

DEMAND OF PRIVILEGE—A STEP BACKWARD

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THE meaning of the word 'Freedom' is not the same for all. It changes according to the status of one using the word. For the holder of political power it signifies political domination. For the subject of political power freedom means the absence of such domination. A further confusion arises because the members of society are not one or the other only but both at the same time.

Freedom of speech and expression may be looked at from two angles: the absence of any prior restraint upon the publication; as an ideal in itself, i.e., as absence or removal of restraints for all, from time to time, on the achievements of certain social ideals.

When we say that our Constitution guarantees freedom of speech and expression we tend to think that either a country has freedom or it does not. But every country has some freedom of speech. The difference lies in the nature of the right of its citizens.

If it is a public right we call that country a free country, and if it is a private right alone we say that there is no freedom there.

Something can be said by all at some time and at some places without prior consent and also without any fear of punishment. But in no country one has freedom to say anything at any time and in any place.

Our Constitution does not specifically mention freedom of press as a fundamental right. However, it has been accepted 'as a species of which freedom of expression is a genus'.¹ Freedom of press and circulation is included under Art. 19(1) (a).² The content of the expression—Freedom of Press—has been variously understood as has been pointed out by the Press Commission.³

1. Press Commission Report Vol. 1, p. 357

2. 1950 S.C.J., p. 418

3. Press Commission Report Vol. 1, p. 357

It means freedom to hold an opinion, to receive or to impart information without interference from public authority. It does not mean that everybody's opinion shall be published by a newspaper, or that the newspaper should be free from the domination or influence of the proprietor or the financier or the advertiser.

Speech and Press are different not only in form and character but also in their impact on their audience.

It is true that there is no such thing as a right of the freedom of the press over and above the universal right of free expression. Freedom of the press does not mean a demand for any privilege of the journalist. The press is open to all who have anything to say and the publisher accepts it, whether they are journalists or not. To claim any privilege would mean to be under a corresponding obligation to the authority from which it is derived.⁴ But its importance as such cannot be overlooked.

The demands of the democratic, social and political order require that the people have full knowledge and information about what the law-makers and the courts of law do and what exactly transpires at their public sessions. The press, an instrument for the development of democratic process, is responsible to the subscriber.

The reader being entitled to be informed of all matters of public interest, the journalist should be unobstructed in the exercise of his function.

The democratic doctrine of freedom of speech and of press rests on certain assumptions. One 'assumption is that from this mutual toleration and comparison of diverse opinions the one that seems the most rational will emerge to be generally accepted'⁵. This is the theory that is written in the American Bill of Rights and must also be presumed to be at the base of our Fundamental Rights. Democratic Constitutionalism means the creation of various sets of devices to subject the political freedom of the holders of power to institutional limitations and legal controls.

One of several such problems which affects us directly at the moment is the claim of our Legislatures under Art. 194(3) of our Constitution, and obviously also under Art. 105(3).

4. Dermot Morrah, Editor of *The Round Table*.

5. *Freedom & Responsibility*—by Carl L. Becker, p. 33

The claim is that the legislatures have all privileges, powers and immunities, as they conceive and interpret them, as the House of Commons in England had on 26th January 1950. So the first part involves no controversy. The difficulty in the latter is that the extent of these powers, privileges and immunities is the same as that of the House of Commons in U.K.

This assertion has created disputes between the fundamental rights of the citizens and the fundamental rights of the legislatures, and the jurisdiction of the legislature to decide and punish a citizen for its contempt or for breach of its privilege.

Every member of a legislature must enjoy freedom from any fear of action against them for anything said or done in performance of their duty—facilities without which they cannot discharge their functions. Such facilities are grouped together as 'privileges, powers and immunities'.⁶

The points should be made:

Legislature alone has the right to frame its own rules of procedure and is also free to follow or not to follow those rules.

Legislature itself is the exclusive judge of the question of the legality of its own proceedings.⁷

Even if a member misuses his right of free speech and comments upon the judiciary in contravention of Article 211, there is no remedy outside. It is for the Speaker to see that the members do not misuse their right of free speech.⁸

The Court has no jurisdiction to issue any writ to the Speaker for any orders issued or rulings given in that capacity to regulate the conduct of the business of the legislature. The Court is not competent to say whether a ruling is right or wrong.⁹

It is recognised that the legislature has the power to ban even a true report of proceedings in the House.¹⁰

The Press comes in contact with the legislature by reporting

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6. Privilege means that the acts which might be unlawful are allowable in certain circumstances—Paton, p. 256
 7. A.I.R. 1954 All., p. 319
 8. A.I.R. 1958 Orissa, p. 168
 9. A.I.R. 1952 Or., p. 234
 10. A.I.R. 1959 S.C., p. 395

the debates; by interpreting the proceedings, by criticizing the decisions of the legislature. The accepted rules for this are:

Publication of evidence taken before a select committee until it has been reported to the House is a breach of privilege.

Indignities offered to the character of the members or to the legislature by defamatory reflections is a breach of privilege. What is indignity is to be decided by the legislature.

Reflections on the character of the Speaker or accusation of partiality in discharge of his duty is a breach of privilege.

