredients of a flagrante delicto offence. Examples concern the arrest of members of parliament for several days and even months after the alleged facts under the pretext of a “flagrant crime”, the arrest of parliamentarians who had participated in a peaceful demonstration, but were held responsible under the flagrante delicto procedure for acts of violence which occurred after they had left the premises, and the arrest of a parliamentarian for allegedly having signed uncovered cheques several months before his arrest. The Committee has consequently recalled that a broad interpretation of flagrante delicto may amount to voiding immunity itself of any real meaning.²⁰⁶

6.3 The Procedure of Lifting Parliamentary Inviolability

As already stated, parliamentary inviolability does not offer an absolute protection, and certainly does not seek to afford members of parliament impunity. It entitles parliament only to ensure that members of parliament are not arrested

²⁰⁵ Background Paper prepared by the Inter-Parliamentary Union, Parliamentary Immunity, <http://www.gopacnetwork.org/Docs/Global/IPU%20-%20UNDP%20Immunity%20Paper.pdf>.

²⁰⁶ Resolution adopted by the Inter-Parliamentary Council on case SN/02,03,04, September, 1994.

and prosecuted on baseless charges. If they are satisfied that such is not the case, parliaments lift immunity. The relevant procedures are broadly similar and differ mainly in terms of the authority empowered to file a request for the lifting of immunity, the possibility of waiving one's immunity, and the possibility of filing an appeal against the decision to lift immunity.

6.3.1 Procedure Generally Observed

Generally speaking, the judicial authorities (prosecutor, court) must send a request to the Presiding Officer. A parliamentary committee, either a standing committee on privileges or an ad hoc committee, is then entrusted with examining the request and making a recommendation to the plenary, which takes a vote. The composition of that committee may of course influence the outcome of deliberations, as may majority requirements for the vote in the plenary. These differ from country to country but generally a simple majority must be obtained (in Iraq an absolute majority is required).²⁰⁷ In some cases, for example Timor-Leste and the Republic of Moldova, the Rules of Procedure stipulate that the vote has to be secret.²⁰⁸ During periods when parliament is not sitting, the Assembly Bureau is usually competent to examine requests for the lifting of immunity and to take a decision, which at the Assembly's next sitting must be approved. In very rare cases, the Presiding Officer may decide on such matters. For example, the Speaker of the Iraqi Council of Representatives may authorize or not the arrest of a member after the expiry of his/her term.²⁰⁹ Article 92 of the Constitution of Sudan vests the Presiding Officers of both Chambers with authority to decide whether or not to authorize the institution of criminal proceedings against a

²⁰⁷ See, Marc Van der Hulst, *The Parliamentary Mandate*, Geneva: Inter-Parliamentary Union, 2000, p.91.

²⁰⁸ Background Paper prepared by the Inter-Parliamentary Union, *Parliamentary Immunity*, <http://www.gopacnetwork.org/Docs/Global/IPU%20-%20UNDP%20Immunity%20Paper.pdf>.

member of the respective Chamber or the taking of any measure against his/her personal belongings.²¹⁰

It is important to stress that procedures should be in place which, as far as possible, prevent decisions on the lifting of parliamentary immunity from being taken along party lines. Parliamentarians should be aware that immunity issues are not partisan issues, but affect the institution of parliament as such. Recent developments in the Philippines are noteworthy in this respect: On 25 February 2006, a reportedly unlawful attempt was made to arrest five opposition members of parliament. They were able to enter the House of Representatives and remained there from 27 February until 8 May 2006. On 28 February, the House of Representatives unanimously adopted a resolution affirming the right of the persons concerned to due process and granting them “protective custody” in the absence of any judicially issued arrest warrant resulting from a preliminary investigation or indictment.²¹¹

6.3.2 Decision Made by Courts and not by Parliament

In very rare cases and as notable exceptions to the separation of powers, it is not parliament but the courts which lift parliamentary immunity. This is the case in Guatemala, for example, where the Supreme Court of Justice, after examining a

²⁰⁹ Id.

²¹⁰ Id.

²¹¹ Charges of rebellion were brought against the parliamentarians concerned in February 2006; the court dismissed them on 4 May 2006. The prosecution brought new charges of rebellion on 11 May 2006. Pending a decision of the Supreme Court on a certiorari petition, the court suspended proceedings in August 2006. According to Section 11 of the Constitution, while Congress is in session, members of both chambers of parliament are privileged from arrest in all offences punishable by not more than 6 years' imprisonment. The crime of rebellion carries more than six years' imprisonment; Quoted, Background Paper prepared by the Inter-Parliamentary Union, Parliamentary Immunity, <http://www.gopacnetwork.org/Docs/Global/IPU%20%20UNDP%20Immunity%20Paper.pdf>.

report by a judge it appoints to this effect, decides whether or not proceedings shall be instituted against a member of the Congress of the Republic (Article 161a of the Constitution). In Chile, it is the competent court of appeal that is entitled to lift immunity, and members of parliament may lodge an appeal against the decision to the Supreme Court.²¹² In other countries, Israel for example, parliament's decision to lift immunity is subject to judicial review by the Supreme Court. A decision of parliament may therefore be overturned by court.²¹³ In a recent case concerning a member of the Knesset whose immunity had been lifted by the Knesset to permit his prosecution on terrorism-related charges, the question of parliamentary immunity was raised as a preliminary issue in the judicial proceedings. An appeal to the Supreme Court was lodged against the first-instance court's decision to decide on this question at the end of the proceedings. In its ruling of 1 February 2006, the Supreme Court dismissed the charges against the member in question, taking the view that the offending statements came within the scope of his parliamentary immunity, the aim of which is to secure effective representation for all groups and political opinions in Israel.²¹⁴

6.3.3 The Right to Defence

An important issue is respect for the rights of the defence. In some countries, the right of the parliamentarians concerned to present his/her defence is explicitly recognized in the constitution or standing orders. This applies for example to Bolivia²¹⁵ and the Republic of Moldova.²¹⁶ Not in all countries, however, is it a

²¹² See, Robert Myttenaere, Moscow Session (September 1998), The Immunities of Members of Parliament, <http://www.asgp.info/Resources/Data/Documents/UJJICUIPKRGKNWTBNCAMSZFAGOKNXL.pdf>.

²¹³ Id.

²¹⁴ Adalah The Legal Center for Arab Minority Rights in Israel, News Update, February 14, 2006.

²¹⁵ Art. 27b of the Standing Orders of the Chamber of Deputies in Bolivia.

matter of course for the parliamentarian in question to be heard before a recommendation is made or the vote is taken by the parliament. One of the most recent examples is a case which occurred in February 2005 when the Cambodian National Assembly lifted the immunity of three of its members without hearing them and offering them the possibility of presenting their defence. The IPU has always held that it is a principle of natural justice that parliamentarians be heard and entitled to defend themselves, even if such right is not explicitly mentioned in relevant law.²¹⁷

6.3.4 Monitoring of Judicial Proceedings

The lifting of immunity opens the way to arrest and/or judicial proceedings. Apart from the cases referred to below, there are generally no specific provisions for parliaments to monitor proceedings against a member whose immunity has been lifted. However, such monitoring can be essential to ensure not only that the Member of Parliament in question receives a fair trial but also, generally speaking, that respect is strengthened for fair trial guarantees. In many cases, therefore, the IPU has recommended that parliaments monitor proceedings to this end.

A case in Burundi shows that this may be effective.²¹⁸ In July 2004 a member of the then Transitional National Assembly, coordinator of a former rebel movement, was arrested in flagrante delicto on account of the presence in his home of a presumed criminal, a member of an armed group which reportedly wished to join the peace process. The Bureau of the Transitional National Assembly lifted his immunity “to enable the judiciary to investigate the case

²¹⁶ Art. 10, para. 2, of the Law on the Status of Deputies in Moldova.

²¹⁷ Background Paper prepared by the Inter-Parliamentary Union, Parliamentary Immunity, <http://www.gopacnetwork.org/Docs/Global/IPU%20-%20UNDP%20Immunity%20Paper.pdf>.

²¹⁸ Id.

calmly and without hindrance” while reserving the right to review its position after a period of two months. The parliamentarian was released on parole in September 2004 and participated in the July 2005 elections, when he was indeed re-elected. However, charges of “association for the purpose of attacking persons and property” were still pending against him. The Bureau of the newly elected Assembly took up the case and refused to allow his prosecution finding that his flagrante delicto arrest was unjustified and that procedure had been substantially flawed since the Prosecutor General had failed to provide a report on the facts; the parliamentarian concerned had not been heard and the chairpersons of the parliamentary groups and standing committees had not been consulted, in breach of the relevant rules.

6.3.5 Waiving Parliamentary Inviolability

In most countries, parliamentary inviolability is a matter of public policy and therefore cannot be waived. There are, however, exceptions to this rule and one of the foremost is the Philippines where members of parliament, and they alone, can waive inviolability either explicitly or by deciding not to invoke it under the relevant circumstances.²¹⁹

6.3.6 Lifting of Inviolability Conditionally and Right to Request Suspension of Detention

Generally, owing to the principle of separation of powers, parliaments are not entitled to impose any conditions on the lifting of immunity. However, in some countries (Belgium and France for example) a partial lifting of immunity is possible. In most countries, parliament is not entitled to suspend the detention of a

²¹⁹ Marc Van der Hulst, *The Parliamentary Mandate*, Geneva: Inter-Parliamentary Union, 2000, p.91.

Member of Parliament or proceedings against him/her.²²⁰ There are exceptions, however, particularly in countries with a French parliamentary tradition, but also in Germany and Austria, where parliament may adopt such a decision either on its own initiative or at the request of a certain number of its members, or of the member concerned.²²¹ In Thailand, the speaker may request the release of a member who was detained during the investigation or trial before the start of parliament's session.²²²

6.3.7 Right of Detained Members to Attend Parliamentary Sittings

With respect to the right of a Member of Parliament held in preventive detention to attend sittings of parliament, only a few countries provide for this possibility (Greece, Mali, Thailand, Pakistan),²²³ although this would be in accordance with the principle of presumption of innocence and the interest of parliament to secure the attendance and service of its members. Taking account of the fact that, while a parliamentarian is in preventive detention, his/her constituents are without representation, the IPU has held in several cases that parliamentarians should be authorized to attend parliamentary sittings so long as judgment has not been handed down. In most countries, parliamentarians lose

²²⁰ Id.

²²¹ Id.

²²² See, Thailand Constitution, Part 4, Section 131,
<http://www.asianlii.org/th/legis/const/2007/1.html#C06P04>.

²²³ Background Paper prepared by the Inter-Parliamentary Union, Parliamentary Immunity,
<http://www.gopacnetwork.org/Docs/Global/IPU%20-%20UNDP%20Immunity%20Paper.pdf>.

their mandate once they are sentenced to a specific term of imprisonment, and the question of attendance therefore no longer arises.²²⁴

7 Right of the House to Regulate Own Proceedings

7.1 Historical Background

Each House of Parliament enjoys an inherent and exclusive authority to conduct and regulate its proceedings in the manner it deems proper. This right is the natural corollary of the immunity from proceedings in a court of law in respect of anything said or done inside the House. It is well settled now that each House has the exclusive jurisdiction over its internal proceedings.

Historically, right of the House to their own matters is linked with the requirements of freedom of speech. December 1621 at the famous protests, the House of Commons argued that the King should not decide the House's agenda, the House required the deliberations of state affairs freely and parliament should not be disturbed.²²⁵ In their dispute, The King, the lords of major emergency affairs, national defense, the United Kingdom to protect the church, the legislature, in the kingdom against what happened day-to-day relief, these are the subject of board discussions and deliberations on matters. This is not in favor of Crown sovereignty; James I immediately drew retaliation, then James dissolved the parliament. The discussion of House of Commons referred to the matters of the Crown prerogatives and other things, which is not a fit subject for parliament,

²²⁴ See, Marc Van der Hulst, *The Parliamentary Mandate*, Geneva: Inter-Parliamentary Union, 2000, p.93.

²²⁵ See, Prothero, *Select Statutes and Other Constitutional Documents Illustrative of the Reigns of Elizabeth and James I*, London, Oxford University Press, 1894, pp.313-4.

unless the Crown in particular guide them to consider these.²²⁶

If the House of Commons obeyed the command of James, the British Parliament the subsequent history of the development might take a completely different path of development. In other words, if this is the case, the parliament would not be called a “parliamentary sovereignty as it is today, but continue to maintain its original Advisory Board of the Crown, that is, when the king called it when the Crown need supply or just give Legislative suggestion for the King. However, in the 17th century, the Parliament did not comply with the wishes of the Crown, nor the threat of being dissolved by the king was scared to death. Without convening Parliament, the king should not rule indefinitely, the cause of the Crown income and estate income just to meet the expenditure part of the royal family, the rest of the King’s expenditure depends on taxes, which the parliament consents to levy. Beacuse the King dependence on the parliament in financial, the parliament announced that it would not agree to tax until the king agreed to remedy such a result by “harm.” In this case, the King was forced to compromise, and agreed to parliamentary freedom of speech. Article 9 of the Bill of Rights established the legal basis of freedom of speech in order to preventing such a right from royal command.²²⁷

This provision contains a lot of meaning, which is far more than the politicians at that time taking into account the matter. Freedom of speech has been discussed above. In addition, the Article 9 prohibits that proceeding in parliament, in any court of, or any place outside the Council, be impeached or prosecuted. This has been the United Kingdom Parliament and the Court explained separately as follows: each House has the right to manage its own agenda and exclusive

²²⁶ See, E.Campbell, *Parliamentary Privilege in Australia*, Melbourne: Melbourne University Press, p.75-6.

²²⁷ See, E.Campbell, *Parliamentary Privilege in Australia*, Melbourne:Melbourne University Press, p.76.

jurisdiction of those involved in the agenda of the legal part of the application.²²⁸

Parliamentary privilege regardless of the origin, nature, history or law, agencies have to control the agenda of its own privileges, because it is one of the essential independent characteristics of an independent legislative body.

7.2 The Main Content of Right to Regulate Own Proceedings

7.2.1 Review the Qualification of Members

A citizen, who is able to sit in a seat in Parliament to vote on, must first be properly elected to Parliament, and secondly he must meet certain other conditions. That is, the law sets up a qualification that can get a seat to vote on. Sometimes, as a citizen's eligibility or the legitimacy of the elections probably have problems. So, who will be responsible for the review of such problems? Generally speaking, it is a matter of House to regulate own proceedings, but the provisions of each country are different.

In the United Kingdom, from Queen Elizabeth I, the House of Commons has the right to review electoral disputes and disputes related member's qualification. The reason for this is that parliament is worried that if those questions are dealt with by the king's ministers and judges, the Parliament will be improper interferenced by the Crown's. The control of reviewing qualification of the members of parliament is essential for the maintenance of independence. However, it is showed that the parliament was not the best judge to review those things, because many of these cases are based on political considerations rather than legal principles. Finally, in the British Parliament in 1868 gave up the right to review such cases, and the courts have jurisdiction over such controversy. Since then election disputes have caused little difficulty or controversy.²²⁹

²²⁸ Id.

²²⁹ See, UK Parliament, Reports of the Joint Committee on Parliamentary Privilege, <http://www.parliament.the-stationery-office.co.uk/pa/jt199899/jtselect/jtpriv/43/4302.htm>.

In the United States, regarding the review of membership qualification, the Constitution provides as follows “each House shall be the Judge of the Elections, Returns and Qualifications of its own Members”. Relating to this controversy lies in whether or not the provisions grant both houses of Congress to set limits of the qualifications in the Constitution, they can add other restrictions stipulated otherwise. From the British Parliament and the state legislature early practice, the United States Federal Parliament is often not in accordance with the Constitution, and adheres to the “Congress can set conditions of non-qualified to accept the reasons for ordinary human beings.”²³⁰

In other words, except to the constitutional provisions, Congress can add qualification requirements that include the moral, political or other factors to consider. Such as in 1900, Utah, Mr Robert (BHRoberts) was expelled from membership due to his polygamy.

However, in 1969, *Powell v. McCormack* case,²³¹ the Supreme Court’s decision changed this practice. Plaintiff Powell (Adam Clayton Powell), a black member of House of Representatives in New York, in 1966 at the 90th session of the Federal House of Representatives reelection, but before the 89th session of the Federal House of Representatives from the Commission of Inquiry by the Survey Report pointed out that Powell had improperly exercised his privilege to extract false travel expenses and to pay his wife wages illegal to circumvent the New York court proceedings. Therefore, the House of Representatives at the start of the 90th session, which prohibits Powell, became the House of Representatives.

In this case by the District of Columbia Federal District Court and Federal

²³⁰ Edward.S.Corwin, Zhennan Wang Translate, *The Constitution of the United States of America*, 1993, pp.22-3.

²³¹ See, *Powell v. McCormack*, 395 U.S. 486 (1969).

Court of Appeal trial, the plaintiffs have been unsuccessful. To the Federal Supreme Court, Chief Justice Warren wrote, according to the original intent of the constitutional Fathers and the principles of democracy, the Constitution only empowers Congress to “refuse” Members of the authority, which are authorized based on the provisions of the first paragraph, in addition to Congress no longer may not be entitled to any “refuse’s” discretion; ... The Court believes that plaintiffs have the Federal Constitution Article I eligibility requirements, have the right to attend the Congress. In other words, the Federal Supreme Court held that the Constitution only are authorized that the House of Representatives has the right to determine whether its members met the conditions stipulated by the constitution. Now Mr Powell has met the conditions provided for by the Constitution, the House of Representatives has not the authority disqualified.²³²

Some of opinions think that the House’s retention of jurisdiction over disqualification disputes is no longer necessary, nor desirable.²³³

This privilege has been whittled away over the course of the last two centuries and along the way the House has ceded control over a number of aspects of its composition to other bodies.²³⁴

Furthermore, at the heart of the proper functioning of the democratic system lies surely the imperative that the make-up of Parliament must be free from

²³² See, *Powell v. McCormack*, 395 U.S. 486 (1969).

²³³ Claudia Geiringer, *Judging the Politicians: A Case for Judicial Determination of Disputes over the Membership of the House of Representatives*, *New Zealand Journal of Public and International Law*, June, 2005.

²³⁴ David McGee, *Parliamentary Practice in New Zealand*, 2nd ed, GP Publications, Wellington, 1994, p.486.

manipulation, whether from within or without.²³⁵ Considering the important consequences both to individual members and for the integrity of the democratic system, one would expect determinations as to the qualification of members to be made in an environment of fair and impartial deliberation. As long as the House makes those decisions it is difficult if not impossible for such an environment to prevail and to be seen to prevail. This is because of what is at stake for the political parties that make up Parliament. The question of a member's continued qualification to sit in the House has potentially significant implications for the make-up of the House and for the interests of the political parties that comprise it. For that reason, the power to decide whether members remain qualified to sit in the House places the House in the awkward position of acting as judge in its own cause.²³⁶

In fact, the problem of jurisdiction over disqualification dispute mainly due to dependence on that ensure the parliamentary privilege of placing or appropriate on a just decision. The respective parliamentary committee are responsible for the review all election-related disputes, which indeed would cause so-called "majority violence" doubts, that is, the majority party might exclude from the minority party in parliament. However, the courts review the dispute, which will be a threat to the independence of Parliament. Therefore, in consideration of the dilemma, there have also been some compromises of the system. For example, the French Fifth Republic Constitution, the President and Parliament Speaker each appoint three members of the House, composed of the Constitutional Council to review the

²³⁵ Jeremy Waldron, *Retroactive Law: How Dodgy was Duynhoven?*, *Otago LR.*, Vol. 10, 2004.

²³⁶ Claudia Geiringer, *Judging the Politicians: A Case for Judicial Determination of Disputes over the Membership of the House of Representatives*, *New Zealand Journal of Public and International Law*, June, 2005.

dispute.²³⁷ In addition, the German Weimar Constitution of time, the dispute was within a special court composed of professional judges and members of the Special Court jurisdiction.²³⁸

Modern Germany, the federal parliament is responsible for reviewing disqualification dispute. According to Article 41, “review of the election is the responsibility of the federal parliament. Federal parliament decides whether or not its members have the qualification. Against the federal parliament’s decision, the Member of Parliament can take proceedings to the Federal Constitutional Court.”²³⁹

7.2.2 The Right to Set up Rules of Procedure

Rules of Procedure of Parliament refer to abstract, general norms of its own proceedings, as well as other matters of internal rules. In principle, the objects of the rules of procedure are relating to all parliamentary internal matters. Its function is to assist the main parliamentary proceedings smoothly, orderly, and the purpose of parliamentary proceedings is for the exercise of the powers given by the constitution to parliament. Who set up the rules of procedure? Generally, there are the following different practices.

First, the King formulate on behalf of Parliament. Such as, in 19 century, the rules of procedure of the Level parliament Bavaria in Germany exsited in May 26, 1818 Constitution No.10 in the attachment. The attachment together with the

²³⁷ Hung-hsin Hsueh, *The Review Power of Judiciary against Parliamentary Autonomy*, Diss. 1997, p.61.

²³⁸ Weimarer Verfassung, Artikle 31.

²³⁹ Artikle 41, GG.

Constitution was appointed by the king.²⁴⁰ In addition, the Constitution of Austria in 1848 appointed by the Emperor, the so-called pili Stoph Constitution (pillersdorffsche verfassung) also take this form. Although the article 53 of the constitution provides that the parliament enacts rules of Procedure of Parliament, before the parliamentary rules of procedures, the emperor on the representatives of the parliament set up a procedure rules for the Parliament.²⁴¹ The style indicates that parliament does not develop on an independent institution and only is an advisory body for the king. With the formation of a parliamentary system and the strengthening of parliamentary functions, the style was abandoned.

Second, the Parliament formulates the rules of procedure by law. In Germany, Rules of Procedure of Saarland State Parliament regulate by the 970th law.²⁴² In China, September 27, 1914 parliament Act announced by the House also adopted the type.²⁴³

Third, the House itself formulates their own rules of procedure. Such as, the United States Federal Constitution Article 1, section 5, provides that “Each House may determine the Rules of its Proceedings.” German Federal Basic Law Article 40, section 1, provides that “the Federal Parliament to enact its own rules of proceedings.” Rules of proceedings of the United Kingdom parliament are from the House in the course of practice formed, it also can be seen as the formulation by the House.

²⁴⁰ Vgl. Klaus Friedrich Arndt, *Parlamentarische Geschäftsordnungsautonomie und Parlamentsrecht*, Berlin, 1966, S.25.

²⁴¹ Vgl. Norbet Achterberg, *Parlamentsrecht*, Tübingen, 1984, S.323.

²⁴² V. 20.6.1973. ABl. 517, Quoted ,Zongli Xu, *The Parliamentary Procedure Rules and Parliamentary Autonomy*.

²⁴³ Zongli Xu, *The Parliamentary Procedure Rules and Parliamentary Autonomy*.

Parliament enacts rules of procedure by law, which in ancient times the King could control of the legislative process by virtue of legal norms in the form of parliamentary. In theory, now the status of parliamentary is unparalleled to Parliament at period absolute monarchy. Particularly in the exercise of legislative powers now Parliament own on the majority autonomy power, and therefore the form of legal norms of the rule of procedure seem not to exist in a threat to parliamentary independently. As to the essence of each country's constitutional status, however, the Parliament has the right to set up laws, enforcement or application of law need to rely on the executive authorities. Therefore, from the enactment of law to amend, the executive authorities have participated, and even led. If the rules of procedure set up by law, the executive in fact is still possible that affects on the specific content of the law, and thus interferes with the purpose of the exercise of legislative power. If it is so, then the constitutional principle of separation of powers on the legislative power checks and balances on executive power will become a dead letter.²⁴⁴

In addition, the legal form regulate in the parliamentary process, it will limit the flexibility of Parliament at exercise of legislative authority, which in practice will also hinder the freedom of parliamentary activity, thereby affecting the independence of Parliament. Because the law has a strong binding with the higher stability requirements, to enact, amend, or delete it must go through the more cumbersome procedures.

Each House of parliament can determine own rules of procedure by own provisions, which suggests that Parliamentary House can be independently provided for the content of the rules of procedure, such as how to organize the

²⁴⁴ See, Hung-hsin Hsueh, *The Review Power of Judiciary against Parliamentary Autonomy*, Diss. 1997, pp.66-7.

agenda, whether a bill pass through second read or third read, how to decide the orders of speakers, the speaking time of the length of what kind of vote and so on, other state organs, including the Parliament from another House not interfering.

Because the form of arrangements for the proceedings will inevitably affect to the final resolution, the House of Parliament develops its own procedures for the integration of “all means”, which also must be the true sense of Parliament, or even in a sense can also be said that the people the real meaning.²⁴⁵ Because Parliament is composed of representatives of the people and represents the public, it is an organ with the most basic and direct public opinion in all kinds of state organs

Precisely because of this, the right to formulate rules of procedure constitutes an important element the privilege of the parliament. The country which Parliamentary rules of proceedings are provided by law does not preclude the House’s own right to formulate rules of procedure. Such as, Japan in the Act of Congress shall following the internal organization of the Senate and House of Representatives has a lot of requirements, but according to the Constitution Article 58, section 2 of the provision “each House and Senate determine parliamentary procedures and other...”²⁴⁶ House of Representatives and senate can also formulate their own rules of procedure to regulate their own internal matters.

7.3 Organizing Right of the House

Terms of internal organization of the House include selecting Speaker of the House as well as the organization of various committees in parliament.

²⁴⁵ Ernst-Wolfgang Böckenförde, *Die Organisationsgewalt in Bereich der Regierung*, Berlin, 1964, S.116.

Election of the Speaker. The head of Parliament, known as the Speaker, its responsibilities is to maintain order in Parliament to arrange the agenda, to monitor parliamentary affairs, and to represent of Parliament, so the Speaker has very lofty posts, which its generation and its neutrality are not exactly the same every country in the world.

In British, the Speaker is generated by the members.²⁴⁷ If a member is elected as Speaker and its identity immediately becomes a neutral non-partisan, political parties have to withdraw from the activity in order to express non-biased about the political party, or have the general's political words and deeds.²⁴⁸ The salaries of the Speaker do not come from the national budget, but from a special fund in parliament. It pays not to review the adoption by the Parliament in order to guarant his characteristics of neutrality.

In Germany, the parliamentary Speaker is elected by each legislative session at the General Assembly by secret ballot.²⁴⁹ It is more usual to belong to the majority. In order to protect the independence of Parliament, the Speaker shall not be relieved the term of office. Because of the German Parliament having a strong partisan politics,²⁵⁰ the Speaker does not the obligation to maintain a neutral attitude, while the Speaker of the seats can temporarily leave to participate in the discussion, a vote.

²⁴⁶ See, Hung-hsin Hsueh, *The Review Power of Judiciary against Parliamentary Autonomy*, Diss. 1997, pp.44-7.

²⁴⁷ See, Georges Bergougnous, *Presiding Officers of National Parliamentary Assemblies*, IPU, 1997, p.9.

²⁴⁸ *Id.*, p.13.

²⁴⁹ Artikel 40, Abs.1, GG.

²⁵⁰ Artikel 40, Abs.2, GG.

In the United States, the Members directly elect the Speaker of House of Representatives at beginning of the new Parliament session.²⁵¹ Because the party's approach to follow, House of Representatives, the link is virtually consubstantial and the Speaker of the House is at the same time the leader of the majority. And the United States Senate by the direct provisions of the Constitution of the United States serves as vice president by the federal government.²⁵²

As to the authority of the Speaker, with the exception of political parties color is too serious, such as in the United States, most countries mainly design in order to achieve objective and neutral stance and can be more or less the same.²⁵³ The Speaker of the functions of the United Kingdom are: to decide the order of Members to express their views; to safeguard the interests of all parties to a fair allocation of time; decide the bill of favor or against the same number of decisions; to decide whether a bill for money bill and so on. The United States, in addition to serving as the majority party and policy guidance to the Chairman of the Committee, Speaker of the House is also responsible for the appointment of the Special Committee or the House of Representatives Joint Committee members, the Commission of the bill submitted, as well as deal with general parliamentary affairs functions.

In Germany and other countries, the Speaker of the House have political power of regulating internal management, staff appointment and supervisory

²⁵¹ The U.S. Constitution, Article 1, Section 2.

²⁵² The U.S. Constitution, Article 1, Section 3.

²⁵³ See, Georges Bergougous, Presiding Officers of National Parliamentary Assemblies, IPU, 1997, p.22-3.

authority, the right of representing the house, as well as interpreting the rules of procedure and so on.²⁵⁴

In addition, the Parliament can set up various committees in accordance with their own needs, such as a full-house committee, the Standing Committee, the Special Committee, their organizational structures and functions and operational procedures are decided by the House of Parliament itself.

8 The Power of Discipline²⁵⁵

Members of parliamentary assemblies are required, like their counterparts in other organised bodies, to comply with common rules of conduct and to establish an authority responsible for ensuring observance of the rules.

In some countries,²⁵⁶ the Constitution explicitly authorises assemblies to establish the rules of conduct and ensure their observance.²⁵⁷ In others, the right is a natural extension of the assembly's right to regulate its own functioning. Common rules of conduct are almost always written down, either in a specific act of parliament or in the assembly's standing orders.²⁵⁸

²⁵⁴ See, Georges Bergougous, *Presiding Officers of National Parliamentary Assemblies*, IPU, 1997, p.51-2.

²⁵⁵ See, Marc Van der Hulst, *The Parliamentary Mandate*, Geneva: Inter-Parliamentary Union, 2000, p.112-127.

²⁵⁶ Marc Van der Hulst, *The Parliamentary Mandate*, Geneva: Inter-Parliamentary Union, 2000, p.112.

²⁵⁷ For example, The Constitution of the United States of America stipulates that: 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.

²⁵⁸ The Belgian Constitution stipulates that: Each Chamber shall determine, in its rules of procedure, the way in which its responsibilities shall be discharged.

The rules governing parliamentary discipline are all in some ways designed to ensure the smooth conduct of business. The most graphic example is the prohibition of the use of force of any kind and the explicit (Slovakia) or implicit ban on carrying weapons.²⁵⁹

Secondly, threats, intimidation, provocation and insults are prohibited in almost every parliamentary assembly.

The third category of disciplinary rules is no doubt the most important, both quantitatively and in terms of its practical impact. The rules in question may be broadly designated as measures intended to prevent “unlawful” obstruction of the proceedings. By this is meant cases in which parliamentarians clearly refuse to obey the rules of procedure and try to create an obstruction by word or deed. There is a long list of such “unlawful” procedures, of which we shall mention just a few: Taking the floor without the speaker’s authorisation; Refusing to conclude a statement or to leave the podium; Ignoring a call to order; Refusing to defer to the authority of the speaker; Introducing extraneous material into a statement or being tediously repetitive, etc.²⁶⁰

The fourth category of disciplinary rules is designed to preserve the dignity of the assembly. Almost all assemblies prohibit language or behaviour liable to undermine their dignity. Preservation of dignity is actually the source of the dress code in some countries, particularly those with a British parliamentary tradition (Canada, Egypt, Zambia and Zimbabwe).²⁶¹ In the Indian Rajya Sabha, the Rules

²⁵⁹ Marc Van der Hulst, *The Parliamentary Mandate*, Geneva: Inter-Parliamentary Union, 2000, p.113.

