

could not in the garb of regulating distribution of newsprint, control the growth and circulation of newspapers.

However, as the Supreme Court has emphasized in M.S.M. Sharma v. S.K. Sinha:¹⁰ "Further, being only a right flowing from the freedom of speech and expression, the liberty of the Press in India stands on no higher footing than the freedom of speech and expression of a citizen and that no privilege attaches to the Press as such, that is to say, as distinct from the freedom of the citizen". Thus, the press cannot claim immunity from general tax laws or industrial laws.^{10a} The government can appoint a committee to enquire into the economics of the newspaper industry.^{10b}

II

The Concept of Legislative Privileges

Privileges are attached to a House of a legislature collectively, or to the members of a House individually, with a view to enabling the House to act

10. A.I.R. 1959 S.C. 402.

10a. Express Newspapers v. Union of India, A.I.R. 1958 S.C. 578

10b. The Statesman v. Fact Finding Committee, A.I.R. 1975, Cal. 14.

and discharge its high functions effectively without fear or favour, or without any hindrance, interference or obstruction from any quarter. Legislative privileges are deemed to be necessary to enable the Legislature to fulfil its constitutional functions. Privileges are attached not only to a house collectively but even to individual members, the reason being that no house can function effectively unless its members can function effectively and without any interference from any quarter. Privileges are conferred on a House of Legislature so that it may vindicate its authority, prestige and power and protect its members from any molestation or obstruction in the performance of their functions as members of the House. Privileges of a legislature exist chiefly for its protection and maintenance of its independence and dignity.

The Constitution-makers appreciated the need to confer certain privileges on the Legislatures in India. The Constitution does not however exhaustively enumerate the legislative privileges. The Constitution specifically defines only a few legislative privileges, but, for the rest, it assimilates the privileges of the legislatures in India to those enjoyed by the House of Commons on the date of the commencement of the

Constitution. The idea was to confer on the legislative houses in India very wide privileges, as wide as those enjoyed by the House of Commons in England which enjoys probably the widest privileges as compared to any other legislative house in the world.

The relevant provisions in the Constitution defining legislative privileges are Arts. 105 and 194. Art. 105 relates to Parliament while Art. 194 relates to the State Legislatures. Both these provisions are couched practically in similar language, and, therefore, any discussion on Art. 105 will apply mutatis mutandis to Art. 194. Art. 105 as it stood prior to the 42nd Constitutional Amendment ran as follows:

"105(1) Subject to the provisions of this constitution and to the rules and standing orders regulating the procedure of Parliament, there shall be freedom of speech in Parliament.

(2) No member of Parliament shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings.

(3) In other respects, the powers, privileges and immunities of each House of Parliament and of the members and the committees of each House, shall be such as may from time to time be defined by Parliament by law, and, until so defined, shall be those of the House of Commons of the Parliament of the United Kingdom, and of its members and committees, at the commencement of this Constitution.

(4) The provision of clauses (1), (2) and (3) shall apply in relation to persons who by virtue of this Constitution have the right to speak in, and otherwise to take part in the proceedings of, a House of Parliament or any committee thereof as they apply in relation to members of Parliament. 11

Clause 1 of Art. 105 refers to the Freedom of speech of a member in a House of Parliament. For a deliberative body like a House of Parliament, freedom of speech within the House is of utmost importance. A full and free debate is of the essence of parliamentary democracy. Because of this reason, Art.105(1) guarantees freedom of speech to members in a House. However, this privilege is not directly relevant to the issue of the Freedom of the press, though as will be seen later, ¹¹ this privilege has given rise to

11. Art. 105(3) is drafted very closely on the model of S.49 of the Australian Constitution which runs as: "The ~~House~~ powers, privileges and immunities of the Senate and of the House of Representatives and of the members and the committees of each House, shall be such as are declared by Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth."

11. Infra, Sec.IV.

two other privileges of the House, viz., to hold a meeting of the House in camera and thus exclude strangers from listening to the debates in the House and prohibiting the publication of the debates and proceedings held within the House.

Cl. 2 of Art. 105 confers an immunity on members of a House of Parliament as well as on the publications made under the authority of the House from any legal proceedings. This privilege also is not directly relevant to the issue of the freedom of the press. To explain the true scope of these two clauses reference may be made to the Supreme Court case, Dr. Jatish Chandra Ghosh v. Hari Sadhan Mukherjee.¹² A member of the West Bengal Legislative Assembly gave notice of his intention to ask certain questions in the Assembly. These questions were disallowed by the Speaker. Nevertheless, the member published the questions disallowed in a local journal called Janamat. A government servant filed a complaint (under Ss. 500 and 501 of the I.P.C.) against the member as well as the editor, printer and publisher of the journal that the member concerned had

12. A.I.R. 1961 S.C. 613.

published false and scandalous imputations against him with a view to harm his reputation. The member concerned then moved the High Court under Art. 226 and the matter ultimately came before the Supreme Court by way of special leave. The court ruled that the said publication did not fall within the scope of cl. 2 of Art. 194 as it was not under the authority of the House nor it was "anything said or vote given" by a member of the Assembly. Immunity of a member of a House for speeches made by him in the House does not extend to publication thereof by him outside Parliament. A member of the House has an absolute privilege in respect of what he says within the House but has only a qualified privilege in his favour even in respect of what he says himself in the House if he causes the same to be published in the public press.

