

“The Whole Constitution Goes for Six”¹

Legislative Privileges and the Media

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An oddly-phrased cricketing metaphor used by the editor of *The Hindu* – which prides itself on its ‘proper’ English – to describe the crisis occasioned by the decision of the Tamil Nadu Assembly to imprison the editor and senior staff of *The Hindu* and the *Murasoli* for breach of legislative privilege. This decision of the House Privilege Committee of the Legislative Assembly was adopted as a resolution by the majority in the House.² The immediate provocation for this resolution was the publication of an editorial piece titled “Rising Intolerance”, which criticized the alleged attempts of the Chief Minister and the speaker of the Legislative Assembly to muzzle the media. A Tamil translation of this editorial was published in *Murasoli*, a newspaper sponsored by the Dravida Munnetra Kazhagam (DMK), a leading regional political party. Predictably, the editors of *The Hindu* proceeded to the Supreme Court to obtain a stay on the Assembly’s orders and thereby authored another legal episode in the continuing struggle between legislative assemblies and the press. On previous occasions, these battles have raised some significant constitutional issues regarding the scope and nature of the un-codified powers of legislative privilege in the Constitution, and its claims of superiority over the fundamental rights guaranteed in the Constitution. This essay explores why the exercise of legislative privilege provokes the constitutional outrage that it does and attempts to clear some of the theoretical confusion that plagues such cases. This essay does not aim to comprehensively work through the dense legal argument that a full response to these issues would require. Instead, it illuminates some crucial themes that such cases raise.

1. Source of Legislative Privileges

Unlike the conventional basis of privilege in the British Constitution, the source of legislative privilege may be traced to Articles in the text of the Indian Constitution. The Constitution sets out in Articles 105 and 194 the powers and privileges that Parliament and the State Legislatures are entitled to. These articles are identical in structure and content. Clauses 1 and 2 grant members of the House the privilege of freedom of speech and immunity from civil liability for anything said or published under the authority of the House. Clause 4 extends both these privileges to apply to any person who is not a member of the House but who participates in proceedings of the House or its Committees. These clauses ensure that participants in House proceedings are not impeded from performing their functions in the House in any manner.

Clause 3 allows the legislatures to define other powers, privileges and immunities by passing laws in this respect. Till such time as they pass these laws, the privileges they are entitled to in 1947 continue to accrue to them. The constitutional framers intended the legislatures to enjoy the privileges enjoyed by the British Parliament in 1947 till such time as they enacted new laws that spelt out these privileges.³ Unsurprisingly, the Indian legislatures have not passed any legislation on the subject and have cashed this blank cheque whenever they have seen fit! It is under the blanket authority of this clause that the Tamil Nadu legislature seeks to proceed against newsmen for a breach of privilege.

We must note at this stage that the privileges of the legislature have both an external and internal effect. Clauses 1 and 2 in these articles protect the internal practices and conduct of members and non-members in the House in order to allow it to conduct its affairs as well as prevent members of the House from abusing their privileges in the House. Clause 3 empowers the House to deal with the conduct and expressions of outsiders who, for good reason, are found to have violated the privileges and immunities of the House. This essay is concerned primarily with the latter external effects of legislative privileges.

Interestingly the South African Constitution of 1996 anticipates the Indian scenario and provides for privilege rather differently. Section 58 sets out the privileges of Parliament. This section adopts a structure very similar to that in Article 105 and 194. Apart from the rights to free speech and immunity from civil proceeding spelled out in sub-sections 1 and 2, Parliament is empowered to make national legislation to provide for other privileges and immunities. The crucial difference lies in the approach to un-codified privileges. Till Parliament passes such a law, it is not entitled to any such privilege. By extinguishing any extant privileges and providing only for codified privileges, the South African Constitution avoids the possibility of any claims of unqualified privilege by Parliament.

Taking a cue from the South African Constitution, the Indian Supreme Court should deny the Indian Legislatures' claim to conventional privileges and compel them to legislate on this crucial subject. Significantly, such a law would need to pass the test of compliance with the fundamental rights under Article 13, thereby ensuring that such a law would imbibe due process norms and respect the guarantees to life, liberty and speech. This step alone will guarantee against any future possibility of flagrant abuse. Till such time we would do well to engage with the problems of the debate as it presently stands.

2. A Definition of Privilege

One key element that plagues the debate in India is the absence of an acceptable definition of the idea of "privilege". Presently, the debate proceeds on the assumption that privileges are what the legislature defines them to be. So it would be useful to begin with a recent definition of legislative privilege developed by the Report of the Joint Committee on Parliamentary Privilege in the United Kingdom:⁴

"Parliamentary privilege consists of the rights and immunities which the two Houses of Parliament and their members possess to enable them to carry out their parliamentary functions effectively. Without this protection members would be handicapped in performing their parliamentary duties, and the authority of Parliament itself in confronting the executive and as a forum for expressing the anxieties of citizens would be correspondingly diminished".

This definition does not work by setting out an exhaustive listing of privileges that the legislature may claim. Instead, it speaks to the functions that the doctrine of legislative privilege seeks to achieve. The definition marks out two essential functions: first, that legislative privilege allows the house to maintain independence and autonomy from the executive, and secondly, that legislative privilege maintains the representative capacity of the house.

A noteworthy omission from this list of functions is the reputation and dignity of the house and its members, which are not sought to be protected by the exercise of legislative privilege. In the Indian experience, the reputation and dignity of the House has sought to be invoked as the fundamental purpose of the powers of legislative privilege. By omitting these concerns, the Report does not suggest that these are unimportant, but only that these interests are best protected by the ordinary civil law of defamation and libel and not through the constitutional powers of