²⁶⁰ Id.

²⁶¹ Id.

contain a lengthy chapter on parliamentary etiquette, which stipulates, inter alia, that entering the chamber with a jacket on one's arm is inappropriate and contrary to the decorum of the House. The vast numbers of rules of parliamentary conduct make it virtually impossible to provide a comprehensive overview.²⁶² We have therefore decided to confine ourselves to a compilation of existing disciplinary sanctions and the authorities authorised to impose them.

8.1 Disciplinary Sanctions

Assemblies (or their bureaux or business committees) may impose a wide range of penalties on members who fail to respect their rules of conduct. They are described below in order of severity, from a simple call to order to suspension and expulsion.

8.1.1 From a Call to Order to Censure with Temporary Expulsion

A call to order is not only the most lenient disciplinary sanction but also the most widespread. It is usually applicable to members who disrupt the debate or the order of the house. In almost all assemblies, it is the presiding officer who calls a member to order. It should be noted, however, that the presiding officer at the sitting in question may not always be the speaker of the assembly.

In countries influenced by French tradition, the next step up in terms of severity is usually a call to order with a corresponding entry in the record. In the French National Assembly,²⁶³ the President may impose this penalty on any deputy who, at the same sitting, has already been called to order or who has insulted, provoked or threatened one or more of his or her colleagues. It

²⁶² Id.

²⁶³ Marc Van der Hulst, *The Parliamentary Mandate*, Geneva: Inter-Parliamentary Union, 2000, p.114.

automatically entails a reduction of the deputy's salary by 25 per cent for one month. In the French Senate, a call to order with an entry in the record is applicable to any Senator who has already been called to order at the same sitting. It does not, however, have any impact on salary.

In some countries (Greece, Luxembourg, Slovenia, United States of America), ²⁶⁴members who have been warned or called to order once may be (temporarily) deprived of the right to the floor if they persist in disobeying the rules. In the House of Representatives of the United States of America, a member who uses improper language is not excluded from the sitting — since that would mean denying representation to certain voters — but may be deprived of the right to take the floor for the rest of the day. In Luxembourg, members who have been called to order twice during the same sitting automatically lose the right to take the floor if it has already been accorded and are deprived of the right to take the floor for the remainder of the sitting.²⁶⁵

In most assemblies, the presiding officer may have any slanderous, indecent, unworthy or improper remarks or, in general, any “unparliamentary language” deleted from the record (Belgium, Cyprus, India and the United States).²⁶⁶

In countries influenced by French tradition, a simple censure is generally ranked third on the scale of disciplinary sanctions. In the French National Assembly, it can be imposed on any deputy who, after being called to order with an entry in the record, fails to obey the President's ruling or causes a disturbance in the Assembly. As this is a more serious penalty, it is the Assembly that takes the

²⁶⁴ Id.

²⁶⁵ Id.

²⁶⁶ Id.

decision by a standing vote and without a debate, on the President's proposal. The Deputy concerned is entitled to a hearing or to have a colleague speak on his or her behalf.

There is an identical procedure in the French Senate, but the penalty is applicable, in addition to the two cases mentioned above, to Senators who insult, provoke or threaten their colleagues or use their offices for purposes other than the exercise of their mandate. In both chambers, a simple censure entails deduction of part of a member's salary for a month (one-half in the National Assembly and one-third plus the entire duty allowance in the Senate).²⁶⁷ The word "reprimand" (blame in French) is sometimes used instead of "censure". In Luxembourg, the President issues a reprimand that is entered in the record to any deputy who, having been called to order and denied the floor, fails to obey the President's ruling or causes a disturbance in the assembly. This type of "censure" is commonly found in countries based on the French model, but it also exists elsewhere under a variety of names. (e.g. "censure" and "reprimand" in the United States of America).²⁶⁸

In many countries influenced by French tradition, censure with temporary expulsion is the penalty of last resort. In France, it is applicable to deputies or senators who ignore or have twice been subject to a simple censure, who call for violence at a public sitting, insult the assembly or its President, or insult, provoke

²⁶⁷ According to Duhamel, O. and Meny, Y. *Dictionnaire constitutionnel*, Paris, P.U.F., 1992, p. 31J), the simple censure has been applied only once under the Fifth Republic: on 2 February 1984 in the National Assembly against Jacques Toubon (RPR), Alain Madelin (UDF), and Francois d'Aubert (UDF) during the discussion of the bill on plurality of media enterprises (J.O. De'bats AN, t and 2 February 1984, pp. 442-450 and 475-481). Quoted Marc Van der Hulst, *The Parliamentary Mandate*, Geneva: Inter-Parliamentary Union, 2000.

²⁶⁸ Marc Van der Hulst, *The Parliamentary Mandate*, Geneva: Inter-Parliamentary Union, 2000, p.114.

or threaten the President of the Republic, the Prime Minister, the members of the Government or the assemblies provided for in the Constitution. The Senate's Rules of Procedure also target recidivist senators who have already subjected to a simple censure for having used their office for purposes other than the exercise of their mandates.²⁶⁹

This type of censure entails a ban on participation in the assembly's proceedings for 15 days from the date on which the measure was taken. This period may be extended to 30 days if the parliamentarian refuses to obey the President's ruling. It entails deduction of part of the Senator's salary for two months. Censure with temporary expulsion is decided by the National Assembly or the Senate according to the same procedure as simple censure.²⁷⁰ In the French National Assembly, this penalty is also applicable to deputies who assault a colleague, subject to a decision by the Bureau on the proposal of the President. The Bureau is also convened by the President when a deputy attempts to obstruct the freedom of the deliberations or of voting in the Assembly and, having attacked a colleague, refuses to obey the President's call to order.²⁷¹

8.1.2 A Typically British Sanction: "Naming"

²⁶⁹ See, Marc Van der Hulst, *The Parliamentary Mandate*, Geneva: Inter-Parliamentary Union, 2000, p.115.

²⁷⁰ Duhamel, O. and Meny, Y., *Dictionnaire constitutionnel*, Paris, P.U.F., 1992, p.311, note that the last instance of censure with temporary expulsion in France took place on 3 November 1950 in the National Assembly.

²⁷¹ Marc Van der Hulst, *The Parliamentary Mandate*, Geneva: Inter-Parliamentary Union, 2000, p.115.

In most countries with a British parliamentary tradition (Australia, Canada, Kenya, United States of America),²⁷² the most severe penalty that a presiding office can impose on members is usually that of “naming” them.

In Canada, a member can be named for failing to respect the Speaker’s authority by, for example, refusing to withdraw unparliamentary comments, to cut short an irrelevant or repetitive statement or to cease interrupting a member who has the floor. Persistent improper conduct after being asked by the Speaker to desist is another way of defying the Speaker’s authority and may also entail the penalty of naming. Before taking that step, the Speaker usually warns the offender several times of the penalty that may be imposed for failure to obey. If the member apologises and the Speaker is broadly satisfied, the incident is usually deemed to be closed and no measure is taken. If, on the other hand, the member is named, the Speaker has two options: he or she may either order the offender to withdraw forthwith from the House for the remainder of the sitting or simply wait until the House takes any other disciplinary measure it deems appropriate. The first option was adopted in February 1986 and has always been used since to discipline a member who has been named. If the Speaker chooses the second option, another member — generally the Leader of the Government in the House — immediately moves the suspension of the member concerned. The motion may not be debated or amended and the Speaker immediately puts it to the vote. If the motion is adopted, the member must leave the House.²⁷³

If the Speaker names a member in Australia, a motion for (temporary) suspension is put to the vote. If it is adopted, the member is expelled, on the first

²⁷² See, Marc Van der Hulst, *The Parliamentary Mandate*, Geneva: Inter-Parliamentary Union, 2000.

²⁷³ *Id.*

occasion for 24 hours, on the second (within the same year) for three consecutive sittings, and on the third (or any other occasion within the same year) for seven consecutive sittings.²⁷⁴ It should be noted that this amounts to a fully fledged suspension of the member's mandate rather than mere expulsion from the precincts of Parliament.

8.1.3 Subsidiary Sanctions

There are three further categories of sanction, which are usually subsidiary: pecuniary sanctions, compulsory presentation of an apology and loss of seniority. pecuniary sanctions may be of two kinds: in some assemblies, a fine is a penalty in its own right (Gabon, United States of America); in others, certain disciplinary sanctions automatically entail a reduction in the parliamentarian's salary for a specified period (see above: censure in France).

In a number of countries, the presiding officer may order the member to apologise. This type of sanction is common in Asian countries (Japan, Lao Democratic People's Republic, Republic of Korea)²⁷⁵ but also exists in other countries (Slovakia, United States of America).²⁷⁶ In many countries, members present an apology not because they are obliged to do so for disciplinary reasons but to avoid disciplinary sanctions (Romania, Slovakia, United States of America).²⁷⁷

²⁷⁴ Id.

²⁷⁵ Id.

²⁷⁶ Id..

²⁷⁷ Id.

In the United States of America, the House of Representatives imposes a somewhat original penalty, namely loss of seniority.²⁷⁸ Although this penalty is more commonly imposed for failure to respect “ethical” rules than for purely disciplinary purposes, it should not be viewed as a purely symbolic sanction, because seniority is an important criterion for obtaining certain privileges (a large office) and for appointment to certain offices (e.g. committee chairperson).

8.2 Who Imposes Sanctions

As noted above, the most lenient disciplinary sanctions are usually imposed by the person chairing a particular sitting. They are applicable to minor breaches of the rules. As presiding officers are responsible for the conduct of the proceedings and for maintaining order and decorum, it stands to reason that they should issue a ruling in such cases. In France, for example, the President has sole authority to call a member to order, with or without an entry in the record, while more severe penalties (simple censure and censure with temporary expulsion) are imposed by the assembly, on the President’s proposal.²⁷⁹ In Luxembourg, the decision to impose disciplinary sanctions is taken by the presiding officer, except for reprimands with temporary expulsion, which require a vote by show of hands, with an absolute majority, in the Chamber. It should be noted, however, that when a member assaults a colleague, the Labour Committee is responsible for deciding, where appropriate, to issue a reprimand with temporary expulsion. While responsibility for decisions in less serious cases usually lies with the presiding officer, provision may be made for appeal in such cases.²⁸⁰

²⁷⁸ Id.

²⁷⁹ Id.

²⁸⁰ Id.

In the Belgian Senate, for example, a penalised member may appeal to the Bureau of the Senate.²⁸¹ In India, the Speaker of the Lok Sabha may name a member, but any subsequent temporary expulsion requires the consent of the assembly, which may terminate the procedure at any time.²⁸² In the United States of America, the Speaker may penalise a member who has made offensive remarks and refuses to withdraw them, but the member may appeal and the assembly takes the final decision. Another interesting feature of sanction procedures in the United States is the fact that authority to initiate sanctions is not vested in the Speaker alone. Any member can set in motion a disciplinary procedure against a colleague and even call to order a member whose conduct is unseemly.²⁸³ This right exists in some other countries too. In Romania, for example, serious or repeated violations liable to entail suspension are submitted to the Legal Committee.²⁸⁴ The referring source may be a parliamentary group or an individual senator or deputy. The Legal Committee reports to the Bureau, which rules on the matter. The situation is similar in Slovakia, where the Mandates and Immunities Committee may take up a case itself or have the matter referred to it by an individual member who feels insulted by a colleague's remarks.²⁸⁵

In very rare cases, all disciplinary sanctions are taken by the assembly on the proposal of the President (e.g. in Chad). As a rule, however, only severe sanctions (such as temporary expulsion) are imposed by the assembly and a special majority

²⁸¹ Id.

²⁸² Id.

²⁸³ Id.

²⁸⁴ Id.

²⁸⁵ Id.

is sometimes required. In the Philippines, suspension of a mandate may not exceed 60 days and must be ordered by a two-thirds majority of members.

Lastly, a small group of countries adopt an intermediate approach, all disciplinary measures being taken either by the Bureau or equivalent body (e.g. the Lao Democratic People's Republic) or by a special committee. In the Israeli Knesset, for example, the Speaker may call a member to order but the decision to impose more severe sanctions (such as temporary expulsion) must be taken by the Ethics Committee. In the Republic of Korea, the Speaker refers cases to the Special Committee on Ethics, which reports to the plenary and the latter takes the final decision. In assemblies where such ethics committees exist, they usually also have jurisdiction in cases of breaches of ethical precepts or codes of conduct.²⁸⁶

8.3 Contempt of Parliament

8.3.1 A Typical British Institution²⁸⁷

Protection against “insults” to or “contempt” of parliament is a privilege enjoyed both by assemblies and individual members in some countries.

The countries concerned may be divided into two categories. The notion of contempt of parliament is alien to most countries. Clearly, this does not mean that insults to parliament are allowed but simply that no legal distinction is made between insults to parliament and those directed against some other public authority. Parliament is not protected in its own right but as part of the machinery of government whose dignity must be preserved in all circumstances. While the terms “contempt of parliament” or “insult to parliament” are occasionally

²⁸⁶ Id.

²⁸⁷ See, Marc Van der Hulst, *The Parliamentary Mandate*, Geneva: Inter-Parliamentary Union, 2000, pp.129-134.

employed in some countries belonging to this group, especially those influenced by French tradition, their scope is different from that prevailing in countries with a British parliamentary tradition. The Rules of Procedure of the French Senate stipulate that a Senator who insults the Senate or its President is liable to censure with temporary expulsion from the Senate building. In such cases, the French Senate is not exercising criminal but disciplinary jurisdiction. Slander of the “constituent bodies” (including the Parliament) is punishable by a term of imprisonment of one year and a fine of FF 300,000 under the Act of 29 July 1881 concerning freedom of the press.²⁸⁸

The second group of countries, on which we propose to focus in this chapter, consists for the most part of countries with a parliamentary tradition based on the British model (Canada, Ireland, United Kingdom, United States of America).²⁸⁹ In these countries, parliament has laid the foundations for its own protection: it enjoys criminal jurisdiction and may impose penalties on anybody who breaches its privileges.

8.3.2 Preventing from Interfering by the Executive or the General Public

The scope of the concept of contempt of parliament is somewhat unclear, inter alia because Commonwealth parliaments have always jealously guarded their right to determine whether or not their privileges have been breached. It is not surprising therefore that the Rules of Procedure of these parliaments rarely contain a definition of the notion of contempt of parliament.²⁹⁰ As a rule, contempt of

²⁸⁸ Id.

²⁸⁹ Id.

²⁹⁰ The Rules of Procedure of the Indian Council of States (the Rajya Sabha) constitute an exception to this rule by defining contempt of the House in annex III as “any act or omission which obstructs or impedes any member or officer of such House in the discharge of his duty, or which has a tendency directly or indirectly to produce such results”.

parliament denotes what may be termed “breaches of the privileges of parliament” or “insults to parliament”. The following examples illustrate what this means in practice:

- Attacking, obstructing, abusing or insulting members or parliamentary officials in the performance of their duties;
- Bribing a parliamentarian;
- Refusing to obey parliament or its committees;
- Defaming or slandering parliament and its members orally or in writing;
- Publishing confidential information;
- Trying to influence parliamentarians’ votes, opinions, assessments or action by fraud, threats or intimidation;
- Perjury before parliament or its committees;
- Use of force or threatening to use force to suspend a sitting, etc.²⁹¹

It may be gathered from this list, which is not exhaustive, that the aim is to protect the proceedings of the assembly against any kind of interference, primarily by the Executive or the general public. When parliament decides to punish an offender, it usually does so in the form of a reprimand delivered by the presiding officer of the chamber concerned. Offenders who are not members of parliament are summoned to appear before the house. The right to impose sanctions includes

²⁹¹ See, Marc Van der Hulst, *The Parliamentary Mandate*, Geneva: Inter-Parliamentary Union, 2000, p.130.

the right to sentence offenders to limited terms of imprisonment. Some parliaments are empowered to impose fines.

In the United Kingdom and most other Commonwealth countries, the courts recognise the exclusive jurisdiction of parliament in matters of privilege, but conflicts have arisen between parliament and the courts in cases in which the limits of privilege are unclear.²⁹²

In the United States of America, the punitive authority of Congress is more limited than in the parliaments of the United Kingdom and some Commonwealth countries. The Constitution empowers the Congress to censure or report; proceed against persons who breach the clearly established privileges of the two houses, for example a person who deliberately attempts to prevent a member from discharging his or her legislative duties. Congressional committees, all of which now have authority to subpoena, may bring an accusation against witnesses who refuse to cooperate, with the proviso that self-incrimination by such persons is inadmissible. Congress is not, however, vested with general punitive authority and may not determine whether a particular form of behaviour constitutes contempt of Congress.²⁹³

8.3.3 A Weapon of Being Used Against Members of Parliament

While the main purpose of the notion of “contempt of parliament” in countries where it exists is to protect the assembly and its members against acts by the Executive or the general public, members themselves may also commit the offence of contempt of parliament.

²⁹² If, for example, parliamentary privilege is invoked as a defence in a case before the courts, it is the court which decides whether the argument is acceptable or not", Laundry, P., *Parliaments in the Modern World*, Aldershot, Dartmouth, 1989, pp.121-2

A member who is guilty of contempt of parliament, just like any other offender, is liable to a reprimand, a term of imprisonment or a fine. Furthermore, in many Commonwealth parliaments the assembly may impose two other penalties: suspension of the member's mandate or expulsion.

In Western countries, parliaments display considerable reluctance to exercise this right. For example, the last occasion on which the British House of Commons expelled one of its members who had been found guilty of a gross breach of privilege was in 1947.²⁹⁴ In Australia, the 1987 Parliamentary Privileges Act not only abolished the authority of the two houses of parliament to punish individuals for defamation of parliamentarians, but also withdrew their authority to expel their own members.²⁹⁵

In other Commonwealth countries, however, cases of suspension or even expulsion for contempt of parliament occur relatively frequently. In Zambia, for example, there have been four cases over the past thirty years: In 1968, a member was suspended for the remainder of the term for racist allegations against colleagues;²⁹⁶ in 1970, a member was expelled for offensive remarks that discredited the assembly;²⁹⁷ In 1993, a Member of Parliament and the Leader of the Opposition were accused of unjustly impugning the impartiality of the

²⁹³ Id., p.122.

²⁹⁴ UK Parliament, Reports of the Joint Committee on Parliamentary Privilege, <http://www.parliament.the-stationery-office.co.uk/pa/jt199899/jtselect/jtpriv/43/4302.htm>.

²⁹⁵ See, Marc Van der Hulst, *The Parliamentary Mandate*, Geneva: Inter-Parliamentary Union, 2000, p.132.

²⁹⁶ Id.

²⁹⁷ Id.

Speaker (the member was suspended);²⁹⁸ Lastly, in 1996 a member was found guilty of serious contempt of parliament and expelled for openly dissociating himself from action taken by the assembly.²⁹⁹ It is therefore a manifestly dangerous weapon that should be used with the greatest circumspection.

²⁹⁸ Id.

²⁹⁹ Id.

CHAPTER3. Existing Some of Questions of Parliamentary Privilege

9 How to Understand Parliamentary Proceeding

In English model, as to parliamentary privilege, It is often remarked that probably the single most controversial interpretation issue arising out of Article 9 (Bill of Right) is the meaning of the words “proceedings in Parliament”. No comprehensive definition has been determined either by Parliament or by judicial decision.³⁰⁰ In 1689, when parliamentary proceedings were much simpler, a definition may have been thought unnecessary. But this is not so when the phrase is applied to present day parliamentary activities and members’ activities. In several respects the scope of this expression is not clear today.

The broad description in Erskine May is a useful starting place: “The primary meaning of proceedings, as a technical parliamentary term ... is some formal action, usually a decision, taken by the House in its collective capacity. This is naturally extended to the forms of business in which the House takes action, and the whole process, the principal part of which is debate, by which it reaches a decision. An individual member takes part in a proceeding usually by speech, but also by various recognized forms of formal action, such as voting, giving notice of a motion, or presenting a petition or report from a committee, most of such actions being time-saving substitutes for speaking. Officers of the House take part in its proceedings principally by carrying out its orders, general or particular. Strangers

³⁰⁰ See, Gareth Griffith, Parliamentary Privilege: Use, Misuse and Proposals for Reform, <http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/key/ParliamentaryPrivilege:MajorDevelopmentsandCurrentIssues>.

also may take part in the proceedings of a House, for example by giving evidence before it or one of its committees, or by securing presentation of a petition.”³⁰¹

The difficulty is that the application of the term ‘proceedings in Parliament’ is less clear-cut in relation to matters only connected with, or ancillary to, the formal transaction of parliamentary business.³⁰²

9.1 Caucus Meetings and Parliamentary Proceeding

Rata v. Attorney-General, a High Court of New Zealand case from 1997, Master Thompson held that, as Caucus is integral to the parliamentary system, in the interest of ‘robust debate’ what is said there must be absolutely privileged. He concluded:

a) As a matter of principle the caucus system as it has developed in New Zealand is an integral part of the parliamentary process and that all matters transacted in caucus are inextricably linked to Parliament...

b) If that general proposition is wrong then any discussion and related papers will be privileged when they relate to the passage of legislation (present or future) or any matter which is before the House.³⁰³

³⁰¹ May, 22nd ed., 1997, p.95. While referring to this definition, J P Joseph Maingot, *Parliamentary Privilege in Canada* (2nd ed), McGill-Queen’s University press, 1997, p.80 gives this supplementary definition: “As a technical parliamentary term, ‘proceedings’ are the events and the steps leading up to some formal action, including a decision, taken by the House in its collective capacity. All of these steps and events, the whole process by which the House reaches a decision (the principal part of which is called debate), are “proceedings”.

³⁰² Gareth Griffith, *Parliamentary Privilege: Use, Misuse and Proposals for Reform*, <http://www.parliament.nsw.gov.au/prod/parliament/publications.nsf/key/ParliamentaryPrivilege:MajorDevelopmentsandCurrentIssues>.

³⁰³ *Rata v A-G* (1997) 10 PRNZ 304, p.313.

This is contrary to the traditional view that party caucuses are not regarded as proceedings in Parliament even though they occur within its precincts.³⁰⁴ The decision in *Rata* has been criticised by David McGee, Clerk of the New Zealand House of Representatives who called it a “perverse interpretation”.³⁰⁵ Equally critical of the approach taken in *Rata* is PA Joseph, for whom the decision was “without precedent or support”. According to Joseph:

Caucus meetings do not qualify as “proceedings in Parliament”. Caucus does not transact the business of the House but is a party-political meeting for coordinating strategies that may or may not relate to proceedings in Parliament...The correct view is that political meetings are not proceedings in Parliament and lack protection of parliamentary privilege.³⁰⁶

In *Huata v. Prebble & Anor*,³⁰⁷ this traditional view was affirmed by the New Zealand Court of Appeal. At issue in *Huata* was the judicial review of provisions of the disqualification legislation which placed this process in the hands of the political party caucus to be operated by its leader with the agreement of two-thirds of the caucus members. The question for the Court of Appeal was whether the Parliament should have exclusive cognizance of the ‘reasonableness’ of this process, or was this justiciable matter? In support of judicial review, the joint judgment noted that the general position is that proceedings of a party’s caucus are

³⁰⁴ Parliamentary Privilege Bill 1994 (NZ), p.9.

³⁰⁵ D, McGee, Parliament and Caucus, New Zealand Law Journal, April, 1997.

³⁰⁶ P.A.Joseph, Constitutional and Administrative Law in New Zealand, 2nd ed., Brookers, 2001, pp.402-3.

³⁰⁷ [2004] NZCA 147.

not proceedings of Parliament. In our view, the judgment of the High Court in.....was not correctly decided.³⁰⁸

Having reviewed the objections of Joseph and McGee to the High Court's decision, the Court of Appeal noted:

Importantly, Mr.McGee goes on to say that even where caucus discussed legislation before the House privilege would not attach to the discussions. The concept of proceedings in Parliament was limited to "essential steps to parliamentary action" and caucus discussions could not be viewed in that light...For these reasons we agree that Rata was wrongly decided on the privilege point.³⁰⁹

9.2 Parliamentary Proceeding and Parliamentary Committees, Other Bodies

With the proliferation of integrity oversee and adviser's questions arise as to the relationship of some or all of their activities to Parliament. This is especially the case where these bodies assist Parliament in an investigatory capacity. Often the relationship between Parliament and these bodies in complex and intimate.³¹⁰ The connections are obvious in relation to those officers established to oversight parliamentary standards or ethics. In other cases parliamentary committees may be established to oversight independent integrity commissions, as in the case of the ICAC (Independent Commission against Corruption) or the Ombudsman in NSW in Australia. Further, the ICAC is an example of an integrated survey whose brief includes inquiring into the conduct of parliamentarians. As the debate on search

³⁰⁸ [2004] NZCA 147.

³⁰⁹ [2004] NZCA 147.

³¹⁰ Gareth Griffith, Parliamentary Privilege: Major Developments and Current Issues, [http://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/0/18DBE18C7D65CDF0CA2572D100091751/\\$File/ParliamentaryPrivelige07.pdf](http://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/0/18DBE18C7D65CDF0CA2572D100091751/$File/ParliamentaryPrivelige07.pdf).

warrants in Parliament showed, the potential for issues relevant to parliamentary privilege to arise is considerable.

This is uncertainty relates to Parliamentary proceeding and Committees and other investigatory bodies such as the Ombudsman. In NSW (New South Wales) state of Australia, there is a so case. A man, who was Mr Russell Grove, was raised in his briefing to the Legislation Committee on the Defamation Bill 1992. In fulfilling their statutory functions committees handle a large amount of correspondence and, in order to ensure that the absolute privilege afforded to Hansard transcripts of committee proceedings is obtained, committees are at present prepared to hold formal hearings.³¹¹

As the NSW Law Reform Commission said, this is despite the fact that the committee's acknowledge that "this is an over elaborate, expensive and inefficient means of referring a simple matter, such as a letter received from a member of the public which contains potentially defamatory allegations, to the ICAC or Ombudsman for comment and response".³¹² Mr Grove commented, "This impedes the Committee's ability to properly fulfill their statutory duties, and should be rectified".³¹³ Mr Grove proposed adoption of a provision along the lines of section 17 of the federal Parliamentary Privileges Act 1987 (Cth)³¹⁴ which, for

³¹¹ See, Gareth Griffith, Parliamentary Privilege: Use, Misuse and Proposals for Reform, [http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/A21A5D304A093CDACA256ECF00074271/\\$File/Brief%2004-97.pdf](http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/A21A5D304A093CDACA256ECF00074271/$File/Brief%2004-97.pdf).

³¹² NSWLRC, Discussion Paper 32 - Defamation, August 1993, p.138.

³¹³ Report of the Legislation Committee Upon the Defamation Bill 1992, p.60.

³¹⁴ Parliamentary Privileges Act 1987, Section 17 (Certificates relating to proceedings):
For the purposes of this Act, a certificate signed by or on behalf of the President of the Senate, the Speaker of the House of Representatives or a chairman of a committee stating that:
(a) a particular document was prepared for the purpose of submission, and submitted, to a House or a committee; (b) a particular document was directed by a House or a committee to be treated as evidence taken in camera; (c) certain oral evidence was taken by a committee in camera; (d) a document was not published or authorised to be published by a House or a committee; (e) a person is or was an officer of a House; (f) an officer is or was required to attend upon a House or a committee; (g) a person is or was required to attend before a House or a committee on a day; (h) a day is a day on which a House or a committee met or will meet; or (i) a specified fine was imposed on a specified person by a House; is evidence of the matters contained in the certificate.

the purposes of the Act, permits the Presiding Officers may certify as to whether any of the following are “proceedings in Parliament”:

a) A particular document prepared for the purpose of submission, and submitted to a House or a committee;

b) A particular document directed by a House or a committee to be treated as evidence taken in camera;

c) Certain oral evidence taken by a committee in camera; and

d) A document not published or authorised to be published by a House or a committee. The proposal was adopted by the Legislation Committee but not, it seems, by the NSW Law Reform Commission.³¹⁵

It is, however, in other country, notably the UK, that the case law has developed. At issue are two related questions: Does the disputed evidence constitute parliamentary proceedings? If the proceedings are internal to Parliament, do they lie outside the jurisdiction of the courts?³¹⁶

In the UK case of *R v Parliamentary Commissioner for Standards, ex parte Al Fayed*³¹⁷ the Court of Appeal refused an application for judicial review of the report of the Parliamentary Commissioner which had rejected Al Fayed’s claim that an MP (Neil Hamilton) had received a corrupt payment. It was confirmed that the Commissioner’s inquiry and report were ‘proceedings in Parliament’. It is therefore the House of Commons, not the courts, which are responsible for the activities of the Parliamentary Commissioner for Standards. A contrast was drawn

³¹⁵ NSWLRC, Report 75 - Defamation, September, 1995, p.174.

³¹⁶ Gareth Griffith, Parliamentary Privilege: Major Developments and Current Issues, [http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/18DBE18C7D65CDF0CA2572D100091751/\\$File/ParliamentaryPrivilege07.pdf](http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/18DBE18C7D65CDF0CA2572D100091751/$File/ParliamentaryPrivilege07.pdf).

³¹⁷ [1998] 1 ALL ER 93.

in this respect between the Parliamentary Commissioner for Standards and the Parliamentary Commissioner for Administration (the Ombudsman).

The former is one of the means by which the Select Committee of Standards and Privileges carries out its functions, which are accepted to be part of the proceedings of the House, whereas the Ombudsman is concerned with the proper functioning of the public service outside Parliament.³¹⁸

In Australia there are also some cases of dealing with the meaning of the term of ‘parliamentary proceedings’. For example, Between 1994 and 2001 at least three Queensland cases dealt with the meaning of the term ‘parliamentary proceedings’ in relation to decisions, investigations or reports of the former PCJC (Parliamentary Criminal Justice Committee, the Parliamentary Commissioner and the CJC(The Criminal Justice Commission).

In *Criminal Justice Commission (CJC) v. Nationwide News Pty Ltd*³¹⁹ an injunction was sought to restrain publication by a newspaper of a confidential report the independent commission had prepared for the Parliamentary Criminal Justice Committee. The Speaker, who intervened in the case, raised two questions: a ‘procedural’ question as to whether the process of arriving at a conclusion in the case involved a breach of the prohibition in Article 9 of the Bill of Rights against impeaching or questioning proceedings in Parliament; and a ‘substantive’ question as to whether the matter was one within the exclusive jurisdiction of Parliament and that the unauthorised publication of the report was for the Assembly to deal with. The Queensland Supreme Court agreed with the Speaker on the first

³¹⁸ That both the inquiry and report of the Parliamentary Commissioner for Standards constituted parliamentary proceedings was confirmed by the House of Lords in *Hamilton v Al Fayed* [2001] 1 AC 395.

³¹⁹ [1996] 2 Qd R 444.

“procedural” argument, thereby confirming that the report was a parliamentary proceeding. However, it did not accept the ‘substantive’ argument, concluding that the Court had jurisdiction to restrain unlawful disclosure of a confidential CJC report in circumstances where the CJC had a statutory right under s 26(6) of the Criminal Justice Act 1989 (Qld)³²⁰ to protect against disclosure of such reports.

