Parliamentary Privileges : Definition or Divination?

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I

> [T]he principal privilege of Parliament consisted in this, that its privileges were not certainly known to any but the Parliament itself.
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> *Blackstone*[1]

A SELECT COMMITTEE of the House of Commons in the United Kingdom appointed a few years ago to review the law of parliamentary privilege and to report whether any changes in the law of privilege or practice in the House of Commons were desirable, stated in their report :

> In general their examination of the present law, practice and procedure has satisfied Your Committee that these are all in need of radical reform.[2]

That may be the view of a Select Committee in the United Kingdom. Our 'sovereign' Parliament is in no way concerned about what a Select Committee reported in London. But our Parliament appears to be interested in preserving intact what the Constituent Assembly—a body with an identical membership—conferred upon it, the powers, privileges and immunities of the House of Commons of the United Kingdom as they were on January 26, 1950.[3] As loyal Commonwealth citizens, we appeared to have attributed immutability, if not immortality, to the powers, privileges and immunities of the House of Commons of nearly a quarter of a century ago. A vast majority of our lawyers and legislators take pride in the fact that we have inherited the traditions of the English common law and of British parliametary procedure. It is not often that inheritance blossoms forth all of a sudden, it is generally a gradual emanation. It may not, therefore, be strange if our legislators lag behind their counterparts in the United Kingdom by a quarter of a century in their thinking on matters which have agitated the latter's minds.

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1. I *Commentaries on the Laws of England*, 163, quoted in P.S. Pachauri, *The Law of Parliamentary Privileges in U.K. and in India* 452 (1971).
2. H.C. Paper No. 34 (1967-68), the Report, par. 11.
3. See article 105 (3), *The Constitution of India*.

By adopting article 105 (3) and 194 (3) our Constituent Assembly invested Parliament and the state legislatures with the right and authority to define their own powers, privileges and immunities. But up to the time of writing they have exercised a sagacious self-restraint in favour of an amplitude of powers for themselves which need not be subject to Part III of the Constitution.[4]

As early as 1949, if not earlier, the question of defining and codifying the privileges of the legislatures came up for consideration by the Presiding Officers of legislatures. In September 1949 at a Conference of Presiding Officers the question of codification of privileges was discussed. G.V. Mavlankar expressed the view that it was better not to codify them but to rely on the precedents of the British House of Commons. Any attempt at codification, he said, "will very probably curtail our privileges"; and further pointed out that the disadvantage of codification at the present moment was that "whenever a new situation arises, it will not be possible for us to adjust ourselves to it and give members additional privileges.[5] These views were reiterated by him at the Conference of Speakers in 1960.[6] From this it would appear that the main reason, if one may submit this with the utmost respect, for the reluctance of the legislatures to codify their privileges is their apprehension of accompanying atrophy of power. What one can observe from past events in our legislatures is that the exercise of such power has been in general against the citizen whom the members of the legislatures represent. It is not difficult to appreciate in this connection the recommendation of the Select Committee of the House of Commons to the effect that no impediment should be placed in the way of every citizen's freedom fearlessly and in good faith to criticize Parliament or its members' activities. Referring to the origin of the privileges and their employment in recent years in our country, a learned Parliamentarian has said :

> What originted as an instrument of defence against tyranny should not be turned into a weapon of defence against the citizens whose representatives the Members of Parliament are and to whose legitimate criticism they must accustom themselves in order better to serve their interests and the interests of the country.[7]

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4. See *M.S.M. Sharma* v. *Sri Krishna Sinha*, A.I.R. 1959 S.C. 395 at 410. It may, however, be mentioned that Parliament passed the Parliamentary Proceedings (Protection of Publication) Act, 1956, which permitted publication of substantially true reports of proceedings in Parliament. See *infra*, pp. 153-154.
5. Quoted in A.P. Chatterjee, *Parliamentary Privileges in India* 13 (1971).
6. *Id.* at 14.
7. *Id.* at 12.