It is clause (3) of Art. 105 as well as of Art. 194 which is crucial for our present purposes. ~~this clause~~ ^{Art. 105(3)} says that a House may enjoy such privileges as may be defined by Parliament by law and until so defined the privileges available to a House of Parliament shall be those as of the House of Commons of the British Parliament at the commencement of the

of the Constitution. As Parliament has passed no law so far according to Art. 105(3), a House of Parliament would enjoy the same privileges as were enjoyed by the British House of Commons on the 26th January, 1950. Thus, the legislative privileges which by and large affect the press are the ones which are claimed by a House in India under Art. 105(3) or Art. 194(3). Therefore, whenever a question arises whether any privilege of a legislative house has been infringed by a newspaper, invariably it becomes necessary to make a reference to the position obtaining in England; whether any such privilege is available to the House of Commons? If so, then it would be available to a House in India as well.

In 1976, Parliament enacted the 42nd Amendment and thus Art. 105(3) underwent a change. It ~~now~~ ^{stood} then stands as follows:

"(3) In other respects, the powers privileges and immunities of each House of Parliament, and of the members and the committees of each House, shall be those of that House, and of its members and committee's at the commencement of S.21 of the Constitution (Forty-second Amendment) Act, 1976, and as may be evolved by such House of Parliament from time to time."

Later, in 1978, the reference to the 42nd Amendment in Art.105(3) was substituted by the 44th Amendment by the Constitution (Forty-fourth Amendment) Act, 1978.

Art. 105(3) therefore to-day stands as follows:

... shall be such as may from time to time be defined by Parliament by law, and, until so defined, shall be those of that House and of its members and committees immediately before the coming into force of S.15 of the Constitution (Forty-fourth Amendment) Act, 1978.

This amendment came into force on June 20, 1979.

The purport of these Amendments is to drop from the Constitution any reference to the House of Commons. It was regarded as below the dignity of a sovereign country to make references to a foreign Parliament in its Constitution. But, in practice, the situation would not change. For a House enjoys the same privileges as it enjoyed at the commencement of the 44th Amendment. What are those privileges? The answer to this question can be given only by reference to Art. 105 as it stood prior to the 44th Amendment. Thus, again, reference has to

be made to the privileges enjoyed by the House of Commons on the date of commencement of the Constitution. Thus, while, a specific reference to the House of Commons in the Constitution has been done away with, for all practical purposes, reference to the privileges enjoyed by the House of Commons will have to be made whenever any question arises whether a particular privilege is available to a House in India or not. In the beginning, frequent references were made to the privileges enjoyed by the House of Commons, but as time passes, and law of legislative privileges becomes more or less settled in India itself, references to House of Commons for this purpose have become less and less frequent.

Another amendment in Art. 105(3) made by the Constitution (Forty-second) Amendment Act was that a House can evolve its own privileges. Before this Amendment, Parliament had to enact a law to define its privileges. ¹³ The Forty-second Amendment did away

13. Parliament has power to enact such a law under entry 74 of List I. Similarly, a State Legislature can enact such a law under entry 39 of List II of the Seventh Schedule of the Constitution.

with the need for legislation in the area of legislative privileges. What was necessary was 'evolution' of law and not 'codification' of law in the area of legislative privileges, be it a House of Parliament or that of a State legislature as the phraseology of Art.194(3) is similar to Art.105(3). The underlying idea appears^{ed} to be to dispense with the need to pass a law if any privilege ^{was} is to be created. A House ~~can~~ could evolve its own privileges without the concurrence of the other House and the President as would be necessary if a law were to be passed. So, it ^{was} is not necessary for the two Houses to agree; nor would there be any question of testing the law on the touchstone of fundamental rights. The power conferred on each House was in fact too broad in the matter of legislative privileges ^{was in fact too broad}.

Further, how was a privilege to be 'evolved' by a House? By a declaration, resolution or an enactment or simply by asserting a privilege over a period of time? How long should a House have asserted its privilege before it could be regarded as having been 'evolved'. This provision also enabled a House to claim a new privilege which it had not enjoyed hitherto.