In *Corrigan v PCJC*³²¹ the issue was whether a decision of a statutory parliamentary committee – the Parliamentary Criminal Justice Committee (PCJC) – was reviewable by the courts. A person had complained to the PCJC about the Criminal Justice Commission (CJC) and requested that the PCJC refer the matter to the Parliamentary Criminal Justice Commissioner (the Parliamentary Commissioner) for investigation. It was the PCJC’s decision not to refer the matter for investigation that the Supreme Court was asked to review. While recognising a distinction between ‘parliamentary’ and ‘executive’ functions of the committee, Dutney J ruled that the ‘act’ in question was of a parliamentary nature. He could ‘see no reason to distinguish the PCJC from any other committee of the Legislative Assembly merely because it is set up under statute, at least in areas of internal decision making where there is no allegation of breach of any statutory duty or prohibition’.

In *Criminal Justice Commission v Parliamentary Criminal Justice Commissioner*³²² the question was whether a report of the Parliamentary Commissioner constituted a ‘proceeding in Parliament’. The report at issue was

³²⁰ The Criminal Justice Act 1989 (Qld), Article 26, Section 6, No person shall publish, furnish or deliver a report of the commission, otherwise than is prescribed by this section, unless the report has been printed by order of the Legislative Assembly or is deemed to have been so printed.

³²¹ [2001] 2 Qd R 23.

³²² [2002] 2 Qd R 8.

into an unauthorised disclosure by the CJC concerning an inquiry into a Member of Parliament. The investigation undertaken by the Parliamentary Commissioner was at the request of the PCJC. In the event, the Parliamentary Commissioner found out in her report to the PCJC that the CJC was the source of the unlawful disclosure. For its part, the CJC sought orders declaring that:

a) The report of the Parliamentary Commissioner was ultra vires;

b) That in the circumstances the Parliamentary Commissioner could not make findings of guilt; and

c) That the Parliamentary Commissioner had not observed the requirements of procedural fairness. The Speaker intervened, arguing that to grant the first declaration – that the report was ultra vires – would be to directly impeach and question the report contrary to Article 9. That view was upheld, both at first instance³²³ and on appeal. The request by the PCJC that an investigation be undertaken by the Parliamentary Commissioner was held to constitute a proceeding in Parliament, as was the investigation and subsequent report. McPherson JA concluded: “It follows that this Court, like others in Queensland, is precluded by Art. 9 of the Bill of Rights from questioning the validity or propriety of the [Parliamentary] Commissioner’s investigation and report”.³²⁴

Bringing these cases together, Neil Laurie, Clerk of the Queensland Legislative Assembly, comments that the determinative factor for the courts when deciding if a report, decision or investigation constitutes a parliamentary proceeding is ‘the nature of the role of the body in each case, the particular function being discharged and their relationship with the Parliament or committee

³²³ CJC & Ors v Dick [2000] QSC 272.

³²⁴ [2002] 2 Qd R 8 at 22.

of the Parliament'.³²⁵ Irrespective of whether a committee, commission or commissioner is created by statute, the issue is whether its work, in the circumstances in question, is fundamentally an extension of the Parliament's proceedings:

What is important is to determine whether the functions of the investigation are primarily directed to assisting the Parliament discharge its functions or, more particularly, whether the investigation, decision or report itself is a proceeding of the Parliament.³²⁶

9.3 Parliamentary Proceeding and Effective Repetition

It is considered that parliamentary privilege does not protect individual Members publishing their own speeches apart from the rest of a debate. If a Member publishes his or her speech, this printed statement becomes a separate publication,³²⁷ a step removed from actual proceedings in Parliament and this is also the case in respect of the publication of Hansard extracts, or pamphlet reprints, of a Member's parliamentary speeches.

³²⁵ Gareth Griffith, *Parliamentary Privilege: Major Developments and Current Issues*, [http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/18DBE18C7D65CDF0CA2572D100091751/\\$File/ParliamentaryPrivelige07.pdf](http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/18DBE18C7D65CDF0CA2572D100091751/$File/ParliamentaryPrivelige07.pdf).

³²⁶ N.Laurie, *Parliamentary Committees, Commissioners, Independent Commissions – Parliamentary Privilege and*

Judicial review of Decisions, Investigations or Reports', *Australasian Parliamentary Review*, Spring, 2002.

³²⁷ See, May, 23rd ed., p.99.

In addition to, from Article 9 there also arises an inhibition on using speeches or proceedings in Parliament for the purpose of supporting a cause of action, even though that cause of action itself arose outside the House.³²⁸

While this rule may seem straightforward, different factual situations can give rise to complex issues of interpretation, especially where a reference outside Parliament to the defamed person must be implied from what was said inside Parliament. What is clear is that parliamentary privilege does not extend to protect a Member who directly repeats outside Parliament allegations made about a named person in the course of parliamentary debates. More problematic are those instances of “effective repetition” where a member merely affirms a statement made in Parliament.

The paper talks about it thought cases in New Zealand. In recent years, three major New Zealand cases have considered the issues relevant to the use that may or may not be made of parliamentary proceedings in actions for defamation, all of which are distinguishable on the facts.

The first is *Prebble v Television New Zealand*³²⁹ where the defendants (TVNZ) sought to rely on statements in Parliament, from which adverse inferences were to be drawn. In that case a former Labour Minister, Richard Prebble, alleged that a TVNZ program had cast him as having conspired with business leaders and public officials to sell state assets at firesale prices in return for donations to the Labour Party. TVNZ pleaded truth and fair comment and mitigation of damages on the basis of the plaintiff’s reputation as a politician and

³²⁸ *Church of Scientology v. Johnson-Smith* [1972] 1 QB 522 (attempt to show Member’s parliamentary speech evidence of malice in a comment made by Member on television); D McGee, *Parliamentary Practice in New Zealand*, 3rd ed., Dunmore Publishing Ltd. 2005, p.627.

³²⁹ [1995] 1 AC 321.

sought to refer to speeches in the House by the plaintiff and other Ministers. The Privy Council struck out the evidence TVNZ was seeking to rely on, holding that to impugn, or even simply to inquire into, a Member's motives is to 'impeach' or 'question' and is prohibited. It made no difference that the plaintiff in the case was an MP. On the other hand, Hansard could be used to prove what Prebble had said in the House on certain days, or that the State-Owned Enterprises Act 1986 (which facilitated the sale of state assets) had passed the House and received the Royal Assent.

The second is *Peters v. Cushing*³³⁰ where the defamatory statement at issue was first made outside Parliament and only later confirmed in a parliamentary context. The question, therefore, was whether parliamentary proceedings could be used to establish a cause of action in defamation where the extra-parliamentary confirmation preceded the parliamentary publication? This evidence was ruled to be inadmissible, with Grieg J stating that the parliamentary statement was 'not to be admitted merely to prove what had occurred in Parliament but to support, indeed found the cause of action against Mr Peters'.³³¹ Commenting on the case, the Privy Council said:

In *Peters v. Cushing*...the defendant defamed the plaintiff, but without naming or identifying him, in television interviews broadcast on 1 and 3 June 1992. His remarks excited considerable public interest and on 10 June 1992 he named the plaintiff in the House of Representatives. For his first cause of action based on these defamatory remarks the plaintiff could not succeed without relying

³³⁰ [1999] NZAR 241.

³³¹ [1999] NZAR 241 p. 255.

on the naming of him in the House. This was held, rightly in the opinion of the Board, to be impermissible.³³² The Privy Council continued:

For the purposes of the action it must be assumed that the defendant's conduct was proper: if it was not, it was a matter for the House, not the court; and privilege is conferred for the benefit of Parliament as an institution, and of the nation as a whole, not for the benefit of any individual member. Thus the defendant had to be free to name the plaintiff in Parliament if he judged it right to do so, without fear of adverse civil consequences.³³³

On the other hand, the speech in Parliament was admissible to support the second cause of action in *Peters v. Cushing*. This arose from the effective repetition of the defamatory statement in a subsequent television interview on 10 October 1993. In this context it was ruled that *Hansard* could be relied on, not to support the cause of action or as a foundation for it, but to prove what occurred in Parliament as an historical fact.³³⁴

The third case, *Buchanan v Jennings*, was one of the affirmation or “effective repetition” outside Parliament of what was said inside Parliament. As formulated by the Privy Council, the principle in issue was:

Whether a Member of Parliament may be liable in defamation if the member makes a defamatory statement in the House of Representatives – a statement which is protected by absolute privilege under article 9 of the Bill of Rights 1688–

³³² *Buchanan v. Jennings* [2005] 1 AC 115.

³³³ [2005] 1 AC 115.

³³⁴ [1999] NZAR 241.

and later affirms the statement (but without repeating it) on an occasion which is not protected by privilege.³³⁵

Affirmation or ‘effective repetition’ has been found to amount to no more than a Member confirming that they ‘stand by’ what they said in Parliament or, as in *Buchanan v Jennings*, that they “do not resile” from what they said in the House. The facts of the case were that, in December 1997 the MP, Jennings, alleged abuse of expenditure and an illicit relationship on the part of officials involved in the sponsorship of a sporting tour. He was subsequently interviewed by a journalist who then published an article recording that Jennings withdrew some of his financial allegations, and reported him as saying that he ‘did not resile’ from his claim about the illicit relationship between the officials and the sponsors. The affirmation or ‘effective repetition’ was admitted that the evidence and damages were awarded against Jennings in both the New Zealand High Court and the Court of Appeal. From there it went to the Privy Council, which upheld the earlier rulings. There was no doubt that what Jennings said in the House was protected by absolute privilege. However, that privilege did not extend to cover his republication of that statement by reference outside the House.³³⁶

But *Buchanan v. Jennings* has proved a controversial decision. In May 2005 the Privileges Committee of the New Zealand House of Representatives published its report on the case in which it recommended that the Legislature Act 1908 is amended to provide that no person may incur criminal or civil liability for making any statement that affirms, adopts or endorses words written or spoken in

³³⁵ [2005] 1 AC 115.

³³⁶ Gareth Griffith, *Parliamentary Privilege: Major Developments and Current Issues*, [http://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/0/18DBE18C7D65CDF0CA2572D100091751/\\$File/ParliamentaryPrivilege07.pdf](http://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/0/18DBE18C7D65CDF0CA2572D100091751/$File/ParliamentaryPrivilege07.pdf).

proceedings in Parliament where the statement would not, but for the proceedings in Parliament, give rise to criminal or civil liability.³³⁷

The Privileges Committee expressed four main concerns. The first concerned the principle of non-intervention between the courts and Parliament in cases of “effective repetition”. This was not an issue where a Member directly repeated a statement outside Parliament. When a statement was only affirmed or “effectively repeated”, however, this involves the parliamentary statement being put directly to the court as it is the main evidence for the proceedings. Secondly, the Committee considered the potential effects on free speech, in circumstances where a minimal response to a question posed by the media could result in civil liability. Thirdly, this may have a ‘chilling’ effect on public debate, whereby Members and committee witnesses are reluctant to submit themselves to subsequent interview for fear of losing their parliamentary immunity. Fourthly, the Privilege Committee was concerned that the *Buchanan v Jennings* doctrine would have an effect beyond defamation in a parliamentary context. Could it apply, for example, to a breach of statutory incitement laws in a parliamentary context? Might the doctrine also be applied to court proceedings, in which context absolute privilege also applies?³³⁸

In April 2006 these concerns were endorsed by the Procedure and Privileges Committee of the Western Australian Legislative Assembly. It recommended: (a) that the Parliamentary Privilege Act 1891 be amended to include a provision which ensures that parliamentary proceedings cannot be used to establish what

³³⁷ Privileges Committee, Final Report on the question of privilege referred 21 July 1998 concerning *Buchanan v Jennings*, 1.17G, May 2005, p.9; For a commentary see – A Geddis, Parliamentary privilege: *quis custodiet ipsos custodes?* Public Law, Winter, 2005.

³³⁸ Gareth Griffith, Parliamentary Privilege: Major Developments and Current Issues, [http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/18DBE18C7D65CDF0CA2572D100091751/\\$File/ParliamentaryPrivilege07.pdf](http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/18DBE18C7D65CDF0CA2572D100091751/$File/ParliamentaryPrivilege07.pdf).

was ‘effectively’ but not actually said outside Parliament; and (b) that a uniform national approach be adopted through the auspices of the Standing Committee of Attorneys General.³³⁹

By reference to the ruling of the New Zealand Court of Appeal, Odgers Australian Senate Practice declared that *Buchanan v. Jennings* was ‘wrongly’ decided.³⁴⁰

10 The Relation between Judicial Review and the Legislative Process

Parliamentary privilege given to the internal affairs of Parliament has exclusive jurisdiction. It is Parliament to exercise their legislative duties necessarily. As part of Common law, the court respects for which the parliament manages their own internal affairs’ power.³⁴¹ Legally, therefore, the Houses are master in their own houses. Speaking politically it is possible that citizens do not probe deeply into the political process as they feel it is not their place. We trust that if we are electing individuals to govern the country as a whole, self-governance should not be beyond them. Practically, this is also sound. Our legislative assemblies could not function with constant political and legal scrutiny over every action. They require substantial control over their own proceedings.³⁴²

³³⁹ Western Australia, Legislative Assembly, Procedure and Privileges Committee, Effective Repe-
tition: Decision in *Buchanan v Jennings*, Report No 3, 2006.

³⁴⁰ H.Evans, Odgers’ Australian Senate Practice, 11th ed., Department of the Senate 2004, p.44.

³⁴¹ Gareth Griffith, Parliamentary Privilege: Major Developments and Current Issues,
[http://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/0/18DBE18C7D65CDF0CA2572D100091751/\\$File/ParliamentaryPrivilege07.pdf](http://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/0/18DBE18C7D65CDF0CA2572D100091751/$File/ParliamentaryPrivilege07.pdf).

³⁴² Michael D. Mysak, Houses of the Holy? Reconciling Parliamentary Privilege and Freedom of Religion, National Journal of Constitutional Law, 2000-2001.

As part of their post-World-War-II transition into constitutional democracies, these countries rejected the view of Parliament as supreme, or as sovereign, in favor of constitutional supremacy and “constrained parliamentarianism.”³⁴³ Constitutional courts in several of these countries concluded that these changes require reconsideration and reinterpretation of the doctrines that viewed the legislative process and other parliamentary proceedings as nonjusticiable. These courts concluded that, in constitutional democracies, legislative autonomy and independence should be balanced with the principle of constitutional supremacy, which requires that the legislature exercise all its powers (including in the legislative process) in accordance with the constitution.³⁴⁴ Recognizing the judicial duty to ensure the legislature’s adherence to the constitution, courts in Spain, Germany, and other constitutional democracies gradually but dramatically expanded their review of the legislative process.³⁴⁵ In short, judicial review of the legislative process was simply viewed as “a natural outgrowth of the explicit rejection of the English model of parliamentary supremacy.”³⁴⁶

On the one hand, however, in order to protect the parliament from interfering in other organs of power and fulfill fully its responsibilities, it seems necessary that the judiciary must be a degree self-restraint. On the other hand, parliamentary privilege is not unlimitations, once the abuse of parliamentary privilege, in violation of the Constitution power of other mechanism or in violations of human rights, the judiciary can not completely abandon the Constitutional duty with the

³⁴³ Bruce Ackerman, *The New Separation of Powers*, Harv. L. Rev., Vol. 113, 2000.

³⁴⁴ Suzie Navot, *The “Sarid” Test After Twenty Years: Revisiting Judicial Review of Parliamentary Proceedings*, *Mehkarei Mishpat (Bar Ilan Stud. L.)*, Vol. 19, 2002.

³⁴⁵ *Id.*

³⁴⁶ See, Suzie Navot, *Judicial Review of the Legislative Process*, *Isr. L. Rev.*, Vol. 39., 2006.

relief function of checks and balances. Therefore, judicial review of parliamentary privilege how to coordinate becomes the questional focus.

10.1 The Legitimacy of Judicial Review and Its Limits

10.1.1 The Legitimacy of Judicial Review

To safeguard the constitutional holistic order and sustainable development, and even to protect the human right, the judiciary can review laws enacted by Parliament, and even declare that one or all laws are null or void. However, such power to deny a majority vote of the law was challenged in essence, which has been replaced by legislative function. Someone also considers the impact of the traditional framework of separation of powers.³⁴⁷

Whether or not judicial power should intervene in legislative power, as well as its legitimacy is based on what has become a hot problem about Constitutional study. Because it is different that historical culture of each country, organized system of the power, as well as the constitutional validity and so on, the system of unconstitutional review is also different. In America, the birthplace of Constitutional Review system, the discussions about the problem are especially heated. One of the most commonly cases affected by criticism and questioning is that Alexander Bickel put forward an opinion about the unconstitutional review “anti-majority plight”. The plight of so-called anti-majority: Democracy refers to the “majority” principle, which is based on that the people directly elect members of Parliament; Judicial review that exercised by a minor of judges. Sufficient to declare that laws or enacted by majority decision is null and void? The people cannot help feeling doubt.

Modern constitutional democracy Countries emphasize that all public

³⁴⁷ Vgl. Hans-Peter Schneider, Verfassungsgerichtsbarkeit und Gewaltenteilung, Neue Juristische Wochenschrift (NJW) 1980, S. 2103.

authorities shall be subject to the supreme law - the Constitution. Therefore, the law passed the majority in Congress, should also obey constitutional regulation. In other words, the modern constitution includes the protection of the rights of the people and national organizations of the separation of powers principle, which be ensured by the superiority of the constitution. The task of constitutional review is also to protect the rights of the people and to ensure state organs exactly exercise their powers. Thus the legitimacy of the constitutional review exists in superiority of the Constitution.

Because the court was entitled to declare that the laws enacting the will of the majority were invalid, someone questioned its anti-democratic majority of the suspects. However, based on the popular sovereignty on the Constitution, vests in the State organs to exercise the power must eventually return to the general will of the people.³⁴⁸ In order to achieve that acts of national power will return to the general national regulatory requirements, some of scholars think, which according to the Constitution can be developed in three different forms of justification means.³⁴⁹

First, functional and institutional democratic legitimacy (funktionelle und institutionelle demokratische Legitimation): This origin from the principle of separation of powers comes from constitutional law. Constitutional law regulates and provides all different national organs powers, each of which has its function and organization, and their legitimacy directly comes from the constituent's power, such as the Federal Constitutional Court exercise of powers in accordance with the Constitution, which is a national institution set up by the constitution.

³⁴⁸ Eberhard Schmidt-Aßmann, Verwaltungslegitimation als Rechtsbegriff, AÖR 116, 1991, S.336.

³⁴⁹ Vgl. Demokratie als Verfassungsprinzip, in: Josef Isensee/Paul Kirchhof(Hrsg.), Handbuch des Staatsrechts der Bundesrepublik Deutschland, Bd I, 1987, S.887 ff.

Second, organizational-personnel democratic legitimacy (organisatorisch-personelle demokratische Legitimation): Between implementation of public power and the owner of public power through the individual appointment build the legitimacy of non-stop connection with the will of the people, such as the German Federal Constitutional Court judges are elected half by the Federal Parliament and half by the Federal Senate. In this context, the Constitutional Court judges have the democratic legitimacy. In the United States, the Federal Supreme Court judges are nominated by the President, and are appointed by the Senate, which has the same democratic legitimacy.

Third, substantive-objective democratic legitimacy (sachlich-inhaltliche demokratische Legitimation): through the exercise of national power connecting with the will of the people, the substantive-objective legitimacy of the exercise of judicial power will be reach by “trial according to law”, that is, exercise of judicial power must be subject to the law.

Other scholars offer “a participation-oriented representation-reinforcing approach to judicial review”.³⁵⁰ The function of Judicial Review would be to ensure the normal operation of democratic government and to maintain political participation and free-flowing of political pipeline network. In other words, the function of constitutional review ensures that equally participates in dispute settlement procedures, rather than select and decide the value of entities, because under the system of representative democracy, the value should be decided by the people’s representative. Theoretically, it refutes anti-majority problems raised by Constitutional Review. The opinion thinks that judicial review can enhance the operation of representative democracy. Of representative democracy system

³⁵⁰ John H.Ely, *Democracy and Distrust*, Harvard University Press, 1980, p.87.

failure, that is, representative of decision-making proceedings are not trustworthy, and the court should be involved in correcting.³⁵¹

10.1.2 The Boundaries of Judicial Review

The authorities to review Unconstitutional have the power to say, “the last word” about that constitution. Therefore, it can also supervise other unconstitutional acts of national institution. However, who will control supervisors? It has been suggested to change the power up from a legal status (for example, in the court of a quorum to vote on changes in the number) and even on appeal to the moral basis of judicial self-restraint concept; the review body should be recovered controled-intensity unconstitutional for legislators and professional court.³⁵² The Authorities to review unconstitutional have extent power, but not without limits. Based on the principle of separation of powers, it is necessary to explore the boundaries of exercising of the powers of the authorities.

The principal of traditional separation of powers emphasis on separation of powers checks and balances to protect human rights. Today, the separation of powers even asked what should be administered by the authority responsible for deciding what should be an “appropriate authority structure function” (Funktionsgerechte Organstruktur) starts to be divided. In other words, the cause of the distribution of state affairs to the authorities is to aim at the country reaching the decision “right as far as possible”. That is, in term of the authority’s organizational structure and procedures decide the allocation of state affairs, or have called the “functional structure orientation” principle of separation of powers. In particular, unconstitutional review bodies should abide by the function of

³⁵¹ See, John H.Ely, *Democracy and Distrust*, Harvard University Press, 1980, p.103.

³⁵² Helmuth Schulze-Fielitz, *Das Bundesverfassungsgericht in der Krise des Zeitgeists—Zur Metadogmatik der Verfassungsinterpretation*, AÖR 122, S.30.

boundaries on Constitution, restrictions of unconstitutional authority to review and have authority to review norms binding on the principle.³⁵³

Unconstitutional review power control the power of other forms of state power in form of judicial authority, which constitute the boundaries of the exercise of its power.

10.2 The Practice of Judicial Review to Legislative Process

10.2.1 The Practice in England

In England, the necessity of allowing the House to manage its own affairs was established as early as the reign of the Tudors.³⁵⁴ These privileges grew and were eventually entrenched in the Bill of Rights, 1689.³⁵⁵ By reference to what is sometimes called the doctrine of “exclusive cognizance”. It is agreed that “What is said or done within the walls of a parliamentary chamber cannot be examined in a court of law”.³⁵⁶ Central to this doctrine is the notion that the Houses of Parliament retain the right to be sole judges of the lawfulness of their own proceedings, a doctrine that extends to procedural and other activities.³⁵⁷

The most cited articulation of the English rule was stated in the 1842 decision of *Edinburgh & Dalkeith Railway v. Wauchope*:

³⁵³ Klaus Schlaich, *Das Bundesverfassungsgericht*, 3.Aufl., 1994, Rn.470.

³⁵⁴ W. Holdsworth, *A History of English Law*, vol. 4, London: Sweet and Maxwell, 1966, pp.178-80.

³⁵⁵ (U.K.), 1 Will. & Mar. sess. 2, c. 2, Art. 9.

³⁵⁶ Western Australia, Legislative Assembly, Procedure and Privileges Committee, *Effective Repe-
tition: Decision in Buchanan v Jennings*, Report No 3, 2006.

³⁵⁷ Erskine May, 22rd ed., pp.102-6

All that a Court of Justice can do is looking at the Parliamentary roll: If from that it should appear that a bill has passed both Houses and received the Royal assent, no Court of Justice can inquire into the mode in which it was introduced into Parliament, nor into what was done previous to its introduction, or what passed in Parliament during its progress in its various stages through both Houses.³⁵⁸

To a large extent, this rule is based on the traditional English view of parliamentary supremacy or sovereignty. According to the orthodox view of parliamentary supremacy, associated with thinkers such as Austin and Dicey, Parliament, as the legal sovereign, is the source of all laws, and therefore, there can be no legal limitations on its legislative competence, and no person or body may override or set aside its legislation.³⁵⁹ The orthodox English view considers lawmaking as a sovereign prerogative and the legislative process as a sphere of unfettered omnipotence.³⁶⁰ Under this view, there can be no legal restrictions on the legislative process, and even the omnipotent Parliament cannot create restrictions--substantive or procedural--that would limit its future ability to legislate.³⁶¹

Further to the doctrine of “exclusive cognisance”, the courts are precluded from intervening in the legislative process on several grounds. These include considerations arising from the separation of powers that require a policy of non-

³⁵⁸ *Edinburgh & Dalkeith Ry. v. Wauchope*, (1842) 8 Eng. Rep. 279, 285 (H.L.).

³⁵⁹ R. Elliot, *Rethinking Manner and Form: From Parliamentary Sovereignty to Constitutional Values*, Osgoode Hall L.J., Vol. 29, 1991.

³⁶⁰ Jeremy Waldron, *Legislating with Integrity*, *Fordham L. Rev.*, Vol. 72, 2003.

³⁶¹ R. Elliot, *Rethinking Manner and Form: From Parliamentary Sovereignty to Constitutional Values*, Osgoode Hall L.J., Vol. 29, 1991.

intervention, added to considerations arising from Article 9 that preclude judicial questioning of parliamentary proceedings. Added to this, in *Criminal Justice Commission v. Nationwide News Pty Ltd*,³⁶² Davies JA observed that the reluctance of the courts to intervene in the legislative process stems from “the mutual respect which each branch of government should accord the performance of its functions by the other”. Likewise, *British Railway Board v Pickin* is authority for the proposition that a court is barred by the principle of comity from investigating the manner in which Parliament exercises its legislative function.³⁶³

But there are some cases where the courts have intervened in the parliamentary process. In 2002 the Supreme Court of Western Australia in *Marquet v. A-G (WA)* undertook review of this area of the law. A manner and form provision was at issue in that case and declarations had been sought from the Clerk of the Parliaments whether it would be lawful for him to present two Bills for the Governor’s assent that had not complied with the absolute majority requirements.³⁶⁴ On the question of jurisdiction, Steytler and Parker JJ concluded (the other members of the Court agreeing):

In the case of legislation...which provides that presentation of a Bill [for the royal assent] ‘shall not be lawful’ unless particular circumstances have been satisfied, the Court has jurisdiction to intervene in order to make a declaration of the kind sought, after the deliberative process in the Houses of Parliament has

³⁶² [1996] 2 QdR 444, p.460.

³⁶³ [1974] AC 765.

³⁶⁴ See, E.Campbell, *Parliamentary Privilege in Australia*, pp.116-118; P. Johnston, *Method or Madness: Constitutional Perturbations and Marquet’s case*, *Constitutional Law and Policy Review*, August, 2004.

*been completed, but before the Bill is presented to the Governor for Royal Assent.*³⁶⁵

It was further held that the Court should, as a matter of discretion, exercise its jurisdiction. On appealing to the High Court the question of justiciability was not considered. Rather, it was the validity of the manner and form provision that was the point at issue.³⁶⁶

This area of the law was again reviewed by the UK Court of Appeal³⁶⁷ and subsequently, if less extensively, by the House of Lords in *R (Jackson) v. Attorney General*³⁶⁸ in which supporters of fox hunting argued that the Hunting Act 2004 was not a valid Act, on the ground that the 1949 amendments to the Parliament Act 1911 were invalid and the procedures used to pass the Hunting Act were also invalid. The 2004 legislation banning fox hunting was passed without the consent of the House of Lords, pursuant to s 2 of the Parliament Act 1911, as amended in 1949 when the period before the Lords' consent could be dispensed with was reduced by a year. As amended, the procedure only required the passage and rejection of a Bill in two successive sessions (instead of three) over a period of one year (instead of two).³⁶⁹ As explained by Michael Plaxton:

The nub of the Appellants' claim is that s 2(1) of the 1911 Act could not be amended without the formal consent of the House of Lords; that the bypassing

³⁶⁵ [2002] 26 WAR 201, p.160.

³⁶⁶ *Attorney General (WA) v. Marquet* (2003) 217 CLR 545.

³⁶⁷ *Regina (Jackson and others) v. Attorney General* [2005] QB 579.

³⁶⁸ [2005] 3 WLR 733.

³⁶⁹ A Twomey, *Implied Limitations on Legislative Power in the United Kingdom*, *Australian Law Journal*, Vol. 80, 2006.

procedure could not be used to amend itself. The Appellants chiefly rested their argument on the claim that the 1911 Act merely delegated power to the House of Commons that would ordinarily be shared by both Houses. If that were the case, they argued, the House of Commons would be unable to use the powers granted by the 1911 Act to expand them, unless such authority was explicitly granted.³⁷⁰

In the event, both the Court of Appeal and the House of Lords ruled that the 1949 amending Act and therefore the Hunting Act 2004 were valid. In arriving at this decision the Court of Appeal, in a unanimous judgment delivered by Lord Woolf, held that the case turned on more than statutory interpretation and that regard should be had to the parliamentary debates to ascertain the meaning of s 2(1) of the Parliament Act 1911 and ‘subsequent understanding of Parliament as to the nature of the constitutional change effected’ by the Act.³⁷¹ As to the threshold question of justiciability, the Court of Appeal held that this was a rare occasion when it was appropriate for the courts to rule on the validity of legislation that had received the Royal Assent, on grounds that the courts were ‘seeking to assist Parliament and the public by clarifying the legal position when such clarification is obviously necessary’. Further explaining the Court’s *modus operandi*, Lord Woolf stated:

While we refer what has happened in debates in Parliament concerning the issue before us, we will not be adjudicating upon the propriety of what occurred in Parliament.³⁷²

³⁷⁰ M Plaxton, *The Concept of Legislation: Jackson v Her Majesty’s Attorney General*, *Modern Law Review*, Vol. 69, 2006.

³⁷¹ [2005] QB 579 at para. 77.

³⁷² [2005] QB 579 at para. 13.

Whether that argument would have applied if the Court of Appeal had found the 1949 amending Act invalid is another matter. For its part, the House of Lords upheld the validity of that legislation on very different grounds. In doing so, it avoided the potential pitfalls the Court of Appeal might have set for itself in respect to the review of parliamentary proceedings. For the House of Lords, judicial review was held to be constitutionally legitimate in this instance, since the courts were not investigating the internal workings of Parliament but were determining whether the 1949 and 2004 Acts were enacted law.³⁷³ In essence, the case was reducible to a question of statutory interpretation, about which Lord Nicholls of Birkenhead stated:

On this issue the court's jurisdiction cannot be doubted. This question of statutory interpretation is properly cognizable by a court of law even though it relates to the legislative process. Statutes create laws. The proper interpretation of a statute is a matter for the courts, not Parliament. This principle is as fundamental in this country's constitution as the principle that Parliament has exclusive cognizance (jurisdiction) over its own affairs.³⁷⁴

That s 2(2) of the 1911 Act, providing for the Speaker to certify that the requirements of the Act had been duly complied with, was not in dispute. At issue was s 2(1) of the 1911 Act which laid down the circumstances in which, save for stated exceptions, 'any public Bill' could be enacted without the consent of the House of Lords. The term 'any' was given a broad meaning and it was held to refer in this context to primary, not secondary, legislation.

10.2.2 The Practice in America

³⁷³ [2005] 3 WLR 733 at para. 27 (Lord Bingham of Cornhill).

³⁷⁴ [2005] 3 WLR 733 at para. 51.