Difficulties have arisen in respect of the second claim that the extent of these privileges, powers and immunities is exactly the same as of the House of Commons in the U.K.

The claim is more dogmatic than reasonable for it is obvious that some of the privileges of the House of Commons can have no meaning with reference to our Constitution.

This point was raised before Allahabad High Court but that was not squarely answered.¹¹ However, the Supreme Court has now clearly declared that the broad claim that the latter part of Art. 194(3) provides expressly that all powers vested in Commons at the relevant time would vest in the State legislature cannot be accepted in its entirety¹².

Our Constitution is not the result of the laws that a sovereign legislature passes from time to time. The powers of the legislatures are based on the Constitution.

The legislatures have been given power to punish for their contempt committed outside their Chambers.

Where the Speaker has taken some steps against the writer of an offending article, whether the procedure adopted by him is regular or irregular, it is not the concern of the court so long as his acts are confined to the enforcement of the well established rights and privileges of the legislature.¹³ But this right does not oust the jurisdiction of the court to see if any remedy is available to the citizen or the action is within the 'well

11. A.I.R. 1954 All. p. 319

12. (1965) 1 S.C.J., p. 847 (865)

13. A.I.R. 1958 Ass., p. 165

established rights and privileges' of the legislature.¹⁴

It is here that the controversy regarding 'speaking warrant' and 'general or non-speaking warrant' has cropped up.¹⁵ The claim of the legislature that once a warrant against a citizen signed by the Speaker is issued the court is stopped from enquiring further cannot be accepted in India.

In India, in contrast to England, the judiciary decides whether the Constitution has been rightly interpreted. In England, Parliament is superior to all courts.¹⁶

The claim of the legislature is against the concept of Rule of Law itself. Privilege is always at the expense of others.

Provisions of facilities for functions to be performed by different bodies is one thing. The claim of certain privilege—political or otherwise—is another. The value attached to the idea of privilege tends to increase the area of privileges.

It is argued sometimes that these powers, privileges and immunities are necessary for the existence of the parliamentary democracy:

If the Court were to act over the Parliament then the Court would prescribe what the Parliament has to do, the Court will direct the Parliament to function in a manner it desires to do it.¹⁷

But the power to adjudicate for its own contempt without regard to the rights of citizens to seek remedy in a court and without considering that the courts are under a duty to find out if a remedy is available, is not necessary for the functioning of a democratic legislature. The American pattern is an example and it cannot be said that American Congress is less efficient in its task of legislation than the British Parliament.¹⁸

14. '.....neither House of Parliament have power, by any vote or declaration to create to themselves any new privilege.....'Resolution passed by House of Lords in 1704 and assented to by House of Commons, vide May's *Parliamentary Practice*, pp. 48, 50.

15. When the legislature adjudges an act to be an act of contempt and the Speaker as the chief functionary of the legislature signs a warrant stating such adjudication generally without particulars of circumstances and reasons it is known as general warrant. And when particulars are also given it is known as speaking one.

16. (1965) 1 S.C.J., p. 847 (892)

17. 'Shall Parliament be Suppliant to Courts?' by G.S. Pathak, *The Working Journalist*, Nov. 61.

18. While the American Congress can punish its own member for contempt as it relates to keeping order in the House, contempt committed by a citizen outside the House who is not a member is outside the jurisdiction of the Congress and the matter is referred to the court for adjudication.

All that the court can do is to announce its considered view about the validity or otherwise of the acts of legislature. In the same way with contempt. It would enquire whether the type of privilege is available to the legislature and whether the action taken is for contempt.

If the answers are in the affirmative the court would withdraw as it has done in many cases. In India it is the Constitution and not the legislature that is sovereign.

It is interesting to note that while the Indian legislature is claiming to possess certain absolute rights under the title of privilege to adjudicate and punish for contempts committed by a non-member and outside the chambers in Great Britain these privileges are being criticised as being too sweeping. There a view is developing that except in cases of contempt in the face of Parliament the whole question of privilege or contempt should be handed over to the court of law.¹⁹ There seems no reason why a similar view is not acceptable to our legislatures.

A possible reconciliation between the fundamental rights of the citizens and the fundamental rights of the legislature may be found in the method of ordering the Advocate-General to launch a proper prosecution. The Court will enquire about the existence and the extent of the privilege claimed by the prosecution, and if the claim is established the court will withdraw leaving the punishment to the wishes of the legislature.

This method if adopted will ensure against any recurrence of the ugly situation that developed in U.P. It will keep the right of the legislature intact to punish for its own contempt. It will remove the controversy about the speaking warrant and the general warrant.

It will retain the right of the court of law to be the sole adjudicator of law of the land. And it will ensure to the citizen that his fundamental rights shall not be affected for any political reasons.

The question of privileges, powers and immunities of the legislature has become a political question—a question between the rights of the citizen and the rights of his elected representatives who possess power by virtue of their position. The solution also can only be political.

The Press as the spokesman of the elector can by a more purposeful functioning convince the holders of political power, the futility of the conflict and can also convince the citizen of the desirability of showing due respect and recognising the dignity of the legislature.

19. *Hindustan Times*, July 6, 1958.