II

That the heavens will not fall if parliamentary privileges are codified may be seen from the fact that a number of states which derived their law and parliamentary form of government from the United Kingdom have adopted enactments defining the powers and privileges of their legislatures. Kenya, Malaysia, Mauritius, Sri Lanka, Tobago, Trinidad and Zambia among the Commonwealth countries as also South Africa have codfied the privileges and powers of their Houses of legislatures. The Federal Parliaments in Australia[8] and Canada choose to continue a position similar to that of India in the matter of parliamentary privileges, that is, to leave the matter to be decided by the practice of the British House of Commons on a specified date. It is worth considering whether India should follow the example set by Canada and Australia rather than so many other Commonwealth countries which have adopted the parliamentary form of government from the United Kingdom.

In 1858 South Australia passed a piece of legislation codifying the powers and privileges of its legislature. As a result warrants issued by the speaker of the legislature, came to be scrutinized by the courts. The legislature, therefore, repealed in 1872 the Parliamentary Privilege Act, 1858.[9] A very intriguing argument was presented by the Attorney-General of South Australia for the repeal of the enactment. During the second reading of the Bill providing for repeal, he said :

> Parliament's most important privilege is not to define their privileges. A privilege to commit, which is dependent on the chance of some other body to whom a narrative shall be given of that which was not done before their own eyes, being of the same opinion as you are as to whether it was contempt or not, is no privilege at all.[10]

This incidentally is an excellent argument for the proposition that every person should take the law into his own hands, for there is no knowing that a judge and/or a jury would take the same view as the complainant of that which was not done before their own eyes. But then every person is not a privileged person, or one who claims special privileges.

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8. Three states in Australia, namely, New South Wales, Queensland and Tasmania, however, do not enjoy all the privileges of the House of Commons. Enid Cambell, *Parliamentary Privilege in Australia* 26 (1966). The Houses of Parliament in New South Wales have no general power to punish breaches of privilege or contempt. Five Bills introduced between 1856 and 1912 to invest the Houses with penal jurisdiction could not be passed into law.
9. *Id.* at 21.
10. *Supra* note 5 at I6-17.

This brings us to the question of violation of the rule of natural justice if the practice of the House of Commons is permitted to continue indefinitely. It is not uncommon—we had a few instances in our country —for judges to claim the right and authority to sit in judgment in contempt proceedings where those proceedings were against persons who were alleged to have committed the offence against the very judges who desired to hear and decide the issue of contempt.[11] When judges who are believed to have cultivated a judicial mind claim such special privileges, it is no wonder if members of Parliament who are at best representatives of the masses and in reality spokesmen of some political party or other, cherish a notion that they are the best judges of what constitutes their privileges and what amounts to contempt of their dignity, real or assumed. While it is an unhealthy practice for a judge to claim to be judge in his own cause, it is worse still for the members of the legislature to be judges in their own cause. Judges, as we have noticed, are considered to be endowed with a judicial mind, though occasionally it is obliterated when they, as every other human being, are at times governed by prejudices and passions.[12] While this may be an occasional departure from the straight and narrow path judges are expected to tread, it is bound to be a common feature on the part of legislators who are given to partisan prejudices and passions due, perhaps, to some extent at least, to the prevalence of party system in politics. Further, barring a few former judges who may be members of the legislatures no one else in the legislatures is likely to claim the possession of a judicial mind as the expression is generally understood as applied to the judiciary. It is, therefore, extremely injudicious to entrust members of legislatures with judicial powers.[13] We have had at least one instance where public servants were hauled up for contempt for doing their duty without fear or favour.[14]

It is to avoid situations like this that the Bengal Assembly Powers and Privileges Bill, 1939, envisaged that when there is an alleged breach of

11. K.L. Gauba in *Battles at the Bar* gives a remarkable instance of this.
12. See P.N. Sapru's suggestions in the course of his speech supporting a resolution to amend and consolidate the law of contempt of court, quoted in K.L. Gauba, *Battles at the Bar* 207.
13. Professor Enid Campbell writes that the claim of the House of Commons to "exclusive jurisdiction in matters of parliamentary privilege, coupled with a readiness to vindicate it, if necessary, by punitive action, could not be defended on legal grounds. Its justification was purely political. The Commons desired independence, and exclusive power to define and enforce their privileges seemed the only way of securing it." See Enid Campbell, *supra* note 8 at 4. It is obvious that the historical reasons which prompted the House of Commons to claim certain privileges are not relevant to Indian legislatures.
14. One may recall the incident of two police officers who were brought before Parliament and reprimanded.

privilege the secretary to the assembly by authority of the speaker, should prefer a complaint to a court and it is for the court to hear the case and decide the issue of contempt.