In America, there was a serious case about reviewing legislative process, *Field & Co. v. Clark*.³⁷⁵ Marshall Field and other importers challenged the validity of the Tariff Act of October 1, 1890. They argued that the enrolled version of the Act differed from the bill actually passed by Congress. Based on the Congressional Record, committee reports, and other documents printed by the authority of Congress, they argued that a section of the bill, as it finally passed, was omitted from the “enrolled bill.” The Court held, however, that courts may not question the validity of the “enrolled bill” and may not look beyond it to the Congressional Record or other evidence. It stated:

The bill signed by the speaker of the House of Representatives, and by the president of the senate... of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed congress... And when a bill, thus attested, receives the President’s approval, and is deposited in the public archives, its authentication as a bill that has been passed by the congress should be deemed to be complete and unimpeachable... The respect due to coequal and independent departments requires the judicial department to ... accept, as having passed congress, all bills authenticated in the manner stated...³⁷⁶

By the time *Field* was decided, state courts had already expressed a variety of positions on the legislative process question.³⁷⁷ In fact, before *Field*, in cases that were decided on state laws, the U.S. Supreme Court had indicated receptiveness to the position that in deciding the question of whether a statute was duly and constitutionally passed, “any ... accessible competent evidence may be

³⁷⁵ See, *Marshall Field & Co. v. Clark*, 143 U.S. (1892).

³⁷⁶ *Marshall Field & Co. v. Clark*, 143 U.S. (1892)

³⁷⁷ William H. Lloyd, *Pylkinton's Case and Its Successors*, U. PA. L. REV., Vol. 69, 1920.

considered.”³⁷⁸ Additionally, in *Gardner v. Collector* from 1867, the Court stated:

How can it be held that the judges, upon whom is imposed the burden of deciding what the legislative body has done, when it is in dispute, are debarred from resorting to the written record which that body makes of its proceedings in regard to any particular statute?

We are of opinion, therefore, on principle as well as authority, that whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effects, or of the precise terms of a statute, the judges who are called upon to decide it, have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question; always seeking first for that which in its nature is most appropriate...³⁷⁹

Moreover, in *United States v. Ballin*, decided the same day as *Field*, the Court looked beyond the enrolled bill and examined the journal of the House of Representatives to determine whether a quorum had been present in the House when passing a bill.³⁸⁰ Hence, *Field* seems to be inconsistent even with the decisions that existed around the time it was decided. Nevertheless, *Field* was reaffirmed in 1896 in *Harwood v. Wentworth*,³⁸¹ and the norms of the *Field* became the dominant approach in the federal courts.³⁸²

³⁷⁸ *Walnut v. Wade*, 103 U.S. 683, 689 (1880)

³⁷⁹ See, William J. Lloyd, *Judicial Control of Legislative Procedure*, SYRACUSE L.REV., Vol. 4, 1952.

³⁸⁰ *United States v. Ballin*, 144 U.S. 1, 4-5(1892)

³⁸¹ *Harwood v. Wentworth*, 162 U.S. 547, 558-62 (1896)

³⁸² See, William J. Lloyd, *Judicial Control of Legislative Procedure*, SYRACUSE L. REV., Vol. 4, 1952.

At *Leser v. Garnett* case in 1922, argued whether or not 19th amendments to the Constitution were set up. Secretary of State received notice of the approval of 36 states, and then announced the adoption of the amendment. While the appellant stated that the two states ratified resolutions were in violation of state legislation under the rules of procedure, and therefore the resolution was null and void, and the amendment of Article 19 cannot be set up. The Supreme court decided that when the state legislatures ratified the amendment, they were operating in a federal capacity as laid down in the Constitution, a role which “transcends any limitations sought to be imposed by the people of a state; The court found that as the Secretary of State had accepted the ratifications by the legislatures of the two states as valid, they were valid, effectively ruling the matter as non-justiciable.³⁸³

In addition, *Cokeman v. Miller* case,³⁸⁴ centered on the Child Labor Amendment, was proposed for ratification by Congress in 1924. The Supreme Court’s decision almost was the same with *Leser v. Garnett* cases. That is, state legislature’s approval or otherwise of the problem effectively, as well as the question whether the amendments are adopted, which should belong to the privilege of Parliament to decide the matter and the court have no-jurisdiction. At the case of *Baker v. Carr* in 1962,³⁸⁵ the Supreme Court cited the case of *Coleman v. Miller* decision, reaffirmed the validity of the approval of state legislatures, as well as the validity of the adoption of the law should be left to Parliament to decide itself.

³⁸³ *Leser v. Garnett*, 258 U.S. 130 (1922).

³⁸⁴ 307 U.S. 433 (1939).

³⁸⁵ 369 U.S. 186 (1962).

In a word, in the past the Supreme Court in fact thinks that legislative process is parliamentary own matter, and according to political question doctrine, the court should not review the matter.

According to some scholars' opinions, however, in the vast majority of the cases since Baker, the Court has, in effect, followed the classical doctrine, both when rejecting political question claims and in the rare cases in which the Court found a political question.³⁸⁶ Some scholars argue, moreover, that Powell and Chadha effectively eliminated Baker's "respect due coordinate branches" factor,³⁸⁷ and that the Court refrained from expressly relying on it in subsequent decisions.³⁸⁸ Hence, the Court's contemporary political question jurisprudence seriously undermines the major basis of the decision of legislative process.

The most important decision that eroded Field and rendered it doctrinally unstable is the 1990 decision of *United States v. Munoz-Flores*.³⁸⁹ *Munoz-Flores* challenged a statute on the ground that its enactment process violated the Constitution's Origination Clause requiring that "All Bills for raising Revenue shall originate in the House of Representatives."³⁹⁰ He argued that the Act was a bill for raising revenue and that it had originated in the Senate and, thus, was passed in violation of the Clause. The Government countered that the "most persuasive factor suggesting nonjusticiability" is the concern that courts might express a lack of respect for the House of Representatives. It argued that the

³⁸⁶ Cf. Jonathan R. Siegel, *A Theory of Justiciability*, *Tex. L. Rev.*, Vol. 86, 2007.

³⁸⁷ See, John H. Ely, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath*, Diane Pub Co., 1993, p.177.

³⁸⁸ Amanda L. Tyler, *Is Suspension a Political Question?*, *Stan. L. Rev.*, Vol. 59, 2006.

³⁸⁹ *United States v. Munoz-Flores*, 495 U.S. 385 (1990)

³⁹⁰ U.S. Const. Art. I, § 7, cl. 1.

House’s passage of a bill conclusively established that the House had determined that the bill originated in the House (or that it is not a revenue bill), and therefore, a “judicial invalidation of a law on Origination Clause grounds would evince a lack of respect for the House’s determination.”³⁹¹

This argument was expressly rejected by the Court.³⁹² The Court stated that the Government “may be right that a judicial finding that Congress has passed an unconstitutional law might in some sense be said to entail a ‘lack of respect’ for Congress’ judgment.” The Court held, however, that this couldn’t be sufficient to render an issue nonjusticiable. “If it were,” the Court added, “every judicial resolution of a constitutional challenge to a congressional enactment would be impermissible.”³⁹³ The Court noted that Congress often explicitly considered whether bills violate constitutional provisions, but adopted *Powell v. McCormack*’s position that “Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such adjudication may cause cannot justify the courts’ avoiding their constitutional responsibility.”³⁹⁴

In his solitary concurrence, Justice Scalia invoked *Field* in concluding that the Court may not look behind the enrolled bill to examine whether the bill originated in the House or in the Senate.³⁹⁵ Justice Scalia quoted *Field* and stated that the “same principle, if not the very same holding, leads me to conclude that federal

³⁹¹ *United States v. Munoz-Flores*, 495 U.S. 385 (1990).

³⁹² Ittai Bar-Siman-Tov, *Legislative Supremacy in the United States?: Rethinking the ‘Enrolled Bill’ Doctrine*, *Georgetown Law Journal*, Vol. 97, 2009.

³⁹³ *United States v. Munoz-Flores*, 495 U.S. 385 (1990).

³⁹⁴ *Powell v. McCormack*, 395 U.S. 486, 549 (1969).

³⁹⁵ *United States v. Munoz-Flores*, 495 U.S. 385 (1990).

courts should not undertake an independent investigation into the origination of the statute at issue here.”³⁹⁶ Noting that the enrolled bill of the Act in question bore the indication of which the court respects the House, which attests that the legislation originated in the House, Justice Scalia observed: ³⁹⁷

The enrolled bill’s indication of its House of origin establishes that fact as officially and authoritatively as it establishes the fact that its recited text was adopted by both Houses. With respect to either fact a court’s holding, based on its own investigation, that the representation made to the President is incorrect would, as Marshall Field said, manifest a lack of respect due a coordinate branch and produce uncertainty as to the state of the law.³⁹⁸

In rejecting Justice Scalia’s argument, the Court stated that Congress’ determination in the enrolled bill that the bill originated in the House did not foreclose subsequent judicial scrutiny of the law’s constitutionality and emphasized that “this Court has the duty to review the constitutionality of congressional enactments.” The Court added in a footnote that Justice Scalia’s argument could not be supported by Field. The Court further noted, citing Field, that “In the absence of any constitutional requirement binding Congress... The respect due to coequal and independent departments’ demands that the courts accept as passed all bills authenticated in the manner provided by Congress. Where, as here, a constitutional provision is implicated, Field does not apply.”³⁹⁹

10.2.3 The Practice in Germany

³⁹⁶ United States v. Munoz-Flores, 495 U.S. 385 (1990).

³⁹⁷ Ittai Bar-Siman-Tov, Legislative Supremacy in the United States?: Rethinking the ‘Enrolled Bill’ Doctrine, Georgetown Law Journal, Vol. 97, 2009.

³⁹⁸ United States v. Munoz-Flores, 495 U.S. 385 (1990).

³⁹⁹ United States v. Munoz-Flores, 495 U.S. 385 (1990).

In Germany, the German Federal Constitutional Court May 10, 1977 on the Weapons Act legislative process is the most typical disputes about the judicial review of legislative processing. The petitioner on the dispute possessed a firearm, but he was lack of a firearm license because of fault. Therefore he was sentenced to a fine, at the same time, the court according to in 1972 under the Arms Act, Article 56, Section1, paragraph 1, confiscated his firearms. The Petitioner was against it and brought a constitutional petition. The petitioner considered that weapons law, based on the confiscation of firearms, did not achieve the effective legislation, and because at last vote about the draft of the bill in federal republic congress, there were only 36 or 37 members in the vote. According to the principle of representative democracy, there should be at least a certain number of members to attend at this bill finally resolution. Therefore the law was asked to declare invalid.

The focus of controversy in this case lies in the fact that the Federal republic congress for the legal bill for the final resolution adopted or rejected, should it not at least a certain number of members to attend, only which comply with the provisions of constitution regarding the legislative process. Finally the Constitutional Court rejected his petition. Their reasons are as follows:⁴⁰⁰

First, the Constitutional Court considers, the Basic Law does not expressly provide for that the Federal Parliament itself must be the premise in which the ability to have a resolution, so basically it belongs to the scope of the rules of procedure guaranteed by article 40, section1, paragraph 2 in Basic Law. That is, the Parliament for its rules for the matter to which the traditional the rights extend

⁴⁰⁰ 10 Mai.1997 (2 BVR 705/75), in:Entscheidungen des Bunderverfassungsgerichts, 44Bund, J.C.B.Mohr, 1997.

to Parliamentary procedures and the scope of discipline, and the resolute ability belongs to the former.

Second, although the principle of representative democracy is a constitutional principle, the Federal republic congress at formulating the rules of procedure should be adhered to the principle, and therefore, rules of procedure regarding the ability of decision should be consistent with this principle. And this principle requires a common participation of all the members at building the will of the congress, but if the principle is over-rigidly applied at the political life of truth, which would be undermined the spirit of this principle.

Third, even if according to the principles of representative democracy, it should not come that Federal Parliament Members are on behalf of the people in only the House. on the contrary, every Member should have to maintain the possibility of in-depth study on their interest or expertise in their specific areas, and living on the growing complexity of relations and the division of labor considerations, a significant portion of parliamentary jobs traditionally be practiced outside the parliament.

Fourth, rules of procedure of the Federal republic congress, in fact, on basis of the division of labor set up many committees, and the role of the Committee are usually ready for the assembly. Most of will-built process and decision-making process of the Parliament itself exist in the Committee. In addition, the proposal of Rules of Procedure will be discussed. The party caucus should assist Members of Parliament who except to the assembly, may not be directly involved in activities outside the Parliament. Usually, because the party caucus will seek consensus on the meaning of the formation, on the parliamentary decision, the caucus's significance becomes more and more important. Moreover, the caucus will also allow members of parliament to exert its function on behalf of opportunities outside the parliament.

Fifth, based on the necessary of the above norms and facts, all members of parliament are ensured that jointly participate in the process of making a decision as representative as possible, which does not contravene the principles of representative democracy. The current regulation has now been fully taken into account this principle, and ensured that when the people as the owner of national power achieve their resolution in the Parliament, they usually have the appropriate representatives. Therefore, even in the assembly for the final resolution being attended only a few members, at this premise, it is still presumed to be sufficiently representative of its.

Sixth, however, the court also points out that one of the few parties, if, in fact based on the above-mentioned reasons will not attend the final resolution of the assembly, and they can not also participated in the committee or the party caucus for the parliamentary decision, or such proceedings in respect of The Bill do not reach a consensus, and then the presumption is not established. However, the court considers that the decision of the parliament in the case of dispute are thorough preparation, moreover the resolution on the bill at the final stage of the legislative process, legislators essentially did not have differences. Therefore, there exist no such circumstances.

Finally, the Court indicates that Rules of Procedure of the Federal republic, Article 49, Section 2, does not violate the protection of minority parties. Based on that article, during decision, as long as the assembly was not lack of the ability to decide, it is presumed to have ability to decide, rather than need to consider the number of people attending, therefore, the weapons Act is valid law.

10.3 The “Test of Necessity” of Judicial Review

Canada v. Vaid, a case in which the chauffeur of the Speaker of the Canadian House of Commons alleged that he had been constructively dismissed on grounds was forbidden by the Canadian Human Rights Act. On behalf of the House of Commons and the Speaker it was claimed that the hiring and firing of all House

employees were ‘internal affairs’ of Parliament that were not subject to judicial review. This ‘fundamentalist’ interpretation of the exclusive cognisance doctrine was rejected by the Supreme Court, for which Binnie J wrote the unanimous judgment. Applying the ‘test of necessity’ it was held that exclusive and unreviewable jurisdiction over all House employees was not necessary to protect the functioning of the House of Commons. The attachment of privilege to ‘some’ parliamentary employees was undoubtedly necessary, but not those who were only indirectly connected to the legislative and deliberative functions of the House.⁴⁰¹ This was the case in respect to the Speaker’s chauffeur.

This followed Binnie J’s formulation of the test of necessity in these terms: In order to sustain a claim of parliamentary privilege, the assembly or member seeking its immunity must show that the sphere of activity for which privilege is claimed is so closely and directly connected with the fulfilment by the assembly or its members of their functions as a legislative and deliberative body, including the assembly’s work in holding the government to account, that outside interference would undermine the level of autonomy required to enable the assembly and its members to do their work with dignity and efficiency.⁴⁰²

The Court held that the existence and scope of an asserted privilege is determined through the application of a two-step test. The first step is to establish “... whether the existence and scope of the claimed privilege have been authoritatively established in relation to our own Parliament or to the House of Commons at Westminster...” Once the existence and scope of a category is established, “Parliament is the judge of the occasion and manner of its exercise and such exercise is not reviewable by the courts... Established categories of

⁴⁰¹ [2005] SCR 667, at para. 75.

⁴⁰² [2005] SCR 667, at para. 46.

privilege include freedom of speech, control by the Houses of Parliament over “debates and proceedings in Parliament” as guaranteed by the U.K. Bill of Rights of 1689 (including day-to-day procedure in the House),⁴⁰³ the power to exclude strangers (i.e., the public) from proceedings, and disciplinary authority over members and non-members who interfere with the discharge of parliamentary duties.⁴⁰⁴

If the existence and scope of the asserted privilege have not been authoritatively established, the second step of the test requires the assembly or members seeking immunity to show that... the sphere of activity for which privilege is claimed is so closely and directly connected with the fulfillment by the assembly or its members of their functions as a legislative and deliberative body, including the assembly’s work in holding the government to account, that outside interference would undermine the level of autonomy required to enable the assembly and its members to do their work with dignity and efficiency.

This is the Court’s fullest elaboration of the “doctrine of necessity,” the doctrine the Court refers to elsewhere as “The historical foundation of every privilege of Parliament...”⁴⁰⁵ Binnie J. cites with approval Maingot’s necessity-based definition of parliamentary privilege as “the necessary immunity that the law provides for Members of Parliament, and for the members of the legislatures of each of the ten provinces and two territories, in order for these legislators to do their legislative work.”⁴⁰⁶ Hence, on review, the existence and scope of an

⁴⁰³ 62 F.3d 408 (D.C. Cir. 1995).

⁴⁰⁴ See, Rayburn, 497 F.3d, p.659.

⁴⁰⁵ United States v. Brewster, 408 U.S. 501, 513 (1972).

⁴⁰⁶ See, Rayburn, 497 F.3d, p.660.

asserted privilege are determined by a test of necessity which itself is grounded explicitly in the separation of powers; i.e., in immunity from judicial review where such immunity is deemed necessary for “legislators to do their legislative work.”

To summarize, Vaid appears to say that for an assertion of privilege to succeed on review the party asserting the privilege must show either that the existence and scope of the asserted privilege have been authoritatively established, or that the type of privilege sought is necessary for the assembly or its members are able to deliberate and legislate “with dignity and efficiency.” If the existence and scope of an asserted privilege are successfully established on either branch of the two-part test, the courts will not review particular exercises of it.⁴⁰⁷

But the comprehension of test of necessity has been criticized by some of scholars. For example, Evan Fox-Decent, a Canadian scholar, indicates that, “The scope of a power is, in practice, revealed by the exercise that is made of that power. It is at that point that the issue of scope and delimitation comes into play. It is at the moment of the exercise of the power that the necessity test becomes significant. It is at this juncture that one has to determine whether, as part of the scope of the power, its exercise was necessary to attain the objectives for which the power was given.”

Therefore he further points out, “Necessity can supply the justification, but implicit within the idea that necessity can justify some assertions of privilege is the corollary that a lack of necessity entails a failure to establish privilege.” Taking these considerations into account, a reviewing court would make two mistakes affirm the existence and scope of an asserted privilege where the fact in

⁴⁰⁷ Evan Fox-Decent, *Parliamentary Privilege and the Rule of Law*, *Canadian Journal of Administrative Law & Practice*, July, 2007.

a particular case suggests that the actual exercise of the affirmed privilege fails the test of necessity. First, the court would misinterpret the scope of the privilege because it would fail to delimit its scope to exclusively those types of exercises of privilege that necessity warrants. Second, the court would abdicate its constitutional responsibility to ensure that no party (in this case, the asserter of privilege), is allowed to be judge and party of the same cause without a special justification, one which is necessarily lacking given the court's first mistake.⁴⁰⁸

11 Can Official Immunity be Applied to Members of Parliament

In America, past critics of the scope of legislative immunity advocated expansion of the Speech or Debate Clause to include protection of a legislator's conduct are not regarded as "purely legislative." Recently, however, critics largely have abandoned that argument. In its place, the official immunity doctrine has emerged as a potential vehicle for protecting members' burgeoning "political" responsibilities, which historically have gone unprotected by the Speech or Debate Clause.⁴⁰⁹

11.1 Definition of Official Immunity

Although the Constitution provides absolute immunity to members of Congress, it offers little protection to executive or judicial acts.⁴¹⁰ The Supreme Court, therefore, has developed an extra-constitutional body of immunity law to provide officials in the executive and judicial branches with absolute immunity

⁴⁰⁸ Id.

⁴⁰⁹ See, Sundquist, 833 F.2d, p.313;

⁴¹⁰ See, Nixon v. Fitzgerald, 457 U.S. 731, 749-56 (1982).

from civil suits.⁴¹¹ Follow to this doctrine, the specific functions of the executive or judicial official determine the protection afforded.⁴¹² In making this determination, the Court will analyze whether the suit deters or distracts an official from his proper functions or unfairly challenges his decisions.⁴¹³

11.1.1 Judicial Privilege

The Supreme Court extended absolute immunity to judges over a century ago in *Bradley v. Fisher*.⁴¹⁴ In the trial of John Surratt for his participation in the conspiracy to assassinate President Lincoln, the trial judge disbarred Surratt's attorney. The attorney filed an action against the trial judge. In denying his claim, the Court held that federal judges were entitled to absolute immunity for their judicial acts.⁴¹⁵ The Court founded the doctrine of judicial privilege upon the "general principle of highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself."⁴¹⁶ Judicial privilege applies not only to actual decisions, but also to defamatory statements made in the course of judicial proceedings.⁴¹⁷ In addition,

⁴¹¹ See, *Butz v. Economou*, 438 U.S. 478, 501-02 (1978).

⁴¹² *Forrester v. White*, 484 U.S. 219, 224 (1988).

⁴¹³ See, *Gregoire v. Biddle*, 177 F.2d 579, 581.

⁴¹⁴ 80 U.S. (13 Wall.) 335 (1871).

⁴¹⁵ *Bradley*, 80 U.S. p.347.

⁴¹⁶ *Bradley*, 80 U.S. p.347.

⁴¹⁷ See, Joel F. Handler, William A. Klein, *The Defense of Privilege in Defamation Suits Against Government Executive Officials*, HARV. L. REV., Vol. 74, 1960.

the protection afforded judges extends to officials who exercise “quasi-judicial” authority.⁴¹⁸

Two policy considerations support the grant of absolute immunity. First, fear of personal liability would detract from the independence and impartiality of judicial action. Second, suits against judges might impinge upon their time at the public’s expense. On the other hand, any grant of immunity imposes certain costs. The Supreme Court’s recognition of judicial privilege, for example, has eliminated a potential deterrent to irresponsible judicial action and a potential remedy to the victims of judicial misconduct. Several restraints within the judicial system keep these costs acceptably low, however, and minimize the possibility of injury at the hands of an irresponsible judge.⁴¹⁹

11.1.2 Executive Privilege

In the late 19th century, the Supreme Court extended the doctrine of official immunity to protect federal executive officers.⁴²⁰ In *Spalding v. Vilas*, a defamation action against the Postmaster General, the Court concluded that the head of an executive department possessed absolute immunity for acts taken in his official capacity. The Court stated that the proper and effective administration of public affairs required the extension of the doctrine of official immunity to high-ranking executive officials.⁴²¹

⁴¹⁸ See, *Imbler v. Pachtman*, 424 U.S. 409, 423, (1976).

⁴¹⁹ See, Joel F. Handler, William A. Klein, *The Defense of Privilege in Defamation Suits Against Government Executive Officials*, HARV. L. REV., Vol. 74, 1960.

⁴²⁰ Mayer G. Freed, *Executive Official Immunity for Congressional Violations: An Analysis and a Critique*, NW. U.L. REV., Vol. 72, 1977.

⁴²¹ 161 U.S. 483 (1896)

The Supreme Court expanded the doctrine of absolute executive immunity in *Barr v. Matteo*. A plurality of the Court held that a low-level federal administrative official performing a discretionary act within the scope of his duties enjoyed absolute immunity from liability in a defamation action.⁴²² The Court premised its holding on a functional approach to immunity questions.⁴²³ The outcome in *Barr* sanctions a greatly broadened scope of immunized activity.⁴²⁴ The Court clearly stated its intention to expand the parameters of the doctrine of official immunity: “We do not think the principle announced in *Vilas* can properly be restricted to executive officers of cabinet rank ... The privilege is not a badge or emolument of exalted office, but an expression of policy designed to aid in the effective functioning of government.”⁴²⁵

In the thirty years since the *Barr* decision, lower federal courts have extended the doctrine of official immunity to public officials of virtually every rank.⁴²⁶ Even dog catchers enjoy the protection of official immunity.⁴²⁷ Recent decisions

⁴²² 360 U.S. 564 (1959).

⁴²³ *Id.*, p.572-73.

⁴²⁴ *Sundquist*, 833 F.2d, p.321.

⁴²⁵ *Barr*, 360 U.S. p.572-73.

⁴²⁶ *Bush v. Lucas*, 462 U.S. 367 (1983).

⁴²⁷ See, *Allred v. Svarczkopf*, 573 F.2d 1146 (10th Cir. 1978) (qualified immunity defense available to Animal Control Officer against dog owner's claim that he violated her civil rights in arresting her for refusing to sign a citation); *Kostiuk v. Town of Riverhead*, 570 F. Supp. 603 (E.D.N.Y. 1983) (qualified immunity defense available to dog catcher against dog owner's claim that one-night impoundment of owner's dog was an unconstitutional deprivation of property).

of the Supreme Court and the Court of Appeals for the District of Columbia Circuit have confirmed that Barr remains good law.⁴²⁸

11.2 Attempts to Apply Official Immunity to Members of Congress

Two recent federal circuit court cases, *Chastain v. Sundquist*⁴²⁹ and *Williams v. Brooks*,⁴³⁰ represented attempts by members of Congress to apply the official immunity doctrine to defamation claims filed against them. In both cases, the circuit courts restricted the scope and application of legislative immunity protection to the Speech or Debate Clause and refused to extend official immunity to the members.⁴³¹ Likewise, the Supreme Court denied Representative *Sundquist*,⁴³² and Representative *Brooks*,⁴³³ petitions for writ of certiorari.

Both cases involved common law tort claims alleged by private citizens.⁴³⁴ Representative *Sundquist* printed allegedly libelous remarks in a two-page letter distributed to the Attorney General and released to the media.⁴³⁵ Representative *Brooks* made allegedly defamatory statements in a television interview.⁴³⁶ In

⁴²⁸ Richard D. Batchelder, Jr, Note: *Chastain v. Sundquist*: A Narrow Reading of the Doctrine of Legislative Immunity, *Cornell Law Review*, January, 1990.

⁴²⁹ 833 F.2d 311 (D.C. Cir. 1987), cert. denied, 487 U.S. 1240 (1988).

⁴³⁰ 945 F.2d 1322 (5th Cir. 1991), cert. denied, 112 S. Ct. 1996 (1992).

⁴³¹ *Brooks*, 945 F.2d at 1330-31; *Sundquist*, 833 F.2d at 328.

⁴³² *Sundquist v. Chastain*, 487 U.S.1240 (1988).

⁴³³ *Brooks v. Williams*, 112 S. Ct. 1996 (1992).

⁴³⁴ *Brooks*, 945 F.2d at 1324; *Sundquist*, 833 F.2d, p.312-13.

⁴³⁵ *Sundquist*, 833 F.2d, p.312-13.

⁴³⁶ *Brooks*, 945 F.2d, p.1323-24.

Sundquist, the United States Court of Appeals for the District of Columbia Circuit reversed a trial court decision that had extended official immunity protection to the Congressman.⁴³⁷ The United States Court of Appeals for the Fifth Circuit in Brooks affirmed the district court's denial of Congressman Brooks' motion to dismiss on grounds of official immunity.⁴³⁸

The Sundquist court determined that the communication in question was not a "purely legislative activity"⁴³⁹ and was thus outside the scope of Speech or Debate Clause immunity. In denying that official immunity protection exists for members of Congress, the court distinguished between a member's constitutional responsibilities and those voluntarily assumed. With the former, the court stated that all of a member's constitutional responsibilities would receive Speech or Debate Clause protection. For the latter, a member's "elective" duties will be afforded neither Speech or Debate nor official immunity protection.⁴⁴⁰

The Brooks court regarded the scope of legislative official immunity as "coextensive" with that provided in the Speech or Debate Clause.⁴⁴¹ Although the court alluded to the separate application of the official immunity doctrine to members of Congress in rulings of other courts and in Supreme Court dictum,⁴⁴² it

⁴³⁷ Sundquist, 833 F.2d, p.328.

⁴³⁸ Brooks, 945 F.2d, p.1330-31.

⁴³⁹ United States v. Brewster, 408 U.S. 501, 512 (1972).

⁴⁴⁰ Sundquist, 833 F.2d, p.328.

⁴⁴¹ Williams v. Brooks, 945 F.2d 1322, 1329 n.6 (5th Cir. 1991), cert. denied, 112 S. Ct. 1996 (1992).

⁴⁴² See Doe v. McMillan, 412 U.S. 306, 319 n.13 (1973)

concluded that the scope of the Speech or Debate Clause was conclusive in determining immunity protection for members of Congress.⁴⁴³

The present status of legislative immunity, that members of Congress are protected only by Speech or Debate Clause immunity, would appear explicit in the rulings of the Sundquist and Brooks courts and implicit in the Supreme Court's refusal to pass on the argument.⁴⁴⁴ The Supreme Court's analysis in this regard, however, is not without ambiguity.⁴⁴⁵

Furthermore, predominant commentary on the issue urges expansion of legislative immunity to include Barr-type, official immunity protection.⁴⁴⁶ Likewise, members of Congress have intervened in several cases attempting to revise the status quo. Whether the Supreme Court's lack of clarity on the issue and the external pressure from commentators and members of Congress will alter the course of legislative immunity is presently unclear. The balance of this Comment addresses these various arguments and concludes that altering the present scope of legislative immunity would betray the Framers' intentions, undermine the Speech

⁴⁴³ Brooks, 945 F.2d, p.1331.

⁴⁴⁴ See, Brooks v. Williams, 112 S. Ct. 1996 (1992)

⁴⁴⁵ The Supreme Court articulated a position contrary to the conclusions of Sundquist and Brooks in an

isolated footnote in Doe v. McMillan, 412 U.S. 306, 1973: "Both before and after Barr, official immunity has

been held applicable to officials of the Legislative Branch."

⁴⁴⁶ See, Reinstein, Silverglate, Legislative Privilege and the Separation of Powers, Harv. L. Rev., Vol. 86, 1973.

or Debate Clause and improperly expand the constitutional authority of members of Congress.⁴⁴⁷

11.3 A controversy about Whether or not Applying Official to Member of Parliament⁴⁴⁸

11.3.1 The Arguments of Favor

A central argument for critics of the current legislative immunity doctrine is that public policy commands the application of Barr-type immunity to members of Congress.⁴⁴⁹

First, critics argue that the same principles guiding the application of executive and judicial official immunity must similarly direct implementation of official immunity to members' nonlegislative duties. Such principles include: encouraging the vigorous performance of official duties;⁴⁵⁰ encouraging entrance into public service; preventing official inaction and cowardly decision-making; and removing the onus of time-consuming litigation.⁴⁵¹

Second, they maintain that representation involves communication between members and their constituents that cannot be achieved merely through the passage and enactment of legislation.⁴⁵²

⁴⁴⁷ Charles W. Johnson IV, *The Doctrine of Official Immunity: An Unnecessary Intrusion into Speech or Debate Clause Jurisprudence*, *Catholic U.L.Rev.*, Vol. 43, 1994.

⁴⁴⁸ See, Charles W. Johnson IV, *The Doctrine of Official Immunity: An Unnecessary Intrusion into Speech or Debate Clause Jurisprudence*, *Catholic U.L.Rev.*, Vol. 43, 1994.

⁴⁴⁹ See, *Sundquist*, 833 F.2d, p.331 (Mikva, J., dissenting).

