

CONTRARIETY BETWEEN LEGISLATURE AND JUDICIARY VIS-A-VIS PARLIAMENTARY PRIVILEGES: SOME SUBMONITIONS FOR PERFECTING THEIR COHESION*

*Aman A.Cheema** and Ashish Virk****

1. Introduction

In the changed political phenomenon after the 1967 elections, a tendency has grown in some quarters that views one organ of the State as superior to the other. Every organ of the State - the Legislature, the Executive and the Judiciary - has its own place and role under the Constitution. It is wrong to presume supremacy of one over the other. As a matter of fact, it is the Constitution which is paramount. The aspirations of the Constitution are to secure to all citizens - justice, social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and of opportunity and fraternity, assuring the dignity of the individual and the unity of the nation. All the organs of the State are enjoined to promote and secure these aspirations for the people. The ultimate source and sanction of the Constitution is the public - the people of India.

The Constitution envisages 'mutual independence' among the basic organs of the State. To assure this mutual independence, it makes provisions which debar courts from enquiring into the proceedings of Parliament or of a State Legislature on the grounds of alleged irregularity of procedure, parliamentary privileges and restricting discussion in the Legislature and in Parliament in respect of judicial conduct.

1. Meaning and Concept

According to Sir Thomas Erskine May¹

Parliamentary Privileges is the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the Parliament and by members

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** LL.M., Ph.D., Lecturer in Laws, University Institute of Laws, Panjab University Regional Centre, Civil Lines, Ludhiana-141001.

***LL.M., Lecturer in Laws, University Institute of Laws, Panjab University Regional Centre, Civil Lines, Ludhiana-141001.

1 Thomas Erskine May (1815-1886) began his career in the House of Commons in 1831 when he became assistant Librarian. In total he worked for that House for 55 years and in so doing acquired a wealth of experience and knowledge of Parliamentary procedure. May's most famous work is his book *A Practical Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, otherwise known as *Parliamentary Practice*.

of each House individually, without which they could not discharge their functions efficiently and effectively and which exceed those privileges that are possessed by other bodies or individuals.²

Thus, parliamentary privileges or legislative privileges connotes certain rights accruing to each House of Parliament collectively and also to members individually without which it would not be possible to maintain either independence of action or the dignity and efficiency of a sovereign legislature. The Parliament has been given somewhat wider personal liberty and freedom of speech than an ordinary citizen enjoys for the reason that a House cannot function effectively without the unimpeded and uninterrupted use of their services. These legislative privileges are deemed to be essential in order to enable the House to fulfil its constitutional functions, to conduct its business and maintenance of its authority.

In India, parliamentary privileges are available not only to the members of a House but also to those who, though not members of a House, are under the Constitution entitled to speak and take part in the proceedings of a House or any of its Committees. For example every minister or Attorney-General of India shall have the right to speak in, and otherwise to take part in the proceedings if either House, any joint sittings if the House, and any Committee of Parliament of which he may be named a member, but shall not by virtue of this article be entitled to vote.³

Article 105 of the Constitution of India very clearly defines the privileges of the two Houses of the Parliament. This constitutional provision does not exhaustively enumerate the privileges of the two Houses. It specifically defines only a few privileges, but, for the rest, it assimilates the position of a House to that of House of Commons in the United Kingdom as Article 105 Clause (3) says that the other powers, privileges and immunities of the members and of each House, “shall be those of the House of Commons” unless defined by law. This provision has given rise to problems. If we look at the origin and rationale of the privileges of the House of Commons in England, we find that they are not exactly the same as in India.

As Erskine May points out, the House of Commons was a weaker body and “had a fiercer and more prolonged struggle for the assertion of their own privileges not only against the Crown and the Courts, but also against the Lords” The privilege was a part of “King’s peace” enjoyed by all the King’s subjects. As a matter of fact, they served as a shield in the fight of people and their

2 Erskine May, *A Practical Treatise on the Law, Privileges, Proceedings and Usage of Parliament* at p. 42 as quoted in J.N. Pandey, *Constitutional Law of India*, Central Law Agency, Allahabad, 14th ed.(2003) at p. 538.