The position in England has been that in 1704, it was agreed that "neither House of Parliament hath any power by any vote, or declaration to create to themselves any new privilege that is not warranted by the known laws and customs of Parliament". Thus one House of British Parliament alone could not create a privilege for itself by itself. This was a logical position for since neither House by itself could add to the law, so neither House could by its own declaration create a new privilege. The amended Art. 105(3) (as well as Art. 194(3)) (before the 44th Amendment) negatived this salutary position. Before the 42nd Amendment of the Constitution, a House could create a new privilege for itself only by legislation by the Legislature concerned. But the 42nd Amendment did away with the need for legislation for the purpose, and left each House free to extend its privileges to any extent it wanted by its own action. Another difficulty could also be envisaged from the amended Art. 105(3) or 194(3). Who was to decide whether a privilege had been evolved or not? Were the courts to decide this question or was the word of the House itself that the privilege had been evolved be sufficient and decisive of the matter? It might also be pertinent to mention here that in 1947, the Committee

of Privileges of the House of Commons ^{again} cautioned that Parliament has no right to extend its privileges beyond those to which recognition had already been accorded. The reason against undue extension of legislative privileges is that there is a dichotomy between legislative privileges and freedoms of the people as legislative privileges impose certain restrictions on the people as to what they can do or cannot do. Therefore, the legislature should not unduly extend the area and scope of its own privileges. This warning given by the Committee of Privileges in England is equally pertinent in India as well. The amended provision threw this caution to the winds. There was another danger. The privileges of the two Houses of Parliament could differ as the Houses could evolve their privileges on different lines. Art.105(3) or 194(3) as it emerged after the Forty-Second Amendment suffered from many pit-falls. Happily these constitutional provisions have now been again amended by the Constitution (Forty-fourth) Amendment Act. Again the position prior to the 42nd has been restored in this respect. Again, it has become necessary to legislate to define privileges of a House.

The most potent weapon in the hands of a house of legislature to enforce its privileges is

the power to punish for its contem^ptp or for 'breach of privilege'. A House can punish any one, whether a member or an outsider, for its contempt or breach of privilege. In England, this power of the House of Commons has been aptly described as the 'keystone of parliamentary privilege', as the House can use this power to protect its privileges, punish their violation, and vindicate its own authority and dignity. The difficulty here is that the power of the House to punish for its contempt is a very vague and flexible power. The grounds on which a person can be held guilty of contempt of a House are really vague, uncertain and indefinite, and have not been specified anywhere. The scope of the phrase 'contempt of the House' is rather flexible and broad and covers a variety of situations when the House can take action.

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Generally speaking, contempt of a House is committed when any act or omission impedes or obstructs a House in the discharge of its functions, or which obstructs or impedes any member or the officer of the

14. Some of these grounds insofar as relevant to newspapers are mentioned in Sec.IV. infra.

House in the discharge of his duties, or which has a tendency directly or indirectly to produce such results. There is no closed category of classes of offences which may be regarded as constituting contempt of the House. New situations may emerge which the House may regard as constituting its contempt. The right of a House to punish for its contempt is analogous to the right of the superior courts to punish for their contempt.¹⁵ In fact, in the early days in England, the power of Parliament to punish for its contempt was justified on the analogy of the mediaeval concept of Parliament being the highest court.¹⁶ in the land.¹⁶

Now a days, however, the phrase "breach of privilege" is also in vogue. This phrase is much more flexible and broader than the concept of the "contempt of a House". The phrase 'breach of privilege' takes in not only a situation when a recognised and

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15. Art.129 declares that the Supreme Court is a court of record and has all the powers of such a court including the power to punish for its contempt. Similarly, Art. 215 declares a High Court as a court of record having power to punish for its contempt. There is a good deal of case-law on these two constitutional provisions explaining as to what constitutes "Contempt of Court"; See, Jain, Indian Constitutional Law, 115, 189 (1978).
 16. "The first point that must be made is that the English Parliament began its history not as a legislative or political institution, but as a court of justice". See, Enid Campbell, Parliamentary Privilege in Australia 3 (1966).

accepted privilege of the House is infringed or disregarded by any individual or authority, but also any act or omission which, though not a breach of a specific privilege, yet undermines the dignity or authority of the House or tends to obstruct the House, or an individual member thereof, in the discharge of the functions. The great advantage in using the term 'breach of privilege' lies in the fact that the House concerned is enabled to uphold its dignity and defend itself against disrespect and affronts when the offensive action could not be brought, or could be brought only by implication, within the compass of an established and recognised privilege. As the Committee of Privileges of the House of Commons asserted in 1947, the right to punish for its contempt is by no means restricted to the case where some actual privilege of the House has been infringed. This gives an added dimension to the power of the House to punish for its contempt and breach of privilege.