⁴⁵⁰ See, *Sundquist*, 833 F.2d, p. 330.

⁴⁵¹ See, *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949).

⁴⁵² See, 134 Cong. Rec. 10,576 (1988)

Third, members must be free to inform their constituents, respond to their needs, and keep them apprised of government activities.⁴⁵³

Finally, critics emphasize that legislators, the only officials whom the Constitution explicitly protects, actually receive the least amount of immunity protection as a direct result of this textual protection.⁴⁵⁴ The executive and judiciary, receiving no constitutional immunity, emerge with broader protection. In their view, this disparity makes no practical sense.⁴⁵⁵

11.3.2 The Viewpoints of Against

Some commenters argue that each of the policy arguments would bolster significantly the existing legislative immunity doctrine. Furthermore, maintaining the vitality of members' nonlegislative responsibilities to meet these policy concerns is a realistic and necessary concern. Achieving these goals, however, need not and cannot be accomplished by providing members of Congress with extra-constitutional immunity protection.⁴⁵⁶

First, the duties to which these policy mandates attach historically have been determined by the constitutional and statutory responsibilities of the various officials.⁴⁵⁷ Courts have granted common law immunity to judges, prosecutors and grand jurors because performance of their constitutional, statutory, and

⁴⁵³ See, Brooks, 945 F.2d, p.37.

⁴⁵⁴ See, 134 Cong. Rec. 10, 576 (1988).

⁴⁵⁵ Eades, 810 F.2d at 725 n.1.

⁴⁵⁶ Charles W. Johnson IV, *The Doctrine of Official Immunity: An Unnecessary Intrusion into Speech or Debate Clause Jurisprudence*, Catholic U.L.Rev., Vol. 43, 1994.

⁴⁵⁷ See, *Chastain v. Sundquist*, 833 F.2d 311, 321 (D.C. Cir. 1987)

delegated duties would be impossible without it.⁴⁵⁸ The same holds true for executive officials, including both department heads and lower level officials.⁴⁵⁹ The Courts have never granted this form of immunity to members, because their constitutional functions and the policy concerns that affect these functions are absolutely protected by the Constitution itself.⁴⁶⁰ Members can lobby their colleagues to push bills through the legislative process; they can direct their staff to gather information or conduct oversight hearings to gain support and momentum for their initiatives; and, whether necessary or not, they can libel anyone with impunity in the House or Senate chamber or in committee. As a result, members can vigorously pursue their legislative agendas without fear of a lawsuit. The populace need not worry about inaction or cowardice of members afraid to pursue policy-making. And potential candidates can rest assured that upon election they will be able to push their constituents' interests forward through legislation without unwanted litigation hampering their efforts.

Second, although communications between members and constituents are an essential ingredient of representative government, refusing to expand legislative immunity to accommodate the official immunity doctrine will not impair members' non-legislative performance. Members' communications with constituents will not suffer. For instance, members may use their franking privileges, news conferences, press releases, and speeches in their home districts to inform, establish strong ties with, and solicit viewpoints from their constituents. Members of Congress need only adhere to the manifest rules of proper official

⁴⁵⁸ See, *Imbler v. Pachtman*, 424 U.S. 409, 422-23 (1976)

⁴⁵⁹ See, *Barr v. Matteo*, 360 U.S. 564, 573 (1959).

⁴⁶⁰ See, *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951).

conduct articulated in the limited body of legislative immunity cases, which forbid them from defaming others through nonlegislative, unprotected means.

Members are accustomed to tailoring their legislative and nonlegislative behavior to abide by a wide range of rulers⁴⁶¹ and statutes. For instance, in representing constituent interests before administrative agencies, members may intervene to urge action or reconsideration of a matter, express opinions on pending issues, gather information and status reports, or secure appointments.⁴⁶² But to intervene, they must abide by certain standards of conduct. For example, federal law prohibits a member of Congress from communicating with an administrative agency off-the-record on the merits of a particular matter under formal agency consideration - termed an *ex parte* communication. Members have notice of these rules and traditions and should conduct themselves accordingly.

Third, members' abilities to inform their constituents are not chilled by adherence to these principles. In fact, the advent of nationally televised debate in the House and Senate has mooted most arguments questioning the effectiveness of the informing function.⁴⁶³ The House of Representatives, for instance, opens its daily sessions with miscellaneous speeches and concludes with a period of "Special Orders."⁴⁶⁴ This provides members with an opportunity to address their constituents and the nation on any topic without being constrained by the House's

⁴⁶¹ See, House Common Standards of Official Conduct, House Ethics Manual, 102d Cong., 2d Sess. 91, (1992).

⁴⁶² See, *Sierra Club v. Costle*, 657 F.2d 298, 409-10 (D.C. Cir. 1981).

⁴⁶³ See, SulaP.Richardson, U.S. Library of Congress, *Term Limits for Federal Limits for Federal and State Legislators: Background and Recent State Activity* 9, (1993).

⁴⁶⁴ House of Representatives Rule 14, cl. 2 authorizes the Speaker of House to recognize members who request permission to address the House for up to one hour, whether in one-minute or "special order" speeches. House Rule XIV, cl. 2.

stringent debate rules that apply during regular business. For instance, on September 14, 1992, Congressman Henry Gonzalez stood before the House of Representatives during “Special Orders” and condemned alleged criminal conduct by the executive branch over American foreign policy in Iraq before the Gulf War, and in the process, revealed allegedly classified and contentious materials.⁴⁶⁵ Not only were Congressman Gonzales’s orations immune from lawsuit as protected speech under the Speech or Debate Clause, but, as a result of the heavy media coverage of his actions, his home state constituents and the nation presumably gained information regarding activities of the federal government. Thus, critics’ fears of a curtailed informing function are misplaced.

Fourth, the unequal apportionment of immunity protection reflects the vulnerability to suit of executive and judicial officials as compared to legislative officials who may pose a threat to the citizenry. The inequality is inevitable and essential. To fulfil their constitutional, statutory, and delegated responsibilities, executive and judicial officials face daily enforcement decisions that impact directly upon specific individuals.⁴⁶⁶ Conversely, it is precisely the impact that members’ nonlegislative actions and the “political” motivations underlying them can have upon individual citizens that dictates the foreclosure of official immunity to these functions. Members have nearly unencumbered access to their constituents via the media⁴⁶⁷ and the franking privilege. With ease, a member can address his or her constituency under the pretense of official or political necessity and, in the process, personally malign a private citizen or a candidate challenging

⁴⁶⁵ 138 Cong. Rec. H8349-56,8738 (daily ed. Sept. 14, 1992).

⁴⁶⁶ See, *Chastain v. Sundquist*, 833 F.2d 311, 321 (D.C. Cir. 1987).

⁴⁶⁷ See, Mark Tushnet et al., *Judicial Review and Congressional Tenure: An Observation*, *Texl.L.Rev.*, Vol. 66, 1988.

his or her incumbency.⁴⁶⁸ The citizen or non-incumbent candidate, on the other hand, may lack this access to the media and the public and therefore probably has limited ability to rebut such an attack.

Furthermore, members of Congress often will employ nonlegislative aspects of their office to facilitate reelection. Writing for the *Brewster* Court, Justice Burger referred to nonlegislative activities as “political in nature” and “a means of developing continuing support for future elections.”⁴⁶⁹ Likewise, members themselves have noted the extent to which some of their colleagues abuse their official functions to gain reelection, frequently at the expense of effective lawmaking. Conversely, because executive (below the President) and judicial officials are nonelected, their full range of official activities may not be motivated by political gain to the same extent as legislators. Therefore, the apparent inequity in apportionment of common law immunity to members is justified by the need to safeguard the electorate from legislators’ potential abuse of their public office.

Finally, extending absolute immunity to members’ nonlegislative activities would prove problematic for the courts, which ultimately are responsible for maintaining proper immunity protection for members of Congress. Members would call upon the courts to protect their libellous attacks upon private citizens, political opponents, or anyone else personally maligned. To avoid sanctioning such conduct, the courts would have to construct arbitrary limits on what they would consider official functions deserving absolute immunity.

For instance, the courts might have to distinguish between member-constituent communications facilitating the informing function and those communications representing a vehicle for personal vengeance or political posturing. This would require the judiciary to affix new standards to the

⁴⁶⁸ See, *Williams v. Brooks*, 945 F.2d 1322, 1323 (5th Cir. 1991).

⁴⁶⁹ *United States v. Brewster*, 408 U.S. 501, 512 (1972).

legislative immunity doctrine where no precedent exists to justify the intrusion. The result would be to afflict a historically consistent immunity doctrine designed to protect members' essential legislative functions with an arbitrarily constructed, politically charged expansion of immunized conduct. In turn, augmentation of such a doctrine could impose an immense administrative burden on the courts. Strong public policy mandates avoiding such a burden.

The Supreme Court remained impervious to the Joint Committee's recommendations. In 1979, the Court's decision in *Hutchinson v. Proxmire*⁴⁷⁰ further narrowed its interpretation of the speech or debate clause. The Court held that the speech or debate clause did not immunize Senator Proxmire from liability for defamatory statements made in newsletters and press releases in connection with his "Golden Fleece of the Month Award."⁴⁷¹ Although the Court recognized the importance of informing the public and other Congressmen of wasteful spending, it held that the transmittal of such information is "not a part of the legislative function or the deliberations that make up the legislative process."⁴⁷²

⁴⁷⁰ 443 U.S. 111 (1979).

⁴⁷¹ *Id.*, p.114

⁴⁷² *Id.*, p.133.

CHAPTER4. The Development of Parliamentary Privilege

12 The Reasons of the Development of Parliamentary Privilege

Although of the ancient origin, parliamentary privilege is not static or immutable. With the development of modern science and technology, social life has undergone significant changes, which will inevitably affect the development of parliamentary privilege. Approximately the causes of the development are as follows:

12.1 The Changes of Discharging Responsibilities' Way

The way in which parliaments and parliamentarians discharge their responsibilities is also likely to be relevant to developments in relation to privilege. The issue of misuse of privilege, ether by members or by others such as committee witnesses, may continue to receive attention. Modern technology assists greatly in the dissemination of details of parliamentary activities. There are many positive aspects in this:⁴⁷³ The wider community is informed more easily and more quickly of parliament's work. One negative aspect is however that greater damage can be done because a false or reckless attack or the publication of personal details is also carried quickly and to a much wider audience, and false or unreasonably damaging published electronically can continue to "live" in databases and systems even if it is withdrawn or corrected. An awareness of such risks has already caused House committees to consider carefully the publication of submissions — in some cases, for example, certain details have been omitted, the

⁴⁷³ Bernard Wright, Patterns of Change-Parliamentary Privilege,
<http://www.aph.gov.au/HOUSE/PUBS/occpub/privileges.pd>.

committees seeking to balance the interests of openness and accountability with the interests of individuals. Committee procedures, whether established by practice (House committees) or by resolution (Senate committees) allow for the protection of witnesses and for the rights of others. The challenge may be more in the application of the procedures rather than the procedures themselves, and in an awareness of the enhanced potential for damage to be done to individuals by the use of modern technologies, technologies which can be expected to evolve with great speed, and which may impact on the houses themselves and individual parliamentarians as well as on committees.⁴⁷⁴

Caring for the rights of others will need to be shown by Committees of Privileges, and by the relevant houses, if the community is to be expected to accept that parliament should retain the broad power to punish contempts. It is also possible that parliaments may face new forms of obstruction or difficulties which will cause them to seek changes to the law or to the arrangements concerning privilege.

12.2 Wider Legal Developments

The issue of international legal arrangements is one area.⁴⁷⁵ In Europe there have been cases where actions of national parliaments have been tested against the requirements of a larger legal framework in the form of the European Court of Human Rights. A finding of contempt by a national parliament has been held by the court to be in contravention of the Convention on Human Rights because two members who had been criticised by the person in question had not only raised the complaint in the House, they had participated in proceedings on the matter. The

⁴⁷⁴ Bernard Wright, Patterns of Change-Parliamentary Privilege, <http://www.aph.gov.au/HOUSE/PUBS/occpub/privileges.pd>.

⁴⁷⁵ E.Campbell, Parliamentary Privilege in Australia, pp.204-8.

court held that this had denied the person's rights to a fair and impartial hearing⁴⁷⁶. In 2002, a British citizen took actions in the court on the ground that she had been subject to discrimination as a result of criticism of her family by a member of the House of Commons. She argued that her right to the determination of her civil rights and obligations by a fair and impartial hearing had been violated by the use of the parliamentary privilege. Presumably because of the wider significance of this case, several European nations were permitted to make submissions. The action failed in the court ruling that parliamentary privilege did not impose a disproportionate restriction on the right of access to a court.⁴⁷⁷ In 2003 the Court held that immunity did not apply to the repetition out of parliament by a member of Italy's parliament of a defamatory statement made during proceedings.⁴⁷⁸

Human rights legislation at a national or state/territory level may also be important to a Parliament.⁴⁷⁹ The New Zealand Bill of Rights Act 1990 sets out rights and freedoms that the House must observe in exercising its privileges, although the Act does not abrogate any of the House's privileges.⁴⁸⁰ Internal parliamentary processes, such as practices for the protection of witnesses before

⁴⁷⁶ *Demicoli v. Malta* (1992) 14 EHRR 47; May, 23rd ed., p.155.

⁴⁷⁷ May, 23rd ed., p.199; Mme Ponceau, Privileges and Immunities in Parliament, The Association of Secretaries General of Parliaments (ASGP) meeting 17-19 October 2005, <http://www.asgp.info/Resources/Data/Documents/MSUMEOMVPXKTACUJDEWNDNORPOBTYP.pdf>.

⁴⁷⁸ Mme Ponceau, Privileges and Immunities in Parliament, The Association of Secretaries General of Parliaments (ASGP) meeting 17-19 October 2005, <http://www.asgp.info/Resources/Data/Documents/MSUMEOMVPXKTACUJDEWNDNORPOBTYP.pdf>.

⁴⁷⁹ See, For example *Canada (House of Commons) v. Vaid* (2005) SCC 30 (Supreme Court of Canada), 20 May, 2005.

⁴⁸⁰ David McGee, *Parliamentary Practice in New Zealand*, 2nd ed, Wellington: GP Publications, 1994, p.611.

the Privileges Committee, take account of these requirements.⁴⁸¹ Such issues have been given considerable attention in Canada since enactment of the Canadian Charter of Rights and Freedoms in 1982. The result has been that parliamentary privilege has been like other areas of the law in being subject to the provisions of the charter.⁴⁸² A point of broader significance, noted by Professor Lindell in respect of the Vaid case, is the tendency of the court to define the content of parliamentary privilege by reference to the degree of autonomy necessary for the performance of the functions entrusted to the Canadian Parliament as finally determined by the court and not just the Parliament. A scholarly discussion of the position in Canada, and one which takes account of international developments, has been published in *The Table* for 2007. In Australia to date only the ACT and Victoria have enacted human rights laws. Technically legislation in this area may or may not be drafted with reference to parliamentary activities. It would seem however that, as a minimum, a parliament which enacted such a law would feel some obligation to ensure that its own operations were at least consistent with any general standards that it established for the wider community.⁴⁸³

The development of the law in respect of the implied constitutional guarantee of freedom of political communication will be of interest, for example, in Australia including in respect of the Parliamentary Privileges Act 1987. Subsection 16(3),⁴⁸⁴ it has been argued, is in conflict with this freedom in so far as

⁴⁸¹ Id., pp.611, 667.

⁴⁸² Robert Marleau and Camille Montpetit, *House of Commons Procedure and Practice*, pp.112 -13; See, Joseph Maingot, *Parliamentary Privilege in Canada*, 2nd ed, 1997, ch 14.

⁴⁸³ Bernard Wright, *Patterns of Change-Parliamentary Privilege*, <http://www.aph.gov.au/HOUSE/PUBS/occpub/privileges.pd>.

⁴⁸⁴ *Parliamentary Privileges Act 1987*, Section16(3), In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of: (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament; (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

it prevents the analysis of the conduct of elected politicians in the courts or impedes the discussion of the same matters by non-parliamentarians given the legal consequences that may result in defamation.⁴⁸⁵

12.3 Parliamentary Privilege Itself Has Incurred Many of Critics

Parliamentary privilege itself has incurred many of critics, in order to remove the misunderstanding and improve the status of parliamentary privilege in people's ideal, which must bring about the change and the development of parliamentary privilege. According to some scholars' opinions, the critics to parliamentary privilege mainly include:⁴⁸⁶

12.3.1 Parliament Privilege is Peculiar, Arbitrary and Obscure

According to Sir Geoffrey Palmer, most people know nothing about parliamentary privilege and "The law relating to it is ancient, obscure and potentially draconian". He notes that it is, in the words of the noted English constitutional lawyer, O Hood Phillips, "exceptional, peculiar and discretionary".⁴⁸⁷

12.3.2 Potential for Injustice

Parliamentary privilege has the capacity to cause substantial injustice to individuals who have no means of redress. Various examples of the alleged abuse

⁴⁸⁵ E.Campbell, Contempt of Parliament and the Implied Freedom of Political Communication (1999) 10 Public Law Review 196 and Parliamentary Privilege, 2003, p.7, 64-5, and evidence by Professor Lindell to the UK Joint Committee HL 43 III, HC 214—111 (1998-99) at 168-9 paras 21(ii) and 19.

⁴⁸⁶ Gareth Griffith, Parliamentary Privilege: Major Developments and Current Issues, <http://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/key/ParliamentaryPrivilege:MajorDevelopmentsandCurrentIssues>.

⁴⁸⁷ G.Palmer, Parliament and Privilege: Whose Justice?, New Zealand Law Journal, September, 1994.

of privilege can be cited in this context but the general point to make is that the privilege of freedom of speech in Parliament can and does come into conflict with the principle that “every person is entitled to access to the Courts...to obtain redress for alleged wrongs”.⁴⁸⁸ Thus, a citizen defamed by an MP may be denied a remedy by the absolute privilege afforded to what is said in Parliament under Article 9. The reports of Parliamentary Committees are protected by the same absolute privilege and the point is made that potential exists for such Committees “to engage in activities which are oppressive or which may do irreparable harm to individuals”.⁴⁸⁹

12.3.3 Contrary to Democratic Values

According to the ‘WA Inc’ Royal Commission, the present construction of what is meant by freedom of speech in Parliament under Article 9 is “fundamentally inconsistent with the right of all citizens to subject their parliamentary representatives to scrutiny and to be governed in an open and accountable manner”.⁴⁹⁰

12.3.4 Inflated and Unhistorical Interpretation of Parliamentary Privilege

The present Construction of Article 9 (Bill of rights, 1689) makes inflated claims for parliamentary privilege which owes little or nothing to its original purpose and intent. Again, this was the view of Hunt J in Murphy’s case where his Honour proposed a “narrower interpretation” consistent with “both the mischief which the Bill of Rights was enacted to remedy and the history of what led to the

⁴⁸⁸ R.Best, Freedom of Speech in Parliament: Constitutional Safeguard or Sword of Oppression?, VUWLR, Vol. 24, 1994.

⁴⁸⁹ Explanatory Note, Parliamentary Privileges Bill 1994 (NZ), p.28.

⁴⁹⁰ Western Australia, Report of the Royal commission into Commercial Activities of Government and other matters, 1992, Part II, para. 5,8,7.

enactment of Art. 9.” He observed: “Freedom of speech in parliament is not now, nor was it in 1901 or even in 1688 so sensitive a flower that, although the accuracy and the honesty of what is said by members of parliament (or witnesses before parliamentary committees) can be severely challenged in the media or in public, it cannot be challenged in the same way in the courts of law”.⁴⁹¹ As noted, for Hunt J only when legal consequences are to be visited on Members or witnesses should parliamentary privilege and be used to prevent a court questioning what they said or did in Parliament. In support of this approach and contrary to the decision in Prebble, Geoffrey Marshall said the “formula in the Murphy case reflects a more rational attitude to parliamentary privilege as well as to the interests of justice and free speech”.⁴⁹² He went on to observe: “The freedom of debate is sufficiently protected if members enjoy absolute privilege from criminal and civil actions directed at what they say in the course of debate or proceedings in the House. There is no need to inflate claims of privilege beyond that”.⁴⁹³

12.3.5 Facilitating a Regard for Truth

Witnesses to a parliamentary committee and MPs are more likely to tell the truth if they know there is a prospect that what they say may be challenged elsewhere, than if they know they are protected from such challenge. The ‘WA Inc’ Royal Commission commented in this regard: “Statements made in parliament should not be treated, for purposes associated with court and like proceedings, as if they were never uttered. To provide such immunity is likely to encourage, or at least facilitate, a disregard for the truth by those to whom the protection is given.

⁴⁹¹ (1986) 5 NSWLR 18, p.34.

⁴⁹² G.Marshall, Impugning parliamentary privilege, Public Law, Winter, 1994.

⁴⁹³ Id.

We have no doubt that if it is understood by members of Parliament or persons appearing before a parliamentary committee that they may be called to account for their parliamentary statements at a later time, they are more likely than not to speak honestly, although no less freely. To suggest otherwise is to equate the right to speak freely in Parliament with the right to be disingenuous. Such a proposition is fundamentally inconsistent with the right of all citizens to be governed in an open and accountable manner”.⁴⁹⁴

12.3.6 Procedural Fairness

There is no mechanism for ensuring that witnesses before parliamentary committees generally will be protected by the requirements of procedural fairness. In 1991 the NSW Attorney General’s Discussion Paper commented that this had not proved to be a controversial matter in this jurisdiction. But at the same time it said that “Procedural questions such as whether evidence should be heard in-camera, the degree to which counsel should be involved, and the admissibility of questions are currently left to the Committees themselves to determine”. The Discussion Paper went on to say that it is “essential that persons summoned to give evidence before a Committee be accorded procedural fairness”.⁴⁹⁵ Likewise, in a New Zealand context Sir Geoffrey Palmer argued for a legislative provision “explicitly requiring select committees of Parliament to follow the rules of natural justice”.⁴⁹⁶

⁴⁹⁴ Western Australia, Report of the Royal Commission into Commercial Activities of Government and other matters, 1992, Part II, para. 5, 8, 6.

⁴⁹⁵ NSW Attorney General’s Department, Discussion Paper-Parliamentary Privilege in NSW, 1991, p.34.

⁴⁹⁶ G. Palmer, Parliament and privilege: Whose Justice?, New Zealand law Journal, September, 1994.

13 The Scope of Parliamentary Privilege Becoming Narrower and Narrower

13.1 Narrow the Sphere of Freedom of Speech

As to the scope protected by freedom of speech, there are the two theories, “absolute protection” and “relative protection”.

Absolute security is that Members of parliament abuse of freedom of speech, and caused by violations of the rights of others, such as reputation, prestige, which can also be removed from his duty. Such as the United States Constitution in 1787, Article 1, section 6 provides, “and for any Speech or Debate in either House, they shall not be questioned in any other Place.” Belgium Constitution provides that “No member of either of the two Houses can be prosecuted or pursued with regard to opinions and votes given by him in the exercise of his duties”,⁴⁹⁷ French Constitution in 1946 is even more states that “ No member of the Parliament can be pursued, sought after, halted, imprisoned or judged in dependence of the opinions or votes from him issued in the exercise of his functions”,⁴⁹⁸ German Constitution in 1919 provides that “Where the federal Congress, or state legislatures, and their of the Committee, freedom of speech, records, and correct report in an open procedure, takes no responsibility.”⁴⁹⁹ These countries take the theories of absolute protection. The view holding absolute protection considers that the constitution provided the privilege for Members of parliament, and its purpose is not to defend the interests of members, itself, but to protect the public interest and people’s rights, therefore, people’s representative is able to fulfil their responsibility by the special protection.

⁴⁹⁷ Belgium Constitution, Article 58.

⁴⁹⁸ French Constitution in 1946, Article 21.

On respect for the individual personality of the requirements of democratic politics, if Members abuse of such privileges, and infringe on the dignity of a private character, and can be exempted from his duty, the victim is innocent and deserves our sympathy under this system. But if the absolute protection is given up, the influence is obviously not a person's or a small number of people's benefits, but it will weaken the function of representative institutions, and hinder the advancement of democracy, as well as infect on the benefits of all the people throughout the country.

“Relative protection”, first was seen in 1949 West Germany's Basic Law Article 46, section 1, which provides members of Congress freedom of speech, except for the defamation. After the merger of the two Germanys, the German Basic Law, the newly revised Article 46, section 1, the same states that “At no time may a Member be subjected to court proceedings or disciplinary action or otherwise called to account outside the Bundestag for a vote cast or for any speech or debate in the Bundestag or in any of its committees. This provision shall not apply to defamatory insults ” from the point of view of Relative protection, the maintenance of personal dignity, are one of the important spirit of democracy, and in representative government, giving freedom of speech aims to exclude external interference and to be able to freely state public opinion. Based on this premise, if Members perform their duties and speak in this Chamber and involve in defamation and injure to private reputation of dignity, in democracies, the victim of the individual will naturally have to tolerate in order to harm to small to earn whole interest. The purpose of the privilege, however, is to enable Members to fulfil our responsibility statement, rather than for the purpose of defamation. If Members abuse freedom of speech to do with unrelated parliamentary procedure's matter and result in human dignity's harm, which still is irresponsible, it will not

⁴⁹⁹ German Constitution in 1919, Article 36.

suffer the two countries and individuals, but also violate of its original intention. From this perspective, the view of relative protection limits the illegal speech unrelated parliamentary action, which is quite reasonable.

The trend now is that those countries to take the absolute protection gradually take and narrow interpretations on the scope of parliamentary privilege, such as the United States.

The United States Constitution, Article 1, section 6 has also been increasingly inclined to explain the relative protection by the federal Supreme Court, especially in 1972 after the US V. Brewster. In the Brewster case, the U.S. Supreme Court divided the conduct of members of Congress into legislative activity and political activity. Legislative activity should be protected by freedom of speech and political activity is non-application of the speech or debate clause. But the standards of legislative acts that Supreme Court judge for the conduct of members of Congress can be divided into the Brewster case and Gravel v. US.

United States v. Brewster, Appellee, a former United States Senator, was charged with the solicitation and acceptance of bribes in violation of bribery statute. The District Court, on appellee's pretrial motion, dismissed the indictment on the ground that the Speech or Debate Clause of the Constitution shielded him "from any prosecution for alleged bribery to perform a legislative act." The United States filed a direct appeal to the Supreme Court. The Supreme Court stated: The prosecution of appellee is not prohibited by the Speech or Debate Clause. Although that provision protects Members of Congress from inquiry into legislative acts or the motivation for performance of such acts, United States v. Johnson, it does not protect all conduct relating to the legislative process. Since, in this case, prosecution of the bribery charges does not necessitate inquiry into legislative acts or motivation, the District Court erred in holding that the Speech or Debate Clause required dismissal of the indictment. The Court emphasized that

Senator Brewster's illegal conduct was taking the money in exchange for being influenced, not the legislative act itself.⁵⁰⁰

Gravel v. United States,⁵⁰¹ at issue in *Gravel* was the private publication of the Pentagon Papers by Senator Gravel and a legislative aide. A federal grand jury was convened to investigate alleged criminal conduct with respect to the public disclosure of these classified documents and promptly subpoenaed Gravel's aide. Senator Gravel sought to quash the subpoena arguing that the Speech or Debate Clause shielded his aide from questioning. In response, the Court held for the first time that the Speech or Debate Clause would apply with equal force to members and their congressional aides and staff. Writing for the Court, Justice Blackmun referred to congressional staff as members "alter egos" whose services are critical to members' functions amidst a burgeoning workload. The Court concluded, however, that the private publication was not protected speech or debate and that, to the extent that the grand jury investigation related to that publication, Senator Gravel's aide was not protected by the Clause.

Applying the Brewster Court's legislative/political distinction, Justice Blackmun defined legitimate legislative activity as those matters integral to the deliberative and communicative processes that relate to the consideration and passage of legislation. In his view, private publication of the Pentagon Papers was not essential to the deliberations of the Senate or the passage of legislation. Conversely, committee perusal and inclusion in the record of the same materials was essential and protected.⁵⁰² Where the case, the Court further limited the scope of immunity of speech, only the core of the legislative activity should apply to

⁵⁰⁰ See, *United States v. Brewster*, 408 U.S. 501 (1972).

⁵⁰¹ *Gravel v. United States*, 408 U.S. 606 (1972).

⁵⁰² See, *Gravel v. United States*, 408 U.S. 606 (1972)

the protection of speech immunity. As for what the main part of the legislative process is, it remains to be judged by the judiciary in specific cases.

The Supreme Court remained impervious to the Joint Committee's recommendations. Such as *Hutchinson v. Proxmire*⁵⁰³, although the Court recognized the importance of informing the public and other Congressmen of wasteful spending, it held that the transmittal of such information is "not a part of the legislative function or the deliberations that make up the legislative process."⁵⁰⁴ In the case, the Court held that the speech or debate clause did not immunize Senator Proxmire from liability for defamatory statements made in newsletters and press releases in connection with his "Golden Fleece of the Month Award."⁵⁰⁵ As a result, the Court's decision further narrowed the interpretation of the speech or debate clause.

Why the United States Federal Supreme Court step-by-step limited the scope of speech immunity, according to a well-known contemporary American constitutional scholar, Professor Tribe, there are two main reasons. First, although the Constitution expressly authorize Congress may punish its members, but we have reasons to believe that, except in special circumstances, the Congress will hesitate to punish its members. Therefore, the speech immunity provisions should not be explained is extremely broad. Second, more importantly, the speech or debate clause will be taken to narrow the interpretation, adjustable and constitutional review system unconstitutional on the principle of autonomy and the Congress both realities. Shall not be for law enforcement and legislators, and a law against human rights, to be performed by the Court to review that; and many

⁵⁰³ *Hutchinson v. Proxmire*, 443 U.S. 111 (1979).

⁵⁰⁴ *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), p.133.

⁵⁰⁵ *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), p.114.

of the original does not belong to the executive and the judiciary to assist the legislative act that may happen the case of unconstitutional or illegal, also need to have judicial review.⁵⁰⁶

13.2 Waiver of Parliamentary Privilege

The case of *Hamilton v Al Fayed*⁵⁰⁷ arose out of the ‘cash for questions’ scandal of the 1990s. In January 1997, the defendant (Al Fayed) alleged on a TV program that the plaintiff, the MP Neil Hamilton, had sought and accepted cash from him for asking questions on his behalf in the House of Commons. Two parliamentary investigations and reports followed, one by the Parliamentary Commissioner for Standards which concluded that Hamilton had received cash payments from Al Fayed, the other by the Committee on Standards and Privileges, whose report was approved by the House of Commons in November 1997. In January 1998, Hamilton commenced proceedings against Al Fayed for defamation in respect to the allegations made by him on the TV program. In doing so, Hamilton waived his parliamentary privilege, pursuant to s 13 of the Defamation Act, as amended in 1996. This provision enables an MP (or any other participant in parliamentary proceedings) who considers he has been defamed to waive parliamentary privilege and bring proceedings for defamation even though such proceedings would otherwise amount to a breach of parliamentary privilege. On his side, Al Fayed sought to strike out Hamilton’s claim on the grounds that the hearing of the action: (a) would contravene Article 9’s prohibition against questioning ‘proceedings in Parliament’; and (b) would constitute a collateral attack on Parliament’s own investigation into the MP’s conduct.