3 Article 88 of the Constitution of India.

representatives against the monarchy through the House of Commons. The basis of immunity from the judiciary also sprang from the same roots. The Courts like King's Bench or the Court of Star Chamber were used by the King to safeguard his own interests. Moreover, till today, when the British Parliament is omnipotent, at the commencement of every Parliament, the Speaker of the House of Commons presents a petition to the Crown asking for rights and privileges of Commons. This practice itself shows that the fight for privileges was against the Crown and its royal courts.⁴

In India, there is no question of any struggle between the Executive and the Courts on one hand and the Legislature on the other. We have a written Constitution unlike the British who conduct their governmental business on the basis of conventions. The President is elected and there are provisions dealing with his powers. Judiciary is to interpret the Constitution and to defend the citizen against the State. Thus, the Supreme Court of India has to play its role cautiously, impartially, and fearlessly.

In India some legislative privileges are expressly mentioned in the Constitution vide Article 105 as referred above while the others are recognised in the Rules of Procedure and Conduct of Business in the Lok Sabha framed under its rule making power.⁵ The privileges mentioned in the Constitution are as under:

- (a) Freedom of Speech
- (b) Right of Publication of Proceedings under Parliamentary Authority
- (c) Rule - Making Power
- (d) Internal Autonomy

However, it may be noted here, that in the context of Article 105 (Privileges of Members of Parliament) applies *mutatis mutandis*⁶ to the State Legislatures under Article 194 of the Constitution of India as well.

With regard to the 'Other Privileges', the following are recognised under the Rules of Procedure and Conduct of Business in Lok Sabha as well as by certain laws:

- (a) Freedom from arrest of members in civil cases during continuance of the Session of the House and 40 days before its commencement and 40 days after its conclusion.⁷

4 Erskine May, *A Practical Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 17th ed., (1964) as quoted in K.C. Joshi, "Parliamentary Privileges" in (1970) 2 SCC (Jour) 10.

5 Subhash C. Kashyap, *Our Parliament*, National Book Trust, New Delhi (1995), pp. 234-236.

6 Brayan A. Garner, *Black's Law Dictionary*, West Group, St. Paul, Minn., 7th ed., (1999) at p. 1089: explains the Latin word *mutatis mutandis* as 'All necessary changes having been made' or 'necessary changes'.

7 Section 135-A of the *Code of Civil Procedure*, 1908.

- (b) Exemptions of Members from liability to serve as jurors.⁸
- (c) Right of the House to receive immediate information of the arrest, detention, conviction, imprisonment and release of the Member.⁹
- (d) Prohibition of arrest and service of legal process with the precincts of the House without obtaining the permission of the Speaker.¹⁰
- (e) Prohibition of disclosure of the proceedings or decisions of a secret sitting of the House.¹¹
- (f) All Parliamentary Committees are empowered to send for persons, papers and records relevant for the purpose of the enquiry by a committee.¹²
- (g) A Parliamentary Committee may administer oath or affirmation to a witness examined before it.¹³
- (h) The evidence tendered before a Parliamentary Committee and its report and proceedings cannot be disclosed or published by anyone until these have been laid down on the table of the House.¹⁴
- (i) The Right to prohibit the publication of its debates and proceedings.
- (j) Right to exclude strangers from the House.¹⁵
- (k) Right to commit persons for breach of privilege or contempt of the House, whether they are members of the House or not.¹⁶

3. Contentious Orb Between Parliament and Judiciary

There have been certain areas in Indian democratic system where one organ of the government is trying to encroach upon the area given to the other by the Constitution. This attitude had resulted in certain controversies. Some of these are discussed below:

3.1 Parliamentary Privileges and Fundamental Rights

It has always been a matter of debate that if in a case of conflict between the privileges of Parliament and fundamental rights of individuals, which one is

8 *Supra* note 5.