Professor Enid Campbell has observed :

> [A]lthough the Houses in theory are supposed to be deciding complaints of breach of privilege according to law, it may be extremely difficult for them to divorce the legal issues from the purely political. Deciding disputes according to pre-existing norms is not the sort of business with which parliaments usually deal. In the ordinary course of events, decisions will be dictated rather by the sentiments of the political party which happens to command a majority in the House. Just how far considerations of political advantage will intrude into the resolution of disputes over privilege will depend very largely on the attitude which the party leaders in the House are prepared to adopt, that is to say, whether they are prepared to instruct their supporters to vote as their consciences dictate, and also on the disposition of the presiding officer of the House.[15]

The Committee on Parliamentary Privilege of the House of Commons recommended in this regard that

> The House should exercise its penal jurisdiction (*a*) in any event as sparingly as possible and (*b*) only when it is satisfied that to do so is essential in order to provide reasonable protection for the House, its Members or its offiecrs for 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.[16]

A safe and salutary method of dealing with and deciding questions of substantial interference and punishment is perhaps to leave the matter to the jurisdiction of ordinary courts of law.

There is no doubt that while adopting articles 105 (3) and 194 (3) of the Constitution the founding fathers could not have visualized indefinite and deliberate procrastination on the part of our legislatures. It is clear that if the legislatures passed laws defining their powers and privileges those laws were to be subject to the provision of Part III of the Constitution. It is interesting to note in this connection that article 19 (2) which visualises reasonable restrictions on the right to freedom of speech and expression

15. Enid Campbell, *supra* note 8 at 10.
16. Quoted in Chatterjee, *supra* note 5 at 7.

does not envisage such restrictions in relation to contempt of legislature. The view of the founding fathers, as may be gathered from this, was perhaps that, unlike the courts where administration of justice could be interfered with by unsavoury public comments and criticism, the legislatures did not require any such protection from criticism. If any piece of criticism went beyond reasonable limits, it may attract the application of laws relating to freedom of speech in general, for instance, those relating to defamation or decency or morality.

III

Nulla poena sine lege[17] is a fundamental principle of the jurisprudence of all civilised countries. Whenever there was departure from it during the British regime, as when, for instance, through martial law ordinances certain activities engaged in before the promulgation of the ordinances were declared offences, our jurists and leaders raised strident protest against such retrospective legislation. If there is no previous promulgation of law, how are police officers to know that if they treated all citizens alike and did not discriminate in favour of members of legislatures in matters which had nothing to do with legislative work, they would be held liable for contempt of legislature? Until categories of contempt are not defined, the retrospective penalization effected in relation to normal activities like fair criticism on matters of public interest, should be regarded as deserving condemnation. The fact that there are certain other branches of law which have not been codified is no answer to the question of enforcing retrospective penal laws by way of contempt proceedings.[18] Though there is a great deal of difference between the atmosphere in which proceedings for contempt of legislature and those for contempt of court take place, as has been explained earlier, it will be more salutary if contempt of court proceedings are limited to contempt *en face;* in other cases, a regular trial by a different court should be the general rule. It has been said that justice has to be done even if the heavens fall. And justice should also be seen to be done.

It may also be mentioned in passing that many states where there are parliaments, if not a government of the Westminster pattern, are able to get on well without contempt proceedings either in their legislatures or in their courts. It would appear that in many places where contempt proceedings may be initiated in legislatures, the dignity and decorum of the legislature is on the wane. Teachers and parents in general know that it is not penal sanctions but their own conduct that tends to maintain children's respect for them. There is no reason why politicians should forget this

17. There should be no punishment without previous legal authority.
18. See P.S. Pachauri, *supra* note 1 at 454-455.

basic truth when dealing with private citizens or their own colleagues even if they happen to belong to a political party different from their own. There are more things worthwhile in life than an easy applause won by an offensive repartee.

IV

In *M.S.M. Sharma* v. *Sri Krishna Sinha*,[19] Justice Subba Rao of the Supreme Court observed :

> It may not be out of place to suggest to the appropriate authority to make a law regulating the powers, privileges and immunities of the legislature 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 the privileges of the House of Commons at the risk of being called before the Bar of the legislature.