⁵⁰⁶ See, Laurence H. Tribe, *American Constitutional Law*, New York: Foundation Press, 1972, pp.294-5.

⁵⁰⁷ [2001] 1 AC 395.

The final ruling on the “parliamentary privilege” aspect to the case was delivered by the House of Lords, in a unanimous judgment delivered by Lord Browne-Wilkinson. Curiously, it was only at this stage that the determining influence of the waiver of privilege under s 13 was given its full weight. At first instance, Popplewell J had not even referred directly to s 13.⁵⁰⁸ Subsequently, the Court of Appeal had indeed concluded that s 13 “trumped” parliamentary privilege, but only after a lengthy discussion as to whether the two parliamentary investigations were “proceedings in Parliament”.⁵⁰⁹

In summary, the Court of Appeal held that the report of the Parliamentary Commissioner for Standards and that of the Committee on Standards and Privileges were “ ‘proceedings in Parliament’ and that Popplewell J had been in error and had himself breached parliamentary privilege by criticizing the procedures adopted by the Parliamentary Commissioner for Standards. To this point the Court of Appeal and the House of Lords were in agreement. However, the Court of Appeal had then ruled that parliamentary privilege would not have been infringed if the action had gone forward. On the facts of the case, the House of Lords could not accept this argument, saying that it would have been ‘impossible for Mr Al Fayed to have had a fair trial in this action if he had been precluded from challenging the evidence produced to the parliamentary committees on behalf of Mr Hamilton’ ”. Lord Browne-Wilkinson concluded: “Had it not been for section 13, the court should, in my judgment, have stayed the libel action brought by Mr Hamilton...”⁵¹⁰

⁵⁰⁸ [2001] 1 AC 395, p.407.

⁵⁰⁹ Hamilton v. Al Fayed [1999] 3 All ER 317.

⁵¹⁰ [2001] 1 AC 395, p.408.

Lord Browne-Wilkinson made it clear that he had only dealt with this question in order to avoid confusion in the law of parliamentary privilege.⁵¹¹ As he said at the outset, ‘section 13 affects all the issues in this case’.⁵¹² In effect, since Hamilton had chosen to rely on s 13, the trial of the action could proceed, notwithstanding the infringement of parliamentary privilege that would result.

In its First Report of 1999, the Joint Committee on Parliamentary Privilege recommended that s 13 be repealed, arguing that it had “created indefensible anomalies of its own which should not be allowed to continue”. The cure s 13 which ought to achieve what was to rectify the situation where an individual MP (or a witness before a parliamentary committee) is precluded by parliamentary privilege from taking action to clear their name when it is alleged that what they have said in a parliamentary context is untrue. For the Joint Committee, the cure was worse than the disease:

A fundamental flaw is that it undermines the basis of privileges: Freedom of speech is the privilege of the House as a whole and not of the individual member in his own right, although an individual member can assert and rely on it. Application of the new provision could also be impracticable in complicated cases; for example, where two members, or a member and a non-member, are closely involved in the same action and one waives privilege and the other does not. Section 13 is also anomalous: it is available only in defamation proceedings. No similar waiver is available for any criminal action, or any other form of civil action.⁵¹³

⁵¹¹ [2001] 1 AC 395, p.407.

⁵¹² [2001] 1 AC 395, p.398.

⁵¹³ UK Parliament, Reports of the Joint Committee on Parliamentary Privilege, <http://www.parliament.the-stationery-office.co.uk/pa/jt199899/jtselect/jtpriv/43/4302.htm>.

13.3 Narrowing the Sphere of the Power of Regulating Internal Matters

13.3.1 Prudent Apply to Discipline Power

Parliament itself has begun to be restraint in their actions, since long-term time, the discipline power of parliamentary privilege is rarely used, that is, to provide but not to use it.

Over the last century or more the House of Lords has seldom been troubled by complaints of breach of privilege. This has not been true of the House of Commons, where even in the present century there have been frequent complaints of breach of privilege, meaning contempt, some of which appear in retrospect to have been trivial and unworthy. It took the House ten years formally to accept the advice of the 1967 committee that it should be less sensitive in reacting to alleged contempts. In 1977 the House decided: “Its penal jurisdiction should be exercised (a) in any event as sparingly as possible, and (b) only when the House is satisfied that to exercise it is essential in order to provide reasonable protection for the House, its members or its officers, from such improper obstruction or attempt at or threat of obstruction as is causing, or is likely to cause, substantial interference with the performance of their respective functions”.⁵¹⁴

In practice, the House of Commons now treats as contempt only serious breaches of rules by its own members or obstruction by others which it believes interfere seriously with the work of the House or its members. Actions constituting a prima facie contempt nevertheless still cover a wide area: from leaking a draft report of a select committee, or serving a subpoena on a member within the precincts of the House, to intimidating a witness before a committee or bribing a member.

⁵¹⁴ CJ (1977-78) 170, agreeing to paragraph 4 of the Third Report from the Committee of Privileges, HC (1976-77) 417.

In the past the House of Commons frequently, and the House of Lords less often, exercised their power to commit non-members for conduct perceived as an offence and adjudged as a contempt. Offenders were committed either to the custody of Black Rod or the Serjeant-at-Arms or directly to one of Her Majesty's prisons. By the mid-nineteenth century both Parliament and the courts were becoming uneasy about the exercise of this power without any procedure for review. The power of committal has not been exercised by the House of Lords since early in the nineteenth century and not by the House of Commons since 1880.⁵¹⁵

In 1997 the British Parliament appointed a joint select committee to review the law and practice of parliamentary privilege. The committee recommended codification of a definition of contempt and abolition of the Parliament's power to imprison a person, whether a member or not, that the Parliament's penal powers over non-members should, in general, be transferred to the High Court and that wilful failure to attend committee proceedings, answer questions or produce documents should be made criminal offences punishable in the courts. The committee also recommended that procedural fairness before the Committee of Standards and Privileges be ensured and that each House should retain the power to make decisions on contempt matters, but that a penalty should not be able to exceed that recommended by the relevant committee.⁵¹⁶

In Commonwealth, in March 1982 a Joint Select Committee on Parliamentary Privilege was appointed to conduct a thorough review of the law and practice of parliamentary privilege in so far as the Commonwealth Parliament

⁵¹⁵ UK Parliament, Reports of the Joint Committee on Parliamentary Privilege, <http://www.parliament.the-stationery-office.co.uk/pa/jt199899/jtselect/jtpriv/43/4302.htm>.

⁵¹⁶ UK Parliament, Reports of the Joint Committee on Parliamentary Privilege, <http://www.parliament.the-stationery-office.co.uk/pa/jt199899/jtselect/jtpriv/43/4302.htm>.

was concerned. Much discussion took place on the power of a house to punish contempts. The Clerk of the House, Mr J A Pettiffer, argued that a House should not have the ability to punish contempts itself:

The power to impose a fine... and the power to impose a period of imprisonment ...should be passed to the courts [after examination by the House] and

... a modern democratic society ... will no longer readily accept the imposition by the Parliament of penal provisions ... [retention of the penal jurisdiction] was a denial of natural justice.⁵¹⁷

In the event the committee recommended retention of the penal jurisdiction, but with significant changes to guard against misuse: the Houses should by resolution list matters that could be found to be contempts, the penal jurisdiction should be exercised as sparingly as possible, the category of contempt by defamation should be abolished, there should be detailed rules to protect witnesses before the Privileges Committees and, where a house committed a person for contempt, limited judicial review should be available.⁵¹⁸

13.3.2 The Change of the Relation between the Parliament and Its Employees

In 1995, Congress in America passed the Congressional Accountability Act (CCA), which applied federal workplace and anti-discrimination laws to Congress.

⁵¹⁷ Mr Pettifer's concerns were echoed in advice given by Professor Lindell and Professor Carney to the House Committee of Privileges 25 years later – Review of Procedures of the House of Representatives relating to the consideration of privilege matters and procedural fairness, 23 February 2007, <http://www.aph.gov.au/house/committee/priv/reports>.

⁵¹⁸ Joint Select Committee on Parliamentary Privilege 1982-84, Report, (1984), p.219.

13.3.2.1 Congressional Self –regulation Prior to the CAA

For more than 100 years, Congress exempted itself from coverage when enacting laws that created rights enforceable against private and public employers. The Civil Service Act of 1883 restricted patronage in the Executive Branch, but not in Congress. Major workplace protection statutes enacted during the 1930s and 1960s similarly excluded congressional employees while covering private employers, local governments, and executive agencies.⁵¹⁹ In more recent times, outside observers as well as individual legislators have criticized Congress's unwillingness to submit to the laws it imposed on others.⁵²⁰

Congressional reluctance to extend existing laws as written reflected in part a concern that Executive Branch enforcement and judicial review raised serious separation of power problems. Article I of the Constitution bestows upon each chamber the power to regulate and discipline its members, and upon each member privileges from outside arresting or questioning.

Burdened and perhaps fortified with such reservations, Congress in its initial efforts at self-regulation produced unenforceable or inadequate internal requirements, promulgated either through one-house rules or resolutions or through statutory provisions applicable to one chamber's employees.

⁵¹⁹ For example, the Fair Labor Standards Act covered private employers when enacted in 1938; it was amended to apply to state and local governments and federal executive agencies in 1966, but not to employees of Congress. See 29 U.S.C. § 203(d), (e) (1994). Title VII of the 1964 Civil Rights Act initially covered private employers; it was amended to include state and local government employers and federal executive agencies in 1972. See, 42 U.S.C. §§ 2000e(b), (f); 2000e-16 (1994). The Age Discrimination in Employment Act of 1967 originally applied to private employers; it was extended to state and local governments and the Executive Branch in 1974. See, 29 U.S.C. §§ 630(b), 633a (1994).

⁵²⁰ Report of the Joint Committee on Congressional Operations, *The Constitutional Immunity of Members of Congress*, S. Rep. No. 93-896, p.38-39, 53, (2d Sess. 1974).

There are ample grounds to believe that entrusting congressional self-regulation directly to legislators, or to a process that includes significant participation by legislators, is unworkable. Given the realities of partisan politics, members inevitably will be tempted to depart from a neutral disciplinary approach. Further, regular member recourse to such disciplinary procedures would likely threaten even the modest comity among members that is needed to conduct the legislative process.⁵²¹ Yet, to the extent that such factors incline members to curtail or impair the use of disciplinary authority, congressional employees understandably will feel chilled in the exercise of their putative rights. Indeed, employees' diffident assertion of those rights prior to the CAA may well reflect fear of being ignored or retaliated against due to a lack of confidence in the effectiveness or independence of member-controlled enforcement practices.⁵²²

13.3.2.2 Key Aspects of the Enacted CAA

The Act will be administered by an Office of Compliance within the legislative branch, headed by a Board of Directors who is congressional appointees. The Act contains a complex scheme for the Board's adoption of substantive regulations, which is obviously designed to allay constitutional concerns. First, most of the provisions that apply particular federal statutes to congressional employees contain a requirement that the Board's regulations "shall be the same as" those promulgated by the executive branch official who usually administers the statute," except insofar as the Board may determine, for good cause shown... that a modification... would be more effective for the

⁵²¹ Robert S. Getz, *Congressional Ethics: The Conflict of Interest Issue*, Princeton, N.J. Van Nostrand, 1966, pp. 84-113.

⁵²² See, James J. Brudney, *Congressional Accountability and Denial: Speech or Debate Clause and Conflict of Interest Challenges to Unionization of Congressional Employees*, *Harvard Journal on Legislation*, Winter, 1999.

implementation of the rights and protection under this section.”Second, after the Board adopts regulations, they are approved by any of three methods: simple resolution of the house to which they apply; concurrent resolution of both Houses; or joint resolution, which requires the assent of the president. The Board’s recommendation to Congress regarding which method to apply will doubtless depend on whether there is enough variance from the text of the statute and the regulations of the executive to support an argument that new law is being made, so that presentation to the President is required.⁵²³

The Act contemplates a process for complaints and hearings that tracks the earlier proposals. The Office will appoint hearing officers to hold adjudications. On appeal, the Board will review the records of the hearings. Judicial review follows in the Federal Circuit, under a normal administrative law “substantial evidence” standard. The Act authorizes judicial review of the Board’s regulations under the Administrative Procedure Act’s normal criteria.⁵²⁴

An important factor is the extent to which The Act shields members themselves from litigation even while making Congress accountable as an institution.⁵²⁵ Employee complaints may be brought only against the employing office, not the member individually.⁵²⁶ Accordingly, in a court or other formal proceeding the respondent employing office is likely to receive representation

⁵²³ Harold H. Bruff, *That the Laws Shall Bind Equally on All: Congressional and Executive Roles in Applying Laws to Congress*, *Ark. L. Rev.*, Vol. 48, 1995.

⁵²⁴ James J. Brudney, *Congressional Accountability and Denial: Speech or Debate Clause and Conflict of Interest Challenges to Unionization of Congressional Employees*, *Harvard Journal on Legislation*, Winter, 1999.

⁵²⁵ *Id.*

⁵²⁶ See, Public Law, No. 104-1, §§ 405(a), 408(b), 109 Stat. 33, 37 (1995) (codified at 2 U.S.C. §§ 1405(a), 1408(b) (Supp. II 1996)).

from counsel employed by the Senate or House rather than from a private attorney hired and compensated by the member. In addition, Congress pays all monetary damages awarded as a result of misconduct by individual members.⁵²⁷ The decision to immunize members from personal liability represented a departure from Congress's stance in prior legislation, and it generated some internal dissent. Supporters pointed in general terms to the Act's goal of compensating employees rather than punishing individual members of Congress; they may also have feared that personal financial pressure would lead less well-off members to settle false or meritless claims.⁵²⁸

14 Codification of Parliamentary Privilege

In order to alleviate some of the uncertainty traditionally inherent in the exercise of their privileges, some parliaments based on the Westminster model have opted to codify their privileges.⁵²⁹

14.1 The Australian Practice

In 1987, the Australian Parliament passed legislation declaring, clarifying and substantially changing its law of parliamentary privilege. Partly in consequence of the legislation, the Australian Senate passed a series of resolutions substantially codifying its practices in matters related to privileges.⁵³⁰

⁵²⁷ See, Pub. L. No. 104-1, § 415, 109 Stat. 38 (1995) (codified at 2 U.S.C. § 1415 (Supp. II 1996)).

⁵²⁸ James J. Brudney, Congressional Accountability and Denial: Speech or Debate Clause and Conflict of Interest Challenges to Unionization of Congressional Employees, *Harvard Journal on Legislation*, Winter, (1999).

⁵²⁹ See, United Kingdom, House of Commons, Select Committee on Parliamentary Privilege, 1966-67, Report, pp.184-5.

⁵³⁰ See, Harry Evans, *Parliamentary Privilege: Legislation and Resolutions in the Australian Parliament*, The Table, Vol. 56, 1988.

The Australian Parliament, finding that the courts were severely restricting its freedom of speech, enacted statutory remedies to protect its proceedings. The Australian Parliamentary Privileges Act 1987 provides definitions for a number of concepts including contempt. By restricting the category of actions which may be treated as contempts, the Act could be seen as either limiting the right of action of either Australian House or of opening up the actions of both Houses to judicial interpretation. For example, a person punished for contempt of Parliament could bring an action to attempt to establish that the conduct for which he or she was punished did not fall within the statutory definition. This could lead to a court overturning a punishment imposed by a House for contempt of Parliament.⁵³¹

A number of concerns have been expressed in relation to the Australian statutory definition of the privilege: the right of a House to expel a member or the protection of witnesses before committees might be challenged in court;⁵³² the statute might unduly restrict the rights of litigants and defendants in using evidence given before parliamentary committees for the purposes of their court proceedings; the resulting statutory interpretation would further restrict the powers and immunities of Parliament; affirming privileges in statute would result in challenges to the right of the public and the media to comment on what happens in Parliament;⁵³³ and should serious problems arise, they may be corrected only by further codification of the law through legislative amendment.⁵³⁴ As the function of the courts is to consider and apply statutes, not to investigate the proceedings

⁵³¹ Id.

⁵³² Id.

⁵³³ Sylvia Song, *The Reform of Parliamentary Privilege: Advantages and Dangers*, Legislative Studies, Vol. 12, Spring, 1997.

⁵³⁴ Harry Evans, *Parliamentary Privilege: Legislation and Resolutions in the Australian Parliament*, *The Table*, Vol. 56, 1988.

leading to the passage of laws, it has been seen that both the courts and Parliament have expressed the need to avoid conflict in interpreting the scope of privilege.⁵³⁵

14.2 The Experience of the United Kingdom

Where Australia has opted to the codification of the privilege, the United Kingdom has not, though it continues to review its practice and has altered its way of dealing with matters of the privilege. The whole scope and application of the privilege were reviewed by the Select Committee on Parliamentary Privilege in 1967-68; re-examined again in the Third Report of the same Committee in 1976-77; and revisited by the Joint Committee on Parliamentary Privilege in 1998-99. Prior to the 1967-68 Committee's appointment, some concern had been expressed about the number of occasions when criticisms had been raised in the House of breaches of privilege or contempt regarding relatively trivial matters.⁵³⁶

Having examined all aspects of the privilege in the House, the 1967-68 Committee came down against any major changes in the law of the privilege, especially the suggestion that jurisdiction in privilege cases should be transferred to the courts through statute. The Committee did recommend that legislation be promoted to extend and clarify the scope of privilege. It also recommended a number of significant reforms in the way privilege complaints should be considered. It modified the procedure for their examination and, to a certain extent, codified procedures for dealing with matters of privilege. Other reforms served to bring the House's formal rules into line with the practice of nearly 200 years. The

⁵³⁵ Sylvia Song, *The Reform of Parliamentary Privilege: Advantages and Dangers*, Legislative Studies, Vol. 12, Spring, 1997.

⁵³⁶ United Kingdom, House of Commons, *Select Committee on Parliamentary Privilege, 1966-67, Report*.

1976-77 Committee re-examined the findings of the earlier committee and recommended the adoption of many of its recommendations.⁵³⁷

In his memorandum to the British Select Committee in 1976-77, the Clerk of the House cautioned against too rigidly codifying the House's options in dealing with matters of privilege. He wrote: It would be a mistake first and foremost because it would introduce an element of inflexibility into the manner in which the House upholds its privileges and punishes contempts. It is true that the House would be in no danger of abridging its privileges or powers by a mere resolution setting out the sort of cases upon which it normally proposed to act. But formulas which may appear precise and faultless at the time, at which they are drafted, may be found to be defective at a later stage owing to some undiscovered loophole or developments which could not be envisaged at an earlier stage. It would certainly seem undesirable to have to ask the House to amend its resolutions on privileges with any frequency.⁵³⁸

Following the 1976-77 Report, the focus of the House in such matters appeared to shift to the conduct of Members. Allegations of misconduct by Members of the British House were dealt with as matters of conduct or standards and not as privilege. The development of the Register of Members' Interests institutionalized this approach, and this continued into the 1990s with the first report of the Committee of Privileges in 1994-95 and the Nolan Committee on Standards in Public Life which led to the establishment of the Select Committee on Standards in Public Life. This Committee made a number of recommendations pertaining to Members' conduct which resulted in the adoption of a Code of

⁵³⁷ See, United Kingdom, House of Commons, Select Committee on Parliamentary Privilege, 1966-67, Report.

⁵³⁸ United Kingdom, House of Commons, Select Committee on Parliamentary Privilege, 1976-77, Third Report.

Conduct for Members, the remodelling of the Committee of Privileges as the Committee on Standards and Privileges, and the appointment of a Parliamentary Commissioner for Standards.⁵³⁹

In the 1997-98 sessions, the British Parliament created a Joint Committee on Parliamentary Privilege with the broad mandate to review parliamentary privilege and make recommendations. Reappointed with the same terms of reference and membership in the 1998-99 sessions, the Committee presented its report to both Houses on March 30, 1999, and made a number of recommendations calling for the codification of various matters of privilege in statutory law.⁵⁴⁰ The Committee recommended that “place out of Parliament” and “proceedings in Parliament” be defined in statute and that Members of both Houses be included within the scope of forthcoming legislation on corruption. It called for the codification in statute of contempt of Parliament, for the abolition of Parliament’s power to imprison for contempt and for the transfer of Parliament’s penal powers over non-Members to the courts. It recommended the termination of Members’ exemption from attendance in court as witnesses and the abolition of Members’ freedom from arrest in civil cases. It also recommended the replacement of the Parliamentary Papers Act 1840 by a modern statute and suggested that a Parliamentary Privileges Act be passed bringing together all the changes in the law it recommended and codifying parliamentary privilege as a whole.

15 Parliamentary Privilege and Safeguard Human Right

15.1 Citizens Right of Reply

⁵³⁹ May, T.E., *Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 22nd ed., London: Butterworths, 1997, p.82.

⁵⁴⁰ United Kingdom, Joint Committee on Parliamentary Privilege, 1998-99, Report, pp.1-7.

Under Parliamentary privilege's system, some of the people likely are unjustly criticised at some of occasions and even slander, and so a number of remarks can harm the reputation of individuals. However, because of the immunity provided by parliamentary privilege, the damaged reputation of the citizens should not gain legal remedy way to restore their reputation, or to receive compensation.

In view of this circumstance, the introduction of a citizen's right of reply has been canvassed on many occasions on the ground that it would offer some means of reply for people who feel that they have been unfairly attacked under the cover of privilege. The 1984 Commonwealth Joint Select Committee on Parliamentary Privilege concluded on this issue: "We think the only practical solution consistent with the maintenance in its most untrammelled form of freedom of speech and the rights of members of the public to their good reputation may lie - and we emphasise the word 'may' - in adopting an internal means of placing on record an answer to a Parliamentary attack. If such an answer is to have any efficacy, we think it should become part of the record of Parliament so as to carry back to the forum in which the attack was made a refutation or explanation".⁵⁴¹ The Committee recommended that complaints be: (a) subject to rigorous screening; (b) that there be clear limits on what may be put in an answer which is to be incorporated in Hansard; and (c) that complaints are raised directly with the Privileges Committees.⁵⁴²

The Australian Senate in 1988 was the first legislature to adopt a right of reply as part of a package of resolutions relating to parliamentary privilege. A

⁵⁴¹ Parliament of the Commonwealth, Joint Select Committee on Parliamentary Privilege, Final Report, October, 1984, p.55.

⁵⁴² See, Parliament of the Commonwealth, Joint Select Committee on Parliamentary Privilege, Final Report, October, 1984.

detailed account of its method of operation is set out in 1996 report of the Senate Committee of Privileges, but the essence of it is stated by Odgers in these terms:

“A person aggrieved by a reference to the person in the Senate may make a submission to the President requesting that a response be published. The submission is scrutinised by the Privileges Committee, which is not permitted to inquire into the truth or merits of statements in the Senate or of the submission, and provided the suggested response is not in any way offensive, it may be incorporated in Hansard or ordered to be published”.⁵⁴³ The 1996 report says that since 1988 only 22 responses have been recommended for publication. A further five were not proceeded with because the person concerned chose not to pursue the matter after the Committee had made contact. In no case had the Committee refused a right of reply. The relative dearth of right of reply cases was analysed in the report but at the same time the conclusion was reached that “the procedure is both desirable and successful”. In most cases, the report noted, the Committee found that “the persons have been concerned not with vengeance or apology, but rather to ensure that their voice is heard or views are put in the same medium as the original comments were made”. It added that the procedure is usually “quick, cheap and effective” and open to anyone, “regardless of either skill or financial capacity”.⁵⁴⁴

The merits and demerits of a right of reply have been debated in several jurisdictions. In its 1995 report the WA Commission on Government reviewed developments in that State. It noted that in 1989 the Parliamentary Standards Committee had rejected the idea of introducing a right of reply and that in doing so it followed the 1988-89 report of the British House of Commons Select

⁵⁴³ H Evans, *Odgers’ Australian Senate Practice*, 11th ed., Department of the Senate 2004, p.65.

⁵⁴⁴ The Senate Committee of Privileges, 62nd Report, June, 1996, p.17

Committee on Procedure. Perhaps the most serious reservation expressed by both Committees was that, as the rebuttal is likely to appear several weeks after the original allegation, the reply will be robbed of “any immediacy”, with the WA Standing Committee adding that the Senate procedures also “required the drafting of cumbersome regulations which are not easy to interpret in practice and it is difficult to find any evidence to this stage that they have added significantly to the rights available to citizens”.⁵⁴⁵

On the other hand, the Commission on Government found in support of a right of reply, concluding “We are firmly of the view that this innovation is a very high priority amongst the citizens of this State, and is one that is demonstrably workable”.⁵⁴⁶

15.2 Protection of the Human Right of Member of Parliament

Without a doubt, a well-defined system of parliamentary privileges is absolutely necessary for the functioning of a parliament, without which parliaments would degenerate into polite and ineffective debating forums. It is clear that this protection is all the more necessary for parliaments operating in a difficult environment, as is the case in transitional societies. But parliaments do not operate in a vacuum and are largely relyed on their political environment and its respect for democratic and human rights principles. Therefore, it is also clear that parliamentary privilege in itself is not sufficient to create the space of liberty and independence that parliaments require.

⁵⁴⁵ Western Australia, Report of the Parliamentary Standards Committee, Vol 1, 1989, p.55

⁵⁴⁶ Western Australia, Commission on Government, Report No 1, August, 1995, p.385.

In countries with a strong executive dominating the parliament, parliamentary privilege may fail to afford the protection it is meant to provide,⁵⁴⁷ and it is easy to see why: in such parliaments, the Presiding Officer and parliamentary authorities- generally members of the majority party and often inclined to support its interests - may use their disciplinary powers to the detriment of the opposition, censor opposition members for statements critical of the government, suspend their mandate and even expel them from parliament. If Rules of Procedure (Standing Orders) are not handled impartially, the opposition as such may end up being greatly hampered in effectively carrying out its mandate. Moreover, government-dominated parliaments may sometimes find it difficult to accept opposing views, and there have been cases where all - apparently legal - possibilities were resorted to in order to oust opposition members from parliament.⁵⁴⁸ Among the prominent cases is certainly that of the first ever opposition member in the parliament of Singapore, Mr. Joshua B. Jeyaretnam, who was stripped of his parliamentary mandate in 2001 after the then Prime Minister and Foreign Minister and others won a series of defamation proceedings against him, followed by bankruptcy proceedings. The IPU Committee and many other human rights organizations took the view that in making the allegedly offending statements, Mr. Jeyaretnam was exercising his freedom of speech and that, moreover, the sequence and timing of the defamation and bankruptcy proceedings brought against him suggested a clear intention to target him for the purpose of making him a bankrupt and thereby removing him from parliament.⁵⁴⁹

⁵⁴⁷ Background Paper prepared by the Inter-Parliamentary Union, Parliamentary Immunity, <http://www.gopacnetwork.org/Docs/Global/IPU%20-%20UNDP%20Immunity%20Paper.pdf>.

⁵⁴⁸ Background Paper prepared by the Inter-Parliamentary Union, Parliamentary Immunity, <http://www.gopacnetwork.org/Docs/Global/IPU%20-%20UNDP%20Immunity%20Paper.pdf>.

⁵⁴⁹ Resolution adopted by the IPU Governing Council at its 170th session (March 2002).

Moreover, in parliaments with a majority that is obedient to the government, requests for the lifting of inviolability are usually accepted without any resistance, especially if they concern opposition parliamentarians, and the only protection inviolability then affords just covers the time the parliament needs to lift the immunity of the parliamentarian concerned, sometimes just enough to enable the parliamentarian concerned to leave the country to avoid arrest. A good example is the case of the opposition leader in Cambodia, Mr. Sam Rainsy, whose immunity was lifted in February 2005 when he went into exile until his pardoning by the King and return to the country a year later.⁵⁵⁰

Moreover, parliamentary privilege may be of little use if the law enforcement officials are unfamiliar with this institution, fail to respect parliament and its members, especially if they belong to the opposition, and know that they will in any event enjoy impunity for arbitrary actions even if they concern parliamentarians. Examples abound Suffice to mention the situation that prevailed in Zimbabwe in the context of the 2000 parliamentary and 2002 presidential elections, when scores of opposition parliamentarians were arbitrarily arrested and detained for various periods of time, some of them being beaten up and even tortured.⁵⁵¹

Likewise, courts may not always be aware of the privileges attached to the parliamentary office - even though in most countries the privilege of freedom of speech is part of the general and public law and must be judicially noticed. Therefore, they may fail to examine whether or not parliamentary immunity was properly lifted and they are competent to pursue a case. Moreover, in a country

⁵⁵⁰ Background Paper prepared by the Inter-Parliamentary Union, Parliamentary Immunity, <http://www.gopacnetwork.org/Docs/Global/IPU%20-%20UNDP%20Immunity%20Paper.pdf>.

⁵⁵¹ Details may be found in the report on the IPU mission to Zimbabwe, March/April 2004.

with a weak judiciary and deficient rule of law, parliamentarians cannot expect more protection from tribunals than can members of the public.⁵⁵²

The above shows that the general human rights context and the respect for human rights prevailing in a country has a major impact on the ability of parliamentarians, and particularly opposition members, to carry out their mandate, notwithstanding their parliamentary immunity which in such situations may become quite inoperative. One must at the same time note, however, that parliament is a guardian of human rights and thus largely responsible for adopting the laws required to protect and promote human rights and for ensuring that they are implemented and create an environment conducive to human rights. We are thus faced with a vicious circle:⁵⁵³ a weak parliament (weak also because of the failure of immunity to operate) may not be able or even willing to carry out an appropriate oversight function and thus ensure respect for human rights; and this in turn prevents it from acquiring a stronger position. In such a situation, the prospect for a parliament to contribute meaningfully to conflict prevention, conflict settlement and recovery is dim indeed. Any measures designed to improve such a state of affairs must include efforts not only to strengthen the opposition but also to convince members of the majority to carry out their oversight function effectively. A strong and well-understood privilege regime is necessary to this end.

⁵⁵² See, Background Paper prepared by the Inter-Parliamentary Union, Parliamentary Immunity, <http://www.gopacnetwork.org/Docs/Global/IPU%20-%20UNDP%20Immunity%20Paper.pdf>.

⁵⁵³ See, Id.

CHAPTER5. The Privilege and Its Perfect of China's National People's Congress

16 The Connotations and Principles of China's National People's Congress System

16.1 The Connotation of the People's Congress System

National People's Congress System is based on the General Assembly as the center of the National People's Congress, including the government, courts, procuratorate, including the emergence of various state organs, operation and their mutual relations between the entire political systems.

People's congress system is a kind of regime organization according to principles of democratic centralism, by the fact that the democratic election produces National People's Congress and local people's congresses at various levels, taking people's congress as a basis, composing the entire apparatus of state and realizing that the people are the masters of the country. It's also the long-term experience.