9 Rules 229 and 230 of the Rules of Procedure and Conduct of Business in Lok Sabha, Lok Sabha Secretariat, New Delhi (1989) as quoted in Subhash C. Kashyap, *Our Parliament*, National Book Trust, New Delhi (1999).

10 Rules 232 and 233 *ibid*.

11 Rule 252 *ibid*.

12 Rules 269 and 270 *ibid*.

13 Rule 272 *ibid*.

14 Rule 275 *ibid*.

15 Rule 249 *ibid*.

16 Rule 248 *ibid*.

going to have overriding effect. The matter had been in front of the Courts many times. It was for the first time debated in *Gunupati's Case*.¹⁷ The 'Blitz' in one of its issues published a news item casting derogatory remarks on the Speaker of the U.P. Legislative Assembly. The Speaker referred the matter to the Committee of Privileges of the House for investigations and reports. After failure of summons, an arrest warrant against Mistry (editor of Blitz) to force him to appear before the House was issued, by the Speaker who was authorised for it by Assembly's resolution. Mistry was arrested in Bombay and brought to Lucknow where he was lodged in a hotel for a week without anything further. A writ of *habeas corpus* was filed on the ground of violation of Article 22(2)¹⁸. The Apex Court accepted the contention as the fundamental right under Article 22(2) was infringed and the Court ordered his release. The judgment created an impression that the fundamental rights would have upper hand on parliamentary privileges.

However, in 1959, in *Searchlight I Case*,¹⁹ the Supreme Court held that Parliament Privileges were not subject to Article 19(1)(a)²⁰. A House was entitled to prohibit the publication of any report of its debates even if the prohibition contravenes the fundamental right of speech and expression of the publisher under Article 19(1)(a). Any inconsistency between the two articles i.e. Art.19(1)(a) and Art.105 could be resolved by 'harmonious construction' of the two provisions. It was also held by the Court that the House under Article 118 (House of Parliament) and Article 208 (House of State Legislature) can make rules for regulating the procedure for enforcing its powers, privileges and immunities.

However, in *Searchlight II*,²¹ the Court held that Article 21²² would apply to parliament privileges and a person would be free to come to the Court for a writ of *habeas corpus* on the ground that he is deprived of his personal liberty not in accordance with the law but for malafide reasons.

Thus, the position appears to be that it is wrong to suppose that no fundamental right applies to the area of legislative privileges. However, if

17 *Gunupati Keshavram Reddy v. Nafisul Hasan*, AIR 1954 SC 636.

18 Article 22(2) provides "Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of the magistrate".

19 *M.S.M.Sharma v. Sinha (I)*, AIR 1959 SC 395.

20 Article 19(1)(a) provides " All citizens shall have the right to freedom of speech and expression".

21 *M.S.M.Sharma v. Sinha (II)*, AIR 1960 SC 1186.

22 Article 21 provides "No person shall be deprived of his life or personal liberty except according to procedure established by law".

Parliament were to enact a law defining its privileges, then such a law would not be free from the controlling effect of the fundamental rights. Such provisions of law as contravene fundamental rights would be invalid.

3.2 Parliamentary Privilege of Committal for Contempt

As discussed earlier the Constitution of India grants certain privileges to the Parliament and State Legislatures under Article 105 and Article 194 respectively. If any individual or authority disregards any of these privileges, it is called breach of privilege. Referring from the constitutional point of view there is a difference between the two terms often interchangeably used, i.e., *Breach of Privilege* and *Contempt of Court*. 'When any individual or authority disregards or attacks any of the privileges, rights and immunities, either of the members individually or of the House in its collective capacity', the offence is called a *Breach of Privilege*. It is punishable by the House. Besides, actions in the nature of offences against the authority or dignity of the House, such as disobedience to its legitimate orders or libels upon itself, its members, committees or officers also constitute *Breach of Privilege*. On the other hand, *Contempt of the House* may be defined generally as 'any act or omission which obstructs or impedes either House of Parliament in the performance of its functions or which obstructs or impedes any Member or Officer of such House in the discharge of his duty or which has the tendency, directly or indirectly, to produce such results.'