This suggestion was made in 1959. If this had been earnestly taken up and the legislatures had defined their powers and privileges, the *Special Reference No. 1 of 1964*[20] under article 143 would not have been necessary. That reference proves that the uncertainty of the law in this area which necessitates a painstaking research into the law of the privileges of the British House of Commons is a difficulty experienced not only by the average citizens, but also others more learned in the law, including the first citizen of the State. The observation of the Supreme Court in its opinion that as the House of Commons is part of the High Court of Parliament in addition to being a House of legislature, all its powers could not be deemed to have been vested in the U.P. Legislature, which is not a court of law, may, with respect, prove to be of doubtful relevance with the result that a reconsideration of the opinion may be desired some time or other in future. It would seem that while vesting the legislature with the privilege, immunities and powers of the British House of Commons, the question how the British House happened to acquire them did not arise; the question was what powers, privileges and immunities the House had on 26th January 1950, in whatever manner acquired or vested in it. Should we be content with a situation in which we may have to resort to periodical researches whenever a serious question of law in this area crops up?

Exercising, to some extent, the powers granted to it by article 105 (3) Parliament passed the Parliamentary Proceedings (Protection of Publication) Act, 1956. The Act provides that no person shall be liable to any

19. A.I.R. 1959 S.C. 395 at 418.
20. A.I.R. 1965 S.C. 745.

proceedings, civil or criminal, in any court in respect of the publication, for the public good, of a substantially true report of any proceedings of either House of Parliament unless that publication is proved to have been made with malice. As state legislatures do not appear to have adopted any law under the provision of article 194(3) they would appear to enjoy greater powers and privileges than Parliament on the assumption that the House of Commons had on January 26, 1950, greater powers and privileges in relation to publication of its proceedings than are assumed by the Indian Parliament under the Act of 1956.[21]

The Press Commission made a recommendation for codification of the privileges as early as 1954. The commission also reported that several representations were made to them that the law of privilege required to be elucidated. In the course of recommending legislation, the Press Commission stated :

> It would therefore be desirable that both Parliament and State Legislatures should define by legislation the precise powers, privileges and immunities which they possess in regard to contempt and the procedure for enforcing them....Article 105 and 194 do contemplate enactment of such a legislation and it is only during the intervening period that Parliament and State Legislatures have been endowed with the powers, privileges and immunities of the House of Commons.[22]

The intervening period has been understood by Chief Justice Subba Rao to mean 'a reasonable period' and he considers that fifteen years would be such period.[23] The words 'until so defined' in articles 105(3) and 194(3) cannot possibly be attributed any other connotation than the plain ordinary meaning of the words with the result that if our Parliament and state legislatures do not define by legislation their powers and privileges, we shall be governed by the unwritten law of the British House of Commons until doomsday.

Chief Justice Subba Rao thinks that it is an unhappy state of things. He has said :

> [E]ven if Art. 195(3) and Art. 194(3) confer privileges in the alternative, the self-respect of our independent country demands the making of our own laws and there is no necessity to keep it as a memento of our prolonged slavery.[24]

21. See J. Minattur, *Freedom of the Press in India* 95-96. (1917).
23. Foreword to V.G. Ramachandran, *The Law of Parliamentary Privileges in India* xxiv (1966).
24. *Id.* at xix.

It would appear that it is more than a 'memento'. It is a very real and live, if servile, dependence on foreign practice. Time and again our speakers and legislators as also lawyers have to go about finding out parliamentary practice in the United Kingdom. This unhealthy dependence on the unwritten law of the British House of Commons does not appear to bring any benefit to Indian citizens, not excluding the country's democratic legislators; if there be any beneficiaries they may be Butterworths, London, the publishers of Erskine May's treatise on Parliamentary Practice.

A critic of Chief Justice Subba Rao's reference to 'a memento of slavery' contends that

> [I]f dependence on English law after independence is a sign of slavery, the judiciary is the most slavish of slaves in India because it is they who have even after independence taken resort to English law to interpret the law in India.[25]

As long as we follow English law in our country, it is natural for our judges to interpret that law by resorting to English decisions. The fault, if fault there be, is not with the judges, but with the legislators who do not replace English laws by laws of their own making. But they seem to be inclined to cling, not only to English law, but also to English conventions and practices. This does not, however, mean that the judges could not have chalked out a more independent path for themselves, at least in those areas where the provisions of the Indian law are not a replica of English law or where sociological factors point to a different interpretational approach.