Of Communist Party of China in building the political power of the people and it's in line with China's national conditions and people's democratic dictatorship and the nature of the country. The Constitution stipulates that all the powers in the People's Republic of China belong to the people. The organs through which the people exercise state power are the National People's Congress and the local people's congresses at different levels.⁵⁵⁴

This is the core content of the people's congress system. The Constitution also stipulates that the democratic centralism is the fundamental principles of

⁵⁵⁴ People's Republic of China Constitution in 1982, Article 2.

national institutions. This principle is based that all the powers in the country belong to the people. According to the principles of democratic centralism that all authorities belong to the people, the entire apparatus of state are made up of and turn over to the people. According to the regulation of Constitution of the People's Republic of China in 1982, the mainly contents of The National People's Congress are the following:⁵⁵⁵

16.1.1 The National People's Congress and the Local People's Congresses at Different Levels are Instituted through Democratic Election

The National People's Congress and the local people's congresses at different levels are instituted through democratic election. They are responsible to the people and subject to their supervision.⁵⁵⁶ The democratic election is the basis being a democratic centralism and also the first characteristic of the National People's congress. If it doesn't come from the democratic election, it can't be called the National People's Congress. This election is a real commission, which is something that rightfully belongs to the people and the people entrust to their elected representatives, through them to exercise state powers. This shows that the electoral system is an extremely important capacity in the People's Congress system. It shows the origin of the power of the People's Congress, that is, this power comes from the people. People's Congress must represent the interests of the people and will exercise power, be responsible for the people and be supervised by the people. The constituency or the electoral unit can remove the representative that they elect according to legal procedures.

16.1.2 All Administrative, Judicial and Procuratorial Organs of the State are Created by the People's Congresses

⁵⁵⁵ Liuzheng, China's National People's Congress's Characteristics and Its Historical Development, 1990, pp.2-3.

⁵⁵⁶ People's Republic of China Constitution in 1982, Article 3.

All administrative, judicial and procuratorial organs of the state are created by the People's Congresses to which they are responsible and under whose supervision they operate.⁵⁵⁷ This refers to the relationship among People's Congress as an organ of state power and the government, courts and procuratorates. People's Congress exercises the state power, including the legislative power, supervisory power, the right to decide on major issues, elections and the appointment and removal and so on. At the same time, through the formulation of the Constitution and laws, some of the powers entrusted by the people are conferred to the governments, courts, procuratorates and other state organs. They respectively exert the national executive power, judicial power, prosecutorial power and so on. These state organs must not be divorced from People's Congress, or contrary to the will of People's Congress to go along their activities.

16.1.3 The Principle of the Division of Functions and Powers between the Central and Local State Organs

The division of functions and powers between the central and local state organs is guided by the principle of giving full scope to the initiative and enthusiasm of the local authorities under the unified leadership of the central authorities.⁵⁵⁸ This article refers to the relationship between the central and local state organs, namely, the proper separation of powers, to exert both initiatives of the central and local authorities. National and local people's congresses and their standing committees are rather than the leadership but legal supervision system, working links and guidance relations (mainly referring to the electoral process). The State Council leads Local governments at all levels. The decisions that

⁵⁵⁷ People's Republic of China Constitution in 1982, Article 3.

⁵⁵⁸ People's Republic of China Constitution in 1982, Article 3.

National People's congress and its Standing Committee, and the State Council make should be followed by local state organs. At the same time, the local organs have full decision-making powers. In this way, it speeds up socialist modernization both in favor of the unified leadership and easy to exert the enthusiasm.

16.1.4 People's Congress and its Standing Committee Exercise their Functions and Powers Collectively

People's Congress and its Standing Committee exercise their functions and powers collectively, in accordance with the principle of the minority being subordinate to the majority to make the democratic decisions. The Constitution provides authority for people's congresses and their standing committees at all levels. The national events are discussed and decided by National People's Congress and its Standing Committee, and the local events are discussed and decided by local people's congresses and their standing committees rather than by a person or a few to make decisions. This would enable the powers of the state ultimately in the hands of all people. To this end, People's Congress and its Standing Committee have formulated a series of meeting rules and work systems; this is an important element of the people's Congress.

The above four aspects which are dependent on each other constitute the basic content of Chinese People's Congress System. People's Congress System includes not only the systems of the organs of state power also includes the relations between the organ of state power and the people, organs of state power with other state departments, as well as division of national institutions among the central authorities and the local. If we do not understand these, we may incorrectly understand the nature, the status and the role of the National People's Congress and the reason why the National People's Congress is the organ of state power.

Zhou Enlai once pointed out that our system of democratic centralism regime is People's Congress system.⁵⁵⁹ This means that the People's Congress system is the entire power system which is based that the people elect People's Congress representatives.

16.2 The Principles of the People's Congress System

The principle of People's Congress System is referring to the nature and the spirit of the guiding ideology to establish and organize of People's Congress System. According to the basic spirit that the Constitution provides for the People's Congress, the principles of people's congress system can be divided into fundamental principles and organizational principles. The fundamental principle of the people's congress system is that all power belongs to the people and the organizing principle of the system is democratic centralism.

16.2.1 All Power Belongs to the People

All power in People's Republic of China belongs to the people, which mean that people are the root and the owner of all power. Only the people can exercise their powers. Its aim is to ensure that all the state machineries can be controlled by the people. Constitution exerts that all power in the People's Republic of China belongs to the people. The people exercise their state authority through the National People's Congress and Local People's Congresses at all levels.⁵⁶⁰

All power belonging to the people is the fundamental principle of the People's Congress system. The fundamental principle reflects in multi-level: First, the people master the state power through the People's Congress System in order

⁵⁵⁹ Zhou Enlai, *The Anthology of Zhou Enlai*, 1984, p.398.

⁵⁶⁰ People's Republic of China Constitution in 1982, Article 2.

to ensure national laws and principles, policies can reflect the common will of people, and safeguarding the fundamental interests of the people, safeguard that the people are the masters. Second, the people manage state affairs, economic and cultural undertakings and social affairs, in accordance with the law, by various ways and forms, to ensure the development of various undertakings in line with the wishes, interests and requirements of the people. Third, the masses implement direct democracy, the self-government, and their own affairs according to law by the groups themselves, self-management and self-service. Fourth, citizens are equal before the law and enjoy the jurally, broad, full and true self — determination.⁵⁶¹

Regulated by the Constitution of the People's Congress System, the main ones are: the General Assembly deputies to the People's Congress at all levels are elected by the people. It should be responsible to the people, subject to their supervision; the standing state organs which are elected by the people exercise the state power centralizedly and unifiedly, which generate other state organs and supervise them; state organs and state organs workers must accept the supervision of the people; protect national executive organ to obey state power, state organs at lower levels to obey superior state organs, and ultimately to ensure that all country authorities to obey the law.⁵⁶²

So, whether it is the People's Congress System or the system of other countries is around the fundamental criteria how to protect and implement all powers belong to the people to establish and improve. Only people's power and

⁵⁶¹ Yang Jingyu, Study Deng Xiaoping's Thinking on Democracy and the Legal System and Develop into Democratic Politics, <http://news.xinhuanet.com/news>.

⁵⁶² Cai Dingjian, The People's Congress System in China, 2003, pp.79-80.

the rights are protected by the system, not are violated, can people transport their own power and the rights to safeguard and realize their own interests.

16.2.2 Democratic Centralism

Constitution exerts that the Democratic centralism is the organizational principle of national institutions.⁵⁶³ Organizational system of national institutions and their mutual relations system is the People's Congress. China's people's congress system is in accordance with such a guiding ideology of democratic centralism organized. Jiang Zemin pointed out: scientific and democratic decision-making is an important part of democracy, and an important task to build the socialist democratic politics. Decision-making process must be strictly enforced democratic centralism and giving full play to democracy, and seriously listen to different opinions on the basis of the correct focus, to prevent making no decision after a long period.⁵⁶⁴ End-depth understanding to the people, a wide range to reflect public opinions, fully concentrate on their wisdom, and practical value of the financial resources of the people must mechanisms; To make decisions on major matters, it is necessary to the establishment of social conditions and popular sentiments reflect the system, broaden the social conditions and popular sentiments pipeline. Democratic centralism, that is, it is a democratic system, but also centralism system. Democracy is under centralized guidance; the centralism is on the basis of democracy, namely the implementation of a high degree of democracy and a high in the principle of combining.⁵⁶⁵

⁵⁶³ People's Republic of China Constitution in 1982, Article 3.

⁵⁶⁴ Yang Jingyu, Strengthen the Construction of the System in Order to Realizing Institutionalization, Standardization and Procedures of Socialist Democracy Politics, 2002, p.283.

⁵⁶⁵ Xu Dongli, Ji Zhengwen, On Democracy, 2003, pp.197-200.

According to the principle of democratic centralism, the People's Congress System is a concrete manifestation of:

First, in the relationship between the people and the People's Congress, the National People's Congress and Local People's Congress are elected democratically, accountable to the people, and pay people's supervision. Namely, people are the masters of the country, with all the powers of the State, People's Congress elected by the people must be composed of representatives, and to obey the will of the people, act in accordance with the interests of the people, otherwise people are in accordance with the law at any time to replace their own representatives.

Second, People's Congress is the organ of state power, and other state organs, including administrative, judicial, inspection agencies and military organs are produced by the National People's Congress, which are responsible and subject to its supervision. Note here that only the People's Congress is the state power organs by which people exercise their power; other organs are its executive organs. People's Congress and other state organs are in a separate division of labor but not the separation of powers and an equal relationship, and are the relationship to oversee and being supervised.

Third, the relations between the central and local state organs are to follow in the central leadership, and fully play the local initiative and enthusiasm. The aim is to have a unified will and leadership and to mobilize the enthusiasm of the broad masses of people and places their own initiative.

Here is the relationship between the National People's Congress, as an organ of the state power, and local congresses at all levels. On the one hand, local congresses at all levels and their Standing Committees have the constitution to exercise the oversight of the terms. On the other hand, the People's Congress and its Standing Committee should also strengthen the relationship between it and the

local people's congresses and their standing committees, so that the country can play a local role in guiding the work, but also to play a place in the purview of the creative spirit. The fundamental principle of the People's Congress System is that all power belongs to the people, which means that the People's Congress System tables to organize themselves to carry out all activities by the highest standards and should reach the final; democratic centralism is just the guiding ideology to organize People's Congress and the way to organize all state organs. Basically, democratic centralism of the People's Congress aims to combine the relationships between people and representative organs, power organs and executive organs and the central authorities and the local authorities to closely play a whole force.

17 The Necessaries of the National People's Congress Privilege

17.1 In Order to Protecting The National People's Congress' Status as the Highest Organ of State Power

From the previous section we know that the fundamental principle of China's People's Congress System is that all power belongs to the people. All the state organs are serving the people. The consistency of the purpose determines the relationship between them which is cooperation but not confrontation, and between the authorities and the authorities there is no confrontation and hostility. The state administrative organs, judicial and procuratorial organs are produced by the National People's Congress. They are responsible and subject to its supervision, and report to it on the work. People's Congress exercises the unified state power. In this premise, the country's executive power, judicial power and prosecutorial power are distincted clearly. In this way, our country's administrative, judicial and procuratorial organs will be not from or contrary to the will of the People's Congress, and it also enable the various state organs, the law within their respective spheres of responsibility to carry out independent work, and form a unified whole. Therefore, under the People's Congress system, the

state power is the division responsible for co-operation under the centralized and unified.

Under the parliamentary system, countries generally have the legislature, the judiciary and the executive authorities. These differences between the organs in the relations form different political organizations. No matter what formations of political organization require the independence of every organ from other organs eroding, powers possess expansions. On the one hand, this expansion is to the direction of civil rights, thus violating civil rights; on the other direction is to expansions of the other power organs, and will hand over the powers gradually which belong to the other power organs. The former causes the civil rights lost; the latter makes the state power concentrated in a particular organ. And this makes some organs become the sole authority and the constitutional text on the separation of powers no longer exist in real life, and the emergence of “all they have finished ”position. To this end, on the one hand, the need for authorities in different countries to provide a legal and binding mechanism, on the other hand, the need for the various organs of other bodies provides defensive measures to erosion of its powers.

On the representative body concerned, usually with a representative body of public opinion foundation, their behavior is highly democratic legitimacy, and the legality of the conduct of other organs of the representative body as a whole raises less questions, such as the United Kingdom has been exclusion of the judiciary on the constitutionality of legislative review, even review the implementation of the constitutionality of the United States, Germany and other countries, and to make unconstitutional legislation is also very prudent decision. To the legislature to intervene in internal affairs is a very prudent, such as the legislative process of Parliament, the judiciary usually refuses to be reviewed as they are political or Parliament itself issues.

Nevertheless, the executive or judiciary can still be adopted by other means so that the legislature subserves to its will. On one hand, the mandatory by the representatives of the legislatures makes part of the representative in accordance with their wish to carry out its duties, such as to put forward proposals that they want and working through them, and to prevent bills from being passed that the governments, courts do not expect. This will enable the authorities in fact to become the representative of the executive or judicial organs of the client, losing its independence, and the legislative power transfers to other authorities. On the other hand, it interferes to the legislature itself in the activities. Parliament, as a collective resolution of the organs, how to operate effectively, cannot be separated from a series of effective rules and procedures. If the convening and the rules of procedure of the parliament subject to the procedures of other organs, then the independence of Parliament cannot succeed. Therefore, a modern democratic constitutional state Constitution expressly provides that the Parliament enacts its own rules of procedure.

Parliament independence has three different models from the formal point of view.

First, it is the British-style parliamentary sovereignty or the parliamentary extreme mode. One of its features is that only Parliament has the power to enact, amend and repeal laws, and the Parliament's legislative power is without restriction, even out of the constitutional limit. Second, the parliament is higher than the government or the courts; the government and the courts must subordinate and implement parliamentary legislation, and not to against the parliament, and the Legislative Council shall not be negated. This pattern of variation is that the limited Parliament is the supreme body, such as in Germany's parliamentary cabinet system, the German president has the power to review the bill in line with the Basic Law that the Parliament has passed, and he can reject the bill that is against the Basic Law. The Constitutional Court has the right to

review laws passed by Parliament in line with the Basic Law and deny those which are incompatible to the Basic Law.

Second, America-style. The three rights are equal. The United States Constitution does not accept the concept of supreme power. Before it, the status of the country's three major powers that are the legislative, executive and judicial powers and all are full equal. Indeed the legislative power dominates the executive and judicial powers, but in fact the dominant only can be understood as the exercise of their procedural priority. Namely, there must be legislation, and after that we can talk about the implementation and the applicable law. In status, the executive and judicial powers are not only subject to the legislative power, but they can also constraints legislative power.

Third, France-style. Parliament is below the others. After the 1958 Constitution, all kinds of state power were also reorganized. The legislative power is no longer the highest authority, but the president's power was conferred the status of supremacy. The president has the right to supervise all the citizens and state organs to comply with the Constitution, the right to arbitrate the activities of state organs and disputes, the right to guarantee national independence, territorial integrity and comply with its international obligations and the right to submit a bill passed Parliament to referendum. Those powers that President of France can enjoy are regarded as "princiate." That right cannot be enjoyed to any other contemporary head of state in the developed countries. The princiate in France seeks to override the right of the heads of state legislative power. Legislative power is supervised by the princiate, and the disputes with the executive power, judicial power are arbitrated by the princiate. In addition, France's legislative power has been suppressed by the executive power and judicial power which are equal to it. The settings of the scope of the law (that is, on what matters the Constitution on the exercise of legislative power) greatly reduce its activities power; the Constitution of the Committee on Government and Parliament on the legal scope of the contentious jurisdiction, and even the Parliament of the law its

own rules of procedure of the review of the right further limit its freedom. Therefore, all kinds of state power in France, the heads of state power is supreme, while the legislative power has been reduced to second-tier power.

Parliamentary privilege provides system protection for the Council's independence, and prevents the erosion of other organs. National People's Congress privilege has become less function against the illegal invasion of other organs. Its main aim is to ensure its legal status that the National People's Congress is the highest organ of state power and to safeguard the National People's Congress and its Standing Committee to fulfill constitutional powers.

The National People's Congress' Privilege protects its status as the highest organ of state power. The status of this highest organ of state power is different from the independent status of the Parliament under the parliamentary system. In a Western parliamentary system, whatever kinds of independent forms the parliament takes, the courts always do not subordinate to Parliament, but relatively independent organs and can be engaged in the supervision of Parliament. In China, the Court rises from China's National People's Congress, under its supervision and responsible to it. This position of China's National People's Congress reflects that all powers belong to the people. That all powers belong to the people is an inevitable requirement for the people as a whole to exercise the state power. Because the term "people" is a highly abstract word, and is overlooked as individuals between the differences and collections after the formation of the concept. If you want the exercise of sovereignty by the people, you need to understand the concept of by the "people" which contained in the individual. All have to participate in the management of social services and public affairs in the past in order to reflect the will of the people and the only organization in public administration was an integral part of all the people of consent to being local actors. But to obtain the consent of each individual is the behaviour of the whole is impossible, so the only reason of the consent of the majority is to recognize the behaviour of the whole. In reality many people as a

result of widespread, is not by all the people involved in the management, so the Chinese Constitution provides the people through the National People's Congress to exercise the supreme state power. Through democratic procedures, the representative elected by the people, by the representatives of the representative bodies, on behalf of the people and in accordance with the will of the people exercise state power, all people enjoy all the powers, which is unified, complete and integral power.⁵⁶⁶

17.2 Based on the People's Congress' Representative Characteristics

In accordance with Mill's view, to fully meet all the requirements of society is the sole government of all people to participate in government; any participation in, even the youngest to participate in public office would also be useful; to participate in the scope of this size should be everywhere and social progress in general the extent permitted by the scope of the same; only to allow all those who have national sovereignty is a desirable end can be. But since it is in the area and a population of more than a small town society in public affairs in addition to some very minor part all things personally participate in public affairs is impossible, thus can be concluded that the ideal of a perfect type of government must be a representative government.⁵⁶⁷ Therefore, in today's all democratic countries, it is practiced in representative institutions, but also it is elected by the people's institutions, on behalf of the people from exercising their rights. Although the representative institutions in different countries are not the description which is called a parliamentary system in Western countries, in China, it is known as People's Congress system. China's People's Congress system is a kind of indirect democracy manifestations. People's Councils and the West's main

⁵⁶⁶ Shao Zihong, Research on the Privilege of Speech of the Representatives.

⁵⁶⁷ John Stuart Mill, Considerations on Representation Government, London: Parker & Bourn, 1861, p.31.

function are the same. They generally have the power to legislate, that is, to enact, amend, and pass the abolition of the power of laws and decrees. These are the traditional powers, which are played by the legislature that is the main reason for the legislative function.

First, Chinese People's Congress as a legislature makes the will of the people into the law.

Second, it has a wide range of the supervisory power. Government must be accountable to Parliament by the parliamentary oversight, and the Parliament is entitled to exercise the right to a hearing, the right to question, the investigative power, as well as the Budget right to supervise the government, while Chinese National People's Congress is in addition to government supervision, but also can monitor the activities of the judiciary.

Third, countries have parliamentary politics as a citizen; the management of state affairs of the places and institutions, the overwhelming majority of parliamentary representatives are from the grassroots level and multi-elected by the citizens. China's People's Congress is also a representative body of public opinion, which widely ties with the masses and gauge public opinions, through the National People's Congress speeches, motions and suggestions and criticisms, reflecting people's views and demands, linking to the Government and people and enabling the Government better to act for the people. In this regard, the parliamentary privilege protects the parliamentary correctly performs its duties, and this point in terms of China's National People's Congress is also applicable. In other words, the National People's Congress privilege is also the necessary protection to fulfill terms of the National People's Congress.

18 The Main Contents of China's National People's Congress Privilege

In accordance with our constitution, the Organic Law of the National People's Congress and the relevant provisions, China's National People's Congress privilege can be summed up in our country mainly in the following aspects.

18.1 The Freedom of Speech of the Representatives of the National People's Congress

Chinese Constitutional laws in Article 75 of the current constitution ordain the freedom of speech of the representatives of the National People's Congress. It provides that: "in the National People's Congress various speeches made at meetings and voting, from legal action." Article 29 in "The representative law", which was passed on April 3, 1992, also states: "the various speeches made at meetings and voting by the People's Congress representatives, from legal action."

In China, the protection scope of the freedom of speech system can be analyzed from the following four aspects:

18.1.1 The Scope of Man's Protection

The protection of China's speech immunity is limited to the representative itself, not including government officials or other personnels who are questioned by the People's Congress, so the Government officials' answers to the questions, or the speeches, which the experts and scholars make in public hearing, don't have the immunity. Of course, this does not rule out that when government officials in his capacity as representative. When he speaks as a representative, his speeches are immunity. As a government official, he does not have this immunity.

18.1.2 The Scope of the Event's Protection

Solely on the constitutional Article 75th, the scope of the remarks immunity is limited to speak and vote. In accordance with the scholars speeches include incorrect or not entirely correct speeches, and even are proven completely wrong in the end, voting includes passing legal cases, the approval of various reports, plans, resolution, elections, removal, dismissal, question the case, specific issues investigating and all kinds of cases that need to be voted on the motion. When the representative is voting, he does not provide us with the responsibility, from legal action whether to vote in favor, against, abstain from voting, and even invalid.⁵⁶⁸

18.1.3 The Time of the Protection

China's Constitution and the law do not have explicit time to limit to exempt from the protection of the representative's speech immunity by the remarks. According to the legal basis, the premise of the speech immunity should have identity Members. How to calculate the time as a Member? For the time identification of Members elected, generally there are two views: one is to the end of election date, and the other is as Members in the Parliament to exercise. Most scholars believe that the starting time of speech immunity should be from the election results promulgated as a Member, because this time is that the competent national authorities announce the result to the public and after the elected Members must clearly express acceptance to the election results, and the election results are officially confirmed.

As for termination of the speech immunity, the term should be the end of the day. At the same time to clear that the speech and vote as a Member, even if legislators are lost as a Member in the future they need not be responsible for them.

⁵⁶⁸ The Office of the National People's Congress Standing Committee, *The Interpret of Chinese Constitution*, 1996, p.227.

18.1.4 The Location of Protection

That China's Constitution stipulates the "place" of speech immunity as a member is limited to "various meetings". The meaning of "At the meeting," explicitly includes plenary sessions, the delegation of plenary meetings, the Working Group, the Bureau meetings, specialized Committee meetings and various meetings in accordance with the law, as well as the attendance of the original electoral units of the National People's Congress Standing Committee meeting or meetings.

In accordance with the representative of China's law: the representatives of the National People's Congress session of the class work and at this level inter-session activities of the National People's Congress, are the implementation of the representative office (art. 6). The work during the meeting also includes the participation in various meetings, putting forward the proposals, question cases and dismissing case, putting forward the candidates, participating in the elections and vote, proposing various suggestions, making criticisms and comments in aspects of the work and so on.

The representatives' a series of activities during the intersessional period include: aa) to propose interim meeting of People's Congress; bb) to organize and participate in the representatives group of People's Congress at the corresponding level and participate in representatives group of the lower-level People's Congress activities, such as carrying out spot inspections, conducting surveys and researches, understanding of the implementation of the law to listen to the opinions and demands of the masses, to reflect the relevant state organs and so on; cc) to carry out inspection activities, inspection activities are generally in two ways, one is to be arranged in accordance with the National People' Standing Committee to inspect the lower corresponding state organs and related units. During the inspection, the representative may propose to meet the class or the lower-class responsible persons of the relevant state organs. The relevant state

organs responsible or commissioned personnel should listen to the representatives' suggestions, criticisms and opinions; the other is the representative holding representative card in situ inspections. They can make recommendations, criticisms, and opinions to the inspected units, but can't directly address the problems; dd) to participate in the inspection of law enforcement; ee) to keep in touch with the original constituency or electoral units people, to seek and reflect the opinions of the masses, to the departments concerned on criticism, recommendations, etc. ff) to submit written proposals to the national authorities. If in these non-conference space' activities the representatives' speeches aren't properly protected, it will affect the representatives to carry out their duties and play a representative role.

18.2 Freedom from Arrest of the Representatives of the National People's Congress

In accordance with the Constitution and the representative of law, and above the county level people's deputies in the People's Congress session, without the permit of the Bureau of the Conference of the corresponding People's Congress, when the People's Congress is not in session, without the permit of the corresponding People's Congress Standing Committee, may be not arrest or placed on criminal trials. If deputies detainee in cases of flagrante delicto, the Executive Authorities detained should be immediately to the class or the Bureau of the National People's Congress Standing Committee report. On or above the county level people's deputies of the law to take other measures to restrict personal freedom, but also subject to the class or the Bureau of the National People's Congress Standing Committee permission. Representative of Law also stipulates: "The rural townships, towns, the National People's Congress, if arrested by the Criminal Trial Or other provisions to take legal measures to restrict the personal freedom of the executive organ, should be reported immediately townships, nationality townships and towns Congress."From the contents of the above-

mentioned norms of view, the personal representative of the right to special protection system includes the following aspects.

18.2.1 The Protection of the Person

To protect the main body of Immunity and the same expression, the right to protection from arrest is the main body of deputies. Immunity of speech covered by a Member in the parliament of speech and vote, freedom from arrest to cover all the acts of Members, of course, includes the behavior outside the parliament.

18.2.2 The Protection of the Time

Contrary to the privilege of freedom of speech, freedom from arrest only is afforded for the duration of mandate. In other words, the privilege of freedom from arrest is subject to time limits, only when the identity of the deputy can claim that privilege, as soon as the duration of mandate has expired, the deputy of People's Congress may be prosecuted for offences in respect of which People's Congress have not lifted immunity. In such a case, arrest or detention will not hamper the functioning of the legislature.

18.2.3 The Protection of the Way

Personal right to special protection is mainly in the ways: licensing system and reporting system.

“Licensing”, as the name implied, contains the meaning to be allowed and recognized. The “Report” refers to oral or written statements made by the official. There are differences and contacts: The information is just a show that is not necessary to go through the approval of accreditation. It is based on the report. If the departments concerning are not report, there will not be approved by recognized authorities. Therefore, in accordance with the physical protection system in particular the request of the National People's Congress of arrests, detentions and other compulsory measures and the conduct of criminal trials,

detection organ or organs must be to the Bureau of the Conference of the corresponding People's Congress Standing Committee, submit a written report. To the report of putting forward the arrest or criminal trials, only after the Presidium or the National People's Congress Standing Committee permit, the executive can implement the arrest or trial. The implementation is the former report and the executive should be after permission; and criminal detention is due to the urgency of the situation in cases of flagrante delicto can only be detained after the implementation of the Presidium or to the National People's Congress Standing Committee of the report is one of the report before the Executive, the report after the Executive.⁵⁶⁹

18.3 The Power to Review Representative's Qualification

China's current Constitution and laws have stipulated that the National People's Congress' standing committee should establish a deputies' credentials committee, which is responsible for examining the qualification of its deputies. Before 1982, the credentials committee was that NPC's operating mechanism, and only in the period having a meeting there is Representative Qualification examines. In 1982 our country NPC constituent Act provided that the credentials committee is a permanent organ of its standing committee. The local constituent Act revised in 1986 has also done regulation to the above county level local deputy to the People's Congress Eligibility Commission. Credentials committee's role is to review the newly elected deputies of the next qualification review of the by-election is the qualifications of deputies to the NPC session. Credentials committee of the newly elected representatives of the by-election or qualified to carry out the review, submitted to the Standing Committee reviewed a report on

⁵⁶⁹ Su Yuanhua, Some of Questions on Special Protection of People's Deputies.

the outcome, the Standing Committee in accordance with the review of the report to determine the validity of the representative qualifications.⁵⁷⁰

Therefore, the review to the representing qualification belongs to a standing committee of NPC. Credentials committee of standing committee carries out the operating mechanism representing one that qualification examines.

This shows that China's National People's Congress at all levels enjoy the right to exam the representing qualification, and "expel" the unqualified ones. In other words, the right to dispose the unqualified representative belongs to their people's congresses at all levels, rather than their electoral units.

The existence of this system seems that China's National People's Congress has also imposed a certain degree of self-regulation system.⁵⁷¹

18.4 The Internal Organization and Management of the National People's Congress

China's National People's Congress enacts its own rules of procedure to manage their own internal matters. Its main aspects are following:

18.4.1 The Convening of the Meeting

How to hold People's Congress, including the meeting convening, the meeting time, the meeting organizing and chairing, as well as the ways of meeting are decided by the National People's Congress itself. In accordance with the rules of National People's Congress: the National People's Congress is held by the National People's Congress Standing Committee; National People's Congress

⁵⁷⁰ See, Cai Dingjian, *The People's Congress System in China*, 2003, p.238.

⁵⁷¹ Du Qiangqiang, *The Discipline of People's Deputy Should be Changed from the System to Recall to the System to Expel*.

meeting is held in the first quarter of each year; the National People's Congress meeting attended by representatives of more than two-thirds can be held; Presidium presides over National People's Congress. National People's Congress when necessary may hold a secret meeting. Every delegation heads decides to hold a secret meeting, by the Presidium in accordance on the views of all delegations.

18.4.2 Rules of Procedural Matters

The Rules of procedural matters are of the ways and steps to the discussing issues and the guarantee that the People's Congress exercises its power correctly. People's Congress in its own rules of procedure, the item in accordance with their differences, the problem is different from the specific requirements of different ways and steps. But generally speaking, China's National People's Congress proceedings generally include four links, which are the proposing, the consideration and the publication and the vote.

18.4.3 The Management of the Venue

In our country, it refers to National People's Congress to decide who can enter the meeting place. Such as the National People's Congress Rule 17 provides that members of the State Council, the Central Military Commission of the composition of the staff, the Supreme People's Court president and the Supreme People's Procuratorate procurator-general attend the National People's Congress session; other relevant agencies, group's person in charge, under the National People's Congress Standing Committee decision, can attend the National People's Congress session. Gallery can also be set up to allow citizens to observes' the proceedings, but it regrets that the National People's Congress as observers specific approach has not been introduced yet.

18.4.4 The Right to Carry out Investigations

In the course of the investigation, the deputies have the right to ask the witnesses to testify and provide materials. The article 47th of rules of procedure of the National People's Congress provides the "investigation committee to conduct an investigation when all relevant state organs, social organizations and citizens have an obligation to provide it with the necessary materials truthfully."

18.4.5 The Management of People's Deputies

China's National People's Congress on the management of people's deputies is in two ways. First, people's deputies have the obligation of attending meeting. When National People's Congress meetings are held, the people's deputies should attend. Due to illness or other special reasons that they are unable to attend and must leave, the representatives should ask for leave. Second, people's deputies must obey the speech's rules during a meeting. The people's deputies make speeches in the meeting. Each of them is able to speak twice, and for the once, the time is limited to 10 minutes, and for the twice not more than five minutes. The man who requests to speak in the meeting should be in the pre-application to the Secretariat by the General Assembly, the Executive Chairman to arrange the order of speakers; in the plenary Assembly ad hoc requests to speak, by the General Assembly, and the Executive Chairman of license arranges the order; members of the Presidium and the representatives of Head of the delegation elected who speak at each meeting, each of them is able to speak twice on the same subject. The first is not more than 15 minutes, and the second not more than 10 minutes. Under the permission of Conference presenters the speaking time may be appropriately extended.

18.4.6 The Right to Issue Records of Meetings

During the National People's Congress, the various speeches made at meetings by the representatives organized briefly are issued by the meeting and in accordance with his own request, will make a statement or summary of the issuance of meeting records. National People's Congress has press conferences.