The question of Parliament-Court Relationship often arises in privilege matter in almost all democratic countries. In Britain the controversy came before the Court in *Stockdale's* case.²³ Though the balancing lines have now been drawn, these are as follows:

- a) The Courts recognise the common law privileges
- b) The new privileges can be created for the House only by a law passed by the Parliament and not merely by a resolution of one House.
- c) Whether a particular privilege claimed by a House exists or not is a question for the Courts to decide.
- d) The courts do not interfere with the way in which the House exercise the recognised privileges.

The position is that while the courts deny to the House of Commons the right to determine the limits of its own privileges, they allow its exclusive jurisdiction to exercise these privileges within the established limits.

23 *Stockdale v. Hansard*, (1839) L.J.(N.S.) Q.B. 294.

However, in India, a House of Parliament may claim a privilege if:

- a) it has been created by a law of Parliament or
- b) the Constitution grants it specifically or
- c) it is enjoyed by the House under Article 105(3).

Hence, when a question arises whether a particular privilege exists or not, it is for the courts to give a definite answer by finding out whether it falls under any of the sources and this brings the Court into the area of parliamentary privileges.

In number of cases the courts have decided that whether a particular privilege claimed by a House exists or not on the basis that whether it was enjoyed by House of Commons or not. Each House of the Parliament, however, has power to commit a person for its contempt. But the position remains ambiguous on the question whether such committal is immune from judicial scrutiny or not. The question whether courts can interfere with the powers of a House to commit for contempt arose in *Keshav Singh's Case*.²⁴ The facts of the case are that one Keshav Singh published a pamphlet against a member of the State Legislative Assembly. The House adjudged him guilty of committing its contempt and sentenced him to be reprimanded. When Speaker administered a reprimand to him, he behaved in objectionable manner. He was then imprisoned for 7 days by the Speaker. On behalf of Keshav, Advocate Solomon filed a writ petition under Article 226²⁵ of *habeas corpus*. Court ordered interim bail for his release. The House held Keshav Singh, Adv. Solomon and 2 Judges had committed contempt of House and they be brought before it in custody. The Judges filed petition under Article 226 asserting the resolution to be unconstitutional. A full Bench consisting of all the 28 Judges of High Court ordered stay of implementation of resolution till the disposal of the petition. However, clarificatory resolution was passed by House, for which too stay was granted by the Court.

The President of India then referred the matter to the Supreme Court for its advisory opinion under Article 143. By majority of 6:1 the Court held that,

- (a) Two Judges had not committed contempt of the Legislature by issuing the bail orders.
- (b) The Assembly was not competent to direct the custody and production before itself of the advocate and the judges.

²⁴ *Keshav Singh v. Speaker, Legislative Assembly*, AIR 1965 All. 349.

²⁵ Article 226 provides Power of High Court to issue certain writs.

- (c) The harmonious working of the three constituents of the democratic state will help the peaceful development, growth and stabilisation of the democratic way of life in the country.
- (d) The Court held that the right of the citizens to move the judicature and the rights of the advocates to assist that process must remain uncontrolled by Article 105(3) or Article 194(3).
- (e) The Court rejected the contention of the Assembly that it had absolute power to commit a person for its contempt and a general warrant issued by it would be conclusive and free from judicial scrutiny.

Keshav Singh's case is often regarded as the high-water mark of Legislature-Judiciary conflict in a privilege matter in which the relationship between the two was brought to a very critical point.