V

It is not unusual for our lawyers to look up to the experience of the United States in matters relating to the Constitution. This appears to be due mainly to two palpable reasons. One is that the United States has a federal set-up, we too have something of a federation, however limited the autonomy of the states be. Second, the United States has a written constitution as we have. That the United States does not have a parliamentary form of government need not militate against our following its example, in the matter of contempt of legislature. The absence of parliamentary government is not to be regarded as an open invitation by any legislature to any one to ride roughshod over its powers or privileges. If its privileges are infringed, it is not necessary that it should take the law into its own hands. After all a legislature is a law-making body, not a law-enforcing one.

25. P.S. Pachauri, *supra* note 1 at 450.

In the United States while contempt power may be exercised by both Houses of Congress to prevent interference with the legitimate functions of the Houses, in recent years

> The Congress has practically abandoned its practice of utilizing the coercive sanction of contempt proceedings at the bar of the relevant House. Instead it has invoked the aid of the courts in protecting itself against contumacious conduct. It has become customary to refer "contempt of Congress" cases to the Department of Justice for criminal prosecution....[26]

It may also be emphasised that no act is punishable as a "contempt of Congress" unless it is of a nature to obstruct the performance of the duties of the legislature. An ill-tempered letter written to the chairman of a House subcommittee criticizing the subcommittee and its actions, was not held to constitute contempt of Congress.[27] The Supreme Court observed that the writing of the letter was not of such a character as to affect the legislative process. The court proceeded to state :

> The contempt relied upon was not intrinsic to the right of the House to preserve the means of discharging its duties, but was extrinsic to the discharge of such duties.[28]

It may also be mentioned that in the Northern Territory of Australia the Legislative Council (Powers and Privileges) Ordinance, 1963, was adopted providing for prosecution in a court of summary jurisdiction any contravention of the ordinance and any contravention is punishable by a fine not exceeding £ 200 or by imprisonment for not more than six months. If the persuasive influence of the United States practice is at an abysmally low ebb at the moment the following observations of the Select Committee of the House of Commons may perhaps exert a smoothing effect on the febrile brow of legislators decked with the diadem of effervescent 'sovereignty'. The Select Committee stated :

> The word 'privilege' has in modern times acquired a meaning wholly different from its traditional Parliamentary connotation. In consequence its use could convey to the public generally the false impression that Members are, and desire to be, a privileged class.... Your Committee cannot too strongly emphasise the fundamental principle that 'privileges' are not the prerogative of Members in their personal capacities. In so far as the House claims and Members enjoy their rights and immunities which are grouped under the

26. B. Schwartz, I *A Commentary on the Constitution of the United States* 124 (1963).
27. *Marshall* v. *Gordon* 243 U.S. 521 (1917).
28. *Id.* at 546.

> general description of 'privileges', they are claimed and enjoyed by the House in its corporate capacity and by its Members on behalf of the citizens whom they represent. Your Committee, therefore, strongly favours the discontinuance of the use of the term 'privilege' in its traditional Parliamentary sense. They believe that if the basic concept of 'privileges' or 'privilege' is abolished, it will be easier to understand and to concentrate upon the provision of the essential protection which is required by the House, its Members and Officers.[29]

VI

Voltaire is reported to have declared, "Do you want good laws? Burn yours and make new ones".[30] One could possibly make new ones from the ashes of the old. While framing them it is helpful to bear in mind the instructions the East India Company sent to the President and Council at Surat on February 3, 1687. They read in part :

> We do enjoin you, according to His Majesty's last charter to govern the soldiers and the people of that island...according to the usage of the civil law, which only is proper for India, the common law of England being peculiar to this Kingdom, and not adopted in any kind to the government of India, and the nature of these people as we have formerly writ to you and have found by long and useful experience.[31]

This piece of timeless instruction is relevant to the codification of parliamentary powers and privileges, even when we have adopted a system of government which was once peculiar to England.

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29. Quoted in A.P. Chatterjee, *supra* note 5 at 6-7.
30. Quoted in B. Schwartz, *supra* note 26 at 9.
31. 8 *Letter Books* in *the Factory Records* 265.