19 The Problems and Improvements in China's National People's Congress Privileges System

19.1 The Improvement to Speech Immunity

Some academics have suggested, “Since the implementation of the Constitution 82 years, in China there is a rare occurrence in practice related to the National People’s Congress of speech immunity legal issues. One of the reasons is that part of the National People’s Congress did not really fulfill its obligations as a representative organ should be the responsibilities, and many powers are expressly granted by the Constitution which has not been exercised. Even the right of legislative and budgetary accounts of which the most should be the regular exercised are only dealt with by the authorities in some country authorities or some experts have proposed, that the National People’s Congress performs the legal recognition of procedures, and gives them the legal effect. In this case, the National People’s Congress’ actions are relatively limited, because the acts of the limited immunity of speech also did not reflect its role.”⁵⁷² At this point, the National People’s Congress did not perform well the obligations entrusted by the Constitution. The reasons can certainly be deserved a closer study. However, no doubt, as the protection of the National People’s Congress to fulfill the obligations, the privilege system does not play its due role. Rather than the cause for effect should be the privilege of China’s National People’s Congress failing to play properly perform their duties to protect Parliament, its failure to effectively prevents other agencies to interfere in the work of the National People’s Congress. To this end, the need to improve China’s National People’s Congress system privileges, so that it truly becomes the protection of the National People’s Congress to fulfill its functions.

⁵⁷² Shao Zihong, Research on the privilege of speech of the representatives.

Deputies speech immunity perfects, mainly due to the expansion of the speeches the scope of protection of immunity. While the parliamentary system of countries, in view of parliamentary privilege in practical applications often abuses the situation, the protection of speech immunity narrows the scope of the trend, such as the United States, in the Brewster case, the U.S. Supreme Court will be the conduct of members of Congress divided Legislative and political acts, including that legislative acts of speech should be members of Congress to protect the scope of immunity, political acts of non-application of this right to object, without suffering from the right to protection. In Germany, Federal Law No.46 chapter1, the 2nd sentence clearly states that “However, unless defamation.” But China’s situation is exactly the opposite. In China’s National People’s Congress of the exercise of their privileges, not to mention the abuse of it, so, for us, the freedom of speech should be to further expand the scope of immunity protection, through which representatives of the courage to exercise their some terms of reference.

19.1.1 The Protection is not Limited to the Deputies

First, with the diversity of legislation, technical legislation to increase, China’s legislative activities and the increasing complexity and professionalization, legislative assistant system in our country has shown initial signs of clues. In 2002, in Shenzhen, China, first experiences the legislative assistant system. Now in Shenzhen, the legislative assistant system is being “copied” to the various regions. Now the question is: whether should it be in China extensively explained that the scope of the freedom of speech extends to the main legislative assistant? A more common view is that China’s legislative assistant fundamental work is to provide advisory services to deputies. There is no participation in the legislative process to discuss the power of voting and not playing the same role with the National People’s Congress, which is not necessary for the expansion of legal interpretation and their inclusion in the scope of exemption of speech. Second, the National People’s Congress and its Standing

Committee provide evidence whether the immunity of speech should be subject to the protection they need. Because the National People's Congress and its Standing Committee give evidence in favor of the National People's Congress tasks, only to provide evidence to effectively protect people, they will be possible "to know all words." Witnesses to provide evidence of impunity, is not only conducive to the smooth development of the work of the NPC, the NPC will also save the cost of searching data.

19.1.2 The Expansion Explains of "Speeches"

The protection of speech immunity is the people's representatives "of speech", which is a statement of the facts and the expression of opinion. They are not a "simple act" which does not belong to the scope of the protection. This section (i.e. Section 75 of the Constitution) only guarantees by the expression of speech, rather than contribute to the speech act.⁵⁷³ Exemption can not be mechanically interpreted as an oral speech, a debate and a vote in all its forms, but should include other forms, such as a written report and the electoral voting behavior. In short, that is made by the members in Parliament, and parliamentary responsibilities related acts should be broadly interpreted as a legal speech and voting saying.⁵⁷⁴

But the problem is how to distinguish the differences between the "simple act" and the "speeches". Representatives' words and deeds are to be protected. For the People's Congress system function and his relationship between them, it is not only the Representatives' expression, but to fulfill the constitutional mandate, and has its own purpose. Therefore, the "speech" would mean the wish to a broad

⁵⁷³ Lin Qingwei, Shen Shaoyang, The Scope of the Freedom of Speech of Representatives of People's Congress.

⁵⁷⁴ Shao Zihong, Research on the Privilege of Speech of the Representatives.

interpretation; its work covers such areas as “implied” acts. It should extend to the so-called “body language”, for example, in discussion or vote on the motion deeper differences, which occur in discord, quarrels, shouting, or even twisting pushing and hands-assault cases. Strictly in a word, it is also the “political aspirations” of a form of expression with the ordinary “simple act” study different. In principle, it should be able to as “the expression of opinions” a way for speech protected by immunity. It is noteworthy that the differences between a “simple act” and the “speech” are essentially the fact that the issue of how to make a choice is not easy; the key still lies in “whether or not related to official duties.”

“Speeches” needs to carry out their duties and related issues. Some scholars believe that the remarks in a meeting and vote, saying that their job-related speech and a vote concerned have nothing to do with their freedom of expression and vote, are not included. Because the aim of representatives privilege conferred by Constitution is to enable them to fully express their views on their duties. The respect and no cover in order to fulfill its responsibilities and duties unrelated to the speech and vote are not necessary for the protection and the lack of being special reasons to be protected, since the cases are not protected.⁵⁷⁵ In Japan, the Constitution says the academic world also believes that the acts should be exempt from duties on the Department to conduct a line there. So even if members of Congress in the National Assembly by the acts which, if not an act of duty, while the department is an individual act, not to be exempt from the scope of, for example, purely murmur or ridiculed like to play tricks on words, not in being subject to the scope of exemption.⁵⁷⁶

⁵⁷⁵ Lin Jidong, *One by One Interpretation of the Constitution of the Republic of China* 1993, p.454.

⁵⁷⁶ Huang Dongxiong, *The Japanese Diet's the Freedom of Speech and Self-discipline of the Congress*

Scholars have also expressed oppositions to the view that is service-related, difficult to define, if the focus on the multifaceted nature of their duties and in fact no law can be clearly defined duties⁵⁷⁷ In my opinion, freedom of expression is the people's immunity to perform their duties on behalf of a security measures. If its representatives will not be able to perform their duties well, there is a professional exemption, which is intended to ensure that Members can smoothly carry out their duties. Therefore, although the representative of the broad is difficult to distinguish, but can not be generalized to the remarks made on behalf of all that are carrying out their duties, the equivalent of speech on behalf of all is in carrying out their duties then, and the remarks on behalf of all the protection are given immunity. Therefore, the immunity does not protect the speech and execution on behalf of their duties unrelated to freedom of speech, such as the meeting time to rest, and purely private chat, jokes and so on.

19.1.3 The Meaning of “Meeting”

In China, the legal rules are that representatives make on “various conventions of National People's Congress” and vote the investigate and deputies to the National People's Congress, Standing Committee of the National People's Congress “in the representative assembly of people all over the country and Standing Committee of the National People's Congress upper making a speech and voting may not be called to legal liability”. However, the regulation can not be explained that speeches or votes only in National People's Congress' building or Standing Committee of the National People's Congress' building speech are able to exempt from legal liability, but it should be interpreted to deputies who may not be called to the legal account for their speeches or votes at various meetings, which of place can not be restricted.

⁵⁷⁷ Chen xin min, *The Basic Theory of the Fundamental Rights of the Constitution*, 1992, p.262.

NPC has many authorities. A few functions among them fulfill requires that the Committee has bigger maneuverability. This becomes indispensable to hold out of the NPC and its standing committees. As a member of these committees, the speeches and voting of them in these conventions do not shoulder legal liability. In China, is the deputy announces to the outside in an open manner after the meeting, also same not “legal responsibility” for them?

In the United Kingdom, once there were the legal statutes: Any meeting records with discussing official business that parliament orders come out even if the precis writer, having slander words, adopting on the congressman don't accuse that; But, the congressman cannot enjoy remarks relief protection if whose self's words announcing in congress inner are announced in an open manner outside the yard. In Germany, announcing in federation House of Representatives print matter if Congressman addresses inquiries to the person, but with individual name behavior announcing in newspaper and periodical press, the guarantee accepting remarks relief right neither. In Japan is also the same, if the congressman uses printed matter with delivering a speech, discussing that or voting that in what congress does or does not think that the guarantee has other remarks relief right when the method is in publications.

It can be seen that the remarks of members are announced by parliament inner abroad in connection with congressman's general, privately to the outside open announcing, the protection not accepting remarks relief right then. Also there are scholars advocating that in our country, what way to being relating to a deputy to the People's Congress with the person in National People's Congress's words, disregarding with, if announce time in name in an open manner with personal friends or relatives outside the meeting, the guarantee should follow the example of legal institutions of the foreign countries, and should not admit that this also accepts the protection of freedom of speech. The setting of freedom of speech is to have the specially appointed applicability's, and its purpose depends that the representative can use up its duty on National People's Congress and various

conventions of Standing Committee of the National People's Congress of the People's Republic of China, co-determination forming National People's Congress and Standing Committee of the National People's Congress of the People's Republic of China ultimately.⁵⁷⁸ The author thinks that privately open publication sends out convention content after the meeting, which deals with the right that the constituency knows, also involves the problem arriving at relative person right of privacy. Otherwise besides congressman individual is member of convention therefore, generally speaking, with his voting during the period of convention, using written or self's words announce, unless having the legal basis or reason, he still takes responsibility for it. The deputy of the People's Congress has the legal duty to communicate the convention spirit to the unit and the masses in time after the convention is over. It requires that the representative announcing whose convention content on self's own initiative. In practice, represent for the duty finishing fulfilling self, the form also adopts itself to publish a brief report to communicate convention's spirit and content to the constituency. Therefore, our country deputy to the People's Congress announces whose remarks going ahead in convention privately, whether or not should are protected by freedom of speech, which depends on if the person are connected with the duty of fulfilling a representative.

19.1.4 The Meaning of Dispensing the Legal Liability

In China, the speeches of exemption "from legal action" refer that any institution or individual isn't allowed to account for their criminal, civil, administrative and all legal responsibility of the representative's "speech and voting". Therefore, this is primarily a responsibility to dispense justice.⁵⁷⁹ In

⁵⁷⁸ Lin Qingwei, Shen Shaoyang, *The Scope of the Freedom of Speech of Representatives of People's Congress*.

⁵⁷⁹ Cai Dingjian, *The People's Congress System in China*, 2003, p.204

China, whether should the National People's Congress' speech immunity also include exemption from disciplinary action? In the affairs of political parties, they take turns ruling the country, inspired the struggle between political parties, various political parties in general for the Party Members in the parliamentary speech and vote a certain discipline, sanctions for violators. In such circumstances, there is generally regarded as the party discipline is that the scope of autonomy of private law, public authority must not interfere. Such as British Prime Minister on the Party speaks in Parliament without the implementation of the party's decision to discipline can be brought to justice. Therefore, the remarks made by Members tend to be bound by their party. In China's current political system, the discipline of a person to be punished often means the end of his political life. If the representatives of party members and the vote by the party faces the risk of punishment, which is bound to be circumspect and makes it difficult to speak their minds, and of speech guaranteed by the Constitution on behalf of the significance of immunity equal to zero. Moreover, in China, the Chinese Communist Party members at People's Congress of all levels have maintained a stable absolute majority. We simply will not model some countries, which political parties are evenly matched, the fight against violent circumstances, Members of the party to take strict discipline. As regards government discipline, not only existing the same problem as party discipline, but also this would override the executive authority so that the Government has taken on a counter measure and even get a means to interfere in the People's Congress. This goes against our country's political system.⁵⁸⁰

19.2 Perfect Speech from Arrest

19.2.1 The Meaning of "Other Measures of Restriction of Personal Freedom"

⁵⁸⁰Miao Lianying, Reseach on the Freedom of Speech of Representatives.

From the Constitutional point of view, then there are only two provisions of the arrest and criminal justice. The local organizations on the basis of the law increased a criminal detention. In the 30th article of the Representative Law, after it reaffirms the Constitution and local organizations provisions, it adds provisions to people's congress deputies above the county level, "If the law takes other measures to restrict personal freedom, it should be permitted by Presidium of the current session People's Congress or People's Congress Standing Committee."

It should be affirmed that the above-mentioned provisions in the Representative Law subject to enrich and develop the system on non-arresting right of China's National People's Congress. But "other measures of restriction of personal freedom" is a very broad concept which actually includes the measures so far there is no clear provision, or a uniform interpretation of the authority. In addition to the Constitution and the Organic Law and the Representative Law, "representative's speech", edited by Comrade Zhang Chunsheng mentions the residential surveillance, released on bail pending trial, administrative detention and judicial detention that are classified as "other measures to restrict personal freedom". When it applies to National People's Congress, it also should be subject to licensing. However, because of its theoretical explanation is the lack of appropriate legal basis, at present, it has not been implemented in practice.⁵⁸¹

Some scholars believe that the adoption of legal interpretation recommended will be provided for all laws and regulations covering the restriction of personal freedom in the "other measures which restrict right to freedom of the person", at the same time, depending on the different circumstances, to distinguish three types of approval procedures:

⁵⁸¹ Su Yuanhua, Some of Questions on Special Protection of People's Deputies.

First, without license of the Presidium or the National People's Congress Standing Committee's at the same level it can't be done, such as issue a warrant, under house arrest, release on bail, administrative detention, judicial detention, asylum Education, re-education through labor, etc.;

Second, in case of emergency measures must be taken before the Presidium or the National People's Congress Standing Committee report, such as the forced repatriation, mandatory intercombination, mandatory drug treatment and so on;

Third, it does not need the permission by the National People's Congress or report to the National People's Congress, but after the National People's Congress should be informed of the measures, such as infected persons, such as compulsory quarantine measures.⁵⁸²

This article holds that the purpose of freedom from arrest is to protect people's deputies from attacks, retaliation, and frame-up on basis of political motive, and to ensure the smooth discharge of their functions. In accordance with the "law of the other measures to restrict personal freedom" to understand the literal meaning, China's National People's Congress the right to protection from arrest is not limited to criminal cases, including civil, administrative proceedings, as well as procedures for administrative penalties, such as restrictions on the personal law freedom, it can be said of China's National People's Congress the right to protection from arrest a very wide range. Specific: If the Code of Criminal Procedure and Civil Procedure Act issue a warrant, assembly demonstrations forced repatriation law, Health and Quarantine Law and the provisions of the Communicable Disease Prevention Act of Infected staff compulsory segregation, the Administrative Punishment Law provides that the administrative detention, or

⁵⁸² Su Yuanhua, Some of Questions on Special Protection of People's Deputies.

even and supervision departments to monitor the law adopted in accordance with the “double that” measures, the party’s Discipline Inspection Commission, to take the “double regulations” measures and so on, are to varying degrees, limiting personal freedom, which should be in line with “the law of other measures to restrict personal freedom.”

As for whether there is a need to adopt different measures according to different approval procedures, which should be deliberate. The consequences of doing so would be contrary to the purpose of established non- arrest. In such a classification, for the purpose of the judiciary without permission of the National People’s Congress arbitrarily restricts the freedom of people’s deputies found a comparatively convenient way. Subsequently the National People’s Congress also fails to a clear means of relief. Well, freedom from arrest will be faced with the risk of becoming a dead letter. Faced with different measures of restriction of personal freedom, we can learn from the practice of the German Federal Parliament. The National People’s Congress in the exercise of the permission right for certain types of restriction of personal freedom measures can take the way of prior general permission.

In Germany, since 1969, the Federal Parliament at each General Assembly session the first time on the abolition of the adoption of a decision from the power of arrest, the Parliament allowed that members may be preliminary investigated in terms of Federation’s criminal act (unless it is a Penal Code section 185,186,187 provides the political nature of the abusive behavior), as well as traffic offenses and minor crimes the right to cancel the protection from arrest. In addition to confidentiality, the competent public prosecutor must inform the Federal Parliament to adopt the preliminary investigative procedures. Procedures must be taken within 48 hours notice of the Speaker, and then the Speaker in accordance with Rule 107, paragraph 1, referred to the election review of immunity and Committee on Rules of Procedure.

Federal Parliament of the reasons for this approach lies in the fact that the right to protection from arrest is not always, but very few for the protection of individual members elected. The representative does at first, even if it is a small violation of traffic laws of publicity; which involves not only the reputation of its members, but also involves the reputation of the legislature as a whole.⁵⁸³ With the permission of preliminary investigations, the right to protection from arrest does not affect the actual purpose. With the permission, it's possible to make the parliamentarians and other citizens to reach the ideal of equal status.⁵⁸⁴

This is in fact also that there are a number of objections to the point of view. The German Federal Constitutional Court believes that the first session of Parliament in the beginning to decide the general waiver of immunity, which will directly affect the status of Members. The preliminary investigation for Members is generally abandoned the protection of freedom from arrest, which would undermine his capacity as Members of our rights, or because it did not grant permission to carry out the review of special circumstances, or because the prosecutor's notice and began to conduct preliminary investigations of the period to be short for 48 hours, he also could have started proceedings do notice and do not require a preliminary investigation to determine the specific link. And such practices are inconsistent with the Constitution.⁵⁸⁵

However, in the mainstream academic point of view or support the practice of Parliament that the work and functions of Parliament, namely the right to protection from arrest is not the purpose of the overall result of this permission be damaged. In the criminal prosecution of some aspects of licensing restriction

⁵⁸³ BT-Drucks. V/3790, S. 1.

⁵⁸⁴ BT-Drucks. V/3790, S. 2.

⁵⁸⁵ BVerfG, NJW 2002, 1111 (1112)

Parliament vision appears to be on the grant of the right to license intending to simplify procedures, the Parliament to retain this power, because the Basic Law Article 46, paragraph 4 (Members to take any criminal proceedings,) as well as Article 18 of the Basic Law provided for any act, no arrest and detention of individuals for their personal freedom of any other restrictions, if approved by the Federation Council, it should immediately stop. The Federal Assembly can exercise the powers at any time. Members of the status of the individual poses a serious violation of the circumstances, the Council retained the power of a single license.⁵⁸⁶

19.2.2 Lifting the Freedom of Arrest

In china, the right to lift the arrest is enjoyed by the Presidium or the National People's Congress Standing Committee. That is, only during the National People's Congress the arrest of the representative or restriction of personal freedom to carry out other measures is permitted by the Presidium of current session of the National People's Congress; the National People's Congress is not in session, the licensing authority for the NPC Standing Committee. Presidium or the National People's Congress Standing Committee on the request for arrest or criminal trial deputies' application form must be based on the collective study session to make a decision.

Worthing further exploring is the criteria that National People's Congress permits is to take political censorship or legal review, or is the form of review or to carry out a substantial review. In Germany, the Federal Parliament from arrest permits the review taken by the political standard of review. That is "no need to review the evidence in the Federal Parliament. No subjecting to arrest objective is to ensure that the reputation of the federal assembly and function. From arrest or

⁵⁸⁶ Vgl. Dieter Wiefelspütz, Die Immunität des Abgeordneten, DVBl, Ausgabe 18, 2002.

elimination of the right to maintain the decision is a political decision, in essence does not involve the pending procedures, it does not need to identify legal or illegal, guilty or not guilty. Relating to the key political decision is based on the interests of Parliament and other organs of power between the interests of balance of interests. Therefore, it does not need to review the results of the fact that the law of evidence.⁵⁸⁷ “However, the use of pure standards of the drawbacks is that a big parliamentary majority have occurred against a small number of cases. Therefore, in Germany, involved members of federal parliament refused to accept the licensing decisions can be made to the Federal Constitutional Court.

Based on this understanding, this paper argues that, because of the NPC of China to permit a decision, the deputies involved have no right to sue, so the National People’s Congress in the exercise of license when not completely taking the political criteria, we should also give due consideration to legal standards. Specifically from the following three aspects can be reviewed. First, the process is legitimate, legal procedures are complete; Second, there is a proof that the perpetrator have carried out criminal acts or other violations of the preliminary evidence; Third, it would affect the National People’s Congress Standing Committee meeting or you can proceed smoothly. On the second point, the NPC is not clearly identified as long as there is no evidence, not a deliberate retaliation, the authorities should not refuse to apply for an application, the National People’s Congress has no right under the existing evidence and to apply for authority to judge completely different, because the National People’s Congress has no right to replace to apply for authority to exercise powers of arrest or restriction of personal freedom to take other measures.

19.2.3 The Meaning of *Flagrante Delicto* and Reporting System

⁵⁸⁷ Id.

“Flagrante delicto” is generally talking about our preparation for a crime, the implementation of crime or immediately after the crime was discovered one of the following situations “major suspects.” It Should also be regarded as a “flagrante delicto”: the victim or the presence of people who see their criminal identification, in the side or residence found evidence of a crime, the crime of attempted suicide, escape, or at large: It is destroying or fabricating evidence, or the practice of collusion may in. Be “brought to the license” to take measures of people’s deputies are often the economic aspects of criminal suspects of economic crimes is the same as “flagrante delicto”. Some scholars believe that, in general. Economic crimes, whether it is being implemented or have been implemented, once discovered, should also be regarded as a “flagrante delicto” because of its existence before closing the investigation may impede Moreover, the permission of the National People’s Congress confirmed the review was mainly on behalf of identity, whether or not to review cases involving the National People’s Congress exercising their functions and powers, rather than getting to the bottom of the case itself.⁵⁸⁸

Freedom from arrest as a result of a crime the right to exceptions provided for in our country in such circumstances, the executive arm can be detained after the implementation of the Presidium or to the National People’s Congress Standing Committee of the report. Practice relating to the reporting system, there are two different views on the main:

The first, the implementation of the detention of the public security organs should be after the report of the Presidium or the National People’s Congress Standing Committee approved? If the Presidium or the National People’s

⁵⁸⁸ Li Guoliang, Sun Fengtao, On Several Specific Questions of the Special Protection of Deputies of People’s Congress.

Congress Standing Committee do not agree with how detainees do? Secondly, In addition to public security organs and public security organs to exercise the functions of other organs (such as national security authority), other organs of people's deputies to enforce the criminal detention should not be to the Presidium or the National People's Congress Standing Committee report? The first question, I believe that the laws respectively provided for the licensing system and reporting system, that is, they might take into account the differences between the two. The main difference of licensing system and reporting system is that the former must be approved, while the latter is not subject to authorization. Therefore, in cases that flagrante delicto report is first detained, only a message to the detention is to inform the representatives of what has been arrested. The license does not contain much meaning. It can only deal with the record without having to go through the National People's Congress meeting in the form of to make a decision.

The second question, the revised Criminal Procedure Law has clearly stipulated that only the public security organs (including the exercise of the functions of the public security organs of the body) the right to impose detention, other organs (such as prosecutors) cases will be tried in a public security organ. Therefore, any emergency situation in criminal detention under the National People's Congress, should be immediately report by public security in the implementation of detention organs to the Presidium of the corresponding People's Congress or its Standing Committee, and there is no problem that other executive agencies should report.

19.3 Establish a Disciplinary System of the National People's Congress

Any of their rights, there will always be the possibility of abuse. Parliamentary privilege is equally likely. To this end, as noted above, the Inter-Parliamentary privileges have discipline; the Parliament itself even on other personnel can be punished directly. In China, the National People's Congress on how to properly exercise their rights on behalf of the provisions, such as the rules

of procedure of the National People's Congress of China's 50th article stipulates that "in the General Assembly plenary sessions, each of them is able to speak twice. The first is no more than 10 minutes, and the second no more than five minutes. Requesting to speak in the Plenary Assembly, it should be in the pre-application to the Secretariat by the General Assembly, the Executive Chairman to arrange the order of speakers; in the plenary Assembly Ad hoc requests to speak, by the General Assembly, the Executive Chairman of license exceed the floor. "The fiftieth stipulates that" members of the Presidium and head of the delegation or the delegation of elected representatives of the Presidium to speak at each meeting, each of them able to speak twice on the same subject, the first not more than 15 minutes, the second is not more than 10 minutes. With the moderator's permission, speaking time may be appropriately extended. "However, the abuse of rights of deputies to the NPC, the NPC has the right to a lack of appropriate penalties.

In contrast, China provides for the removal of the system of people's deputies. That is, the provisions of the original electoral units or voters can recall their elected representatives (Election Law Article 43), provinces, autonomous regions and municipalities directly under the Central People's Congress removed from the office by the elected representatives of the National People's Congress. The National People's Congress during the recess, the National People's Congress Standing Committee will be removed from office level people's congresses elected National People's Congress (NPC Organization Act No. 45). This reason that lies in the provisions of the representatives of the recall is that this is where socialism is different from capitalism. Comrade Dong in 1951 the first county in North China to address the Conference on members of Congress pointed out that the bourgeois candidates elected by fraud, break off relations with the voters of

our voters on behalf of the incompetent, you can at any time replace him.⁵⁸⁹ In such an attitude, China's candidates are the Department of the electoral law that provides for removal of the representative system.

The original electoral units can be used to the dismissing process to make them take responsibilities, because people's deputies elected are based on the people's trust (in the case of indirect elections they are as representatives of the people's deputies), when their actions have lost the trust of the people, that is, the identity of their representatives are removed.⁵⁹⁰ The penalty to the representative by the original electoral units with is in line with the People's Congress system. However, both in theory and in fact, there still exists some problems.

In theory, the dismissing system decides that the representative is difficult to defy the will of the voters' expressions, for as long as voters who are not satisfied with the representatives can remove them from the office. Who would like to run the risk of being ousted the representative to be contrary to the will of the electors --although its actions are consistent with the long-term interests of the electorate?⁵⁹¹ "Because the representative should instruct the will of the voters, he will not be unable to use his own experience and knowledge to exercise his powers to benefit the country."⁵⁹² Thus, in the dismissing system, the representative of the electorate has become the "mouthpiece". As a representative, he only follows the will of "voters" and takes their judgments as his own judgments. In some cases, the representatives limit their own hands and feet, in

⁵⁸⁹ See, Dong Biwu, *On the Socialist Democracy and the Rule of Law*, 1979, p.30.

⁵⁹⁰ Shao Zihong, *Research on the Privilege of Speech of the Representatives*.

⁵⁹¹ See, He Huahui, *The Theory and Practice of the People's Congress System*, 1992, p.83.

⁵⁹² See, Wang ShiJie, Qian DuanSheng, *Comparative Constitutional Law*, 1997, p.198.

order to be faithful to the interests of voters. In other words, they are faithful to the public interest of the electorate. That may also be necessary.⁵⁹³ However, if the purpose is to select the representative who is higher than ordinary voters in the knowledge and in any aspects, sometimes they should look forward to the views of representatives are different from a majority of voters, and often their views are correct. It can be concluded that: If the voters insist on absolute compliance with their views as the first condition as a representative, it's unwise to do so.⁵⁹⁴

In fact, China's dismissing system, particularly the electoral units conducted by the dismissing system, is largely passive. The representatives break laws first, then to remove them. When a representative has been identified as the existence of criminal cases, the removal of its representation will then follow. Therefore, the dismissing system to the representatives in the electoral units seems to have become in the detection of criminal acts the course of a "routine" stage, because the representative has been suspected of committing a crime. They have to be removed from the office.⁵⁹⁵ This will not be intended to remove the system, that is, the dismissing to the representative should be pro-active by the electoral units -- if the representative is no longer represent public opinion, and then he will be lost as a representative of the qualifications.

We cannot deal with all acts that the representatives abuse their rights by the dismissing system. "Because every time recouring to the people, it means that the Government has some shortcomings. And it will in large measure to enable the

⁵⁹³ John Stuart Mill, *Considerations on Representation Government*, London: Parker & Bourn, 1861, p.91.

⁵⁹⁴ John Stuart Mill, *Considerations on Representation Government*, London: Parker & Bourn, 1861, p.90.

⁵⁹⁵ Du Qiangqiang, *The Discipline of People's Deputy Should be Changed from the System to Recall to the System to Expel*.

Government to give time to lose the respect of everything. Without this kind of respect, perhaps the most brilliant and liberal government will not have the necessary stability.”⁵⁹⁶ Therefore we cannot rely on the original election units entirely to conduct that the representatives abuse their rights. In practice, only when the representatives are suspected of committing a crime, we file the dismissing process. Therefore, solely to rely on the dismissing process, it will make the representatives of China’s National People’s Congress super-citizens in theory. Because, according to China’s Constitution’s speech immunity provides “dispensing the legal liability “ and actually “ Members on the privilege of free speech is definitely not on the Members to speak against moderation and laws; the Members exercise their duties, of course, to agree with the Constitution and laws, and should be subordinated to the rules and orders of the People’s congress. The speeches against these, other laws and regulations, are breaking the law. Only the Parliament itself is able to impeach and crack down on his unlawful. Out of the Congress, no matter what the powers are is not allowed to ask their responsibilities.”⁵⁹⁷ However, China’s National People’s Congress is lack of internal punitive measures the abuse of speech. And it is impossible to conduct any cases for any remarks on the speech abuse.

In fact, the more popular view is that immunity does not protect the representative’s the illegal and criminal acts, that is, the representative at the meeting because of the speech constitutes a crime, you need to pursue their legal obligations. This takes back the privileges that the constitution and the law bring to the representatives. This is the reason that in China’s National People’s

⁵⁹⁶ James Madison, Alexander Hamilton, John Jay, *The Federalist papers*, Penguin Classic, 1987, p.162.

⁵⁹⁷ Zou Jingfang Translate, *Meinongbudajie’s Parliamentary System*, 2005, p.386.

Congress the representatives are ashamed to express their point of view, and the speech immunity rarely has legal cases.

In fact, Constitution which stipulates “dispensing the legal liability”, infers from reverse side that “dispensing” points to the action that should be responsibility for but owing to democratic principle of constitution is exempted specially. If the original act is lawful, there is no defence, nor is it necessary to stipulate the constitutional immunity. It is logical and inevitable conclusion to explain. Taking Criminal liability as an example, the remarks which are already constitutes a crime should be exempted from legal liability. For example, the nature of the act constitutes an insult to the crime of criminal law or defamation, but as deputies to fulfil a statement of responsibility, they are exempted from penalty specially. Therefore, if the act of a representative has constituted the elements of crimes, and that it has gone beyond the limits of immunity and thus that the criminal responsibility, it’s contradictory in theory, and it’s against with the purposes of the constitutional guarantees.

In addition, the recall system does not apply to persons other than a representative. The public gallery of the General Assembly of the audience, as well as Chairman of the General Assembly, government officials disorderly conduct, the National People’s Congress can only have recourse to outside police forces be punished, because the police outside the National People’s Congress did not heed the command, so the police just an effect of exercise its terms of reference, the National People’s Congress may not be able to continue.

For this reason, it is necessary to provide their own disciplinary powers by the National People’s Congress. Although countries in the parliamentary system of disciplinary powers by parliament take an extremely cautious approach, but as a potential deterrent measures, or other staff members have some warning, so the disciplinary powers by the National People’s Congress is rather a preparation and not waste measures. In order to make the disciplinary measures to be implemented during the meeting, the National People’s Congress wishes to have a command of police powers.

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