4. Conclusion and Sub monitions

The Indian Parliament is the creature of the written Constitution, unlike British Parliament, which implies that the Parliament has to work within the limitations imposed on it by the written document as this document is the fundamental law of the country. In *Keshav Singh's* case two ideas cropped up regarding the relationship between the two organs. On the one hand, the Speakers wanted the Constitution to be amended so as to concede an absolute power to the House to commit anyone for contempt. On the other hand, there arose a demand for codification of legislature privileges. A strong case has been made out for codifying legislative privileges, especially the circumstances which constitute contempt of the House. It is desirable from the people and press point of view. There are certain areas within Indian Constitution which need certain amendments. Some of which are as follows:

- (i) To make a Legislature itself a judge in the privilege cases. It appears necessary to amend Article 19(2) wherein the expression 'Contempt of Legislature' should be added. This course of action would remove some uncertainty from the area while at the same time the Houses would not lose its flexibility of approach.
- (ii) There should be relaxation of the rules against reporting of proceedings before Parliamentary Committees about which the general principle should be that the proceedings should be open and reportable unless the public interest clearly requires otherwise.
- (iii) As regards investigation of complaints of contempt, the person against whom a complaint is being investigated should be represented by the

lawyer, to call witnesses and be paid for legal aid. The person against whom the charges are framed should attend personally all the proceedings and should be given full and fair opportunity to defend himself and explain his conduct.

- (iv) The Committee of Privileges should be given separate independent status. It is usually observed that the members of the Committees do not have a non-political approach while performing their duties. Hence their recommendations have the chances of being bias
- (v) The Constitution of India should be amended to change the constitution of the Committee of Privileges. Apart from the members of Lok Sabha and Rajya Sabha, some retired or acting members of the Judiciary too should be made to constitute its membership.
- (vi) Moreover, the recommendations of the Committee are not binding on the House which may accept, modify or even reject the same. Hence, the Committee's observations should have a binding effect and certain powers should be given to the Committee itself making it a bit strong and effective.
- (vii) This Committee headed by the Speaker or the Chairperson as the case may be, should be empowered to decide and investigate the contempt proceedings.
- (viii) The framers of the Constitution were anxious to confer plenary powers on the Houses in India. They felt that legislative privileges should be defined not in a hurry but after giving some thought to the matter. The power was left to the Legislatures to define their privileges. Hence, the Indian democracy had matured itself with the passage of time that an Act for codification of its privileges should be enacted. *Justice Subha Rao* in *Searchlight I* has strongly pleaded for codification of privileges instead of keeping 'this branch of law in a nebulous state, with the result that a citizen will have to make a research into the unwritten law of privileges of the House of Commons at the risk of being the bar of the Legislature'.
- (ix) Simply codifying the law would not plug the loopholes and put an end to the dispute as certain privileges can be codified which are in excess of the powers granted by the Constitution. Hence, a separate committee should be constituted consisting of members of Lok Sabha, Rajya Sabha and Judiciary (retired or acting) to work on the codification of the parliamentary privileges. A Bill should be drafted and then brought before

the Parliament for discussion.

The judicial approach which could be gathered from the above mentioned cases is that when the question arises whether a recognised and established privilege of the House has been breached or not, it is for the House to decide the question. The Courts cannot decide the question. The Courts do not interfere with such decision of the House unless it is the case of malafide. However, when the question is whether a privilege exists or not, then it's a matter for the Courts to decide, for a privilege claimed is under constitutional provision. The justification behind it is that it is the constitutional function of the Supreme Court and High Courts to interpret its provisions, no legislature can claim any such power. Hence, it is the amendments in constitution and powers of the Committee of privileges and the codification of privileges that too by independent Committee, that could reduce the tensions between the two important organs of the country. A democratic legislature and an independent judiciary are two pillars of a democratic system; both have to function in cooperative spirit to further the cause of the rule of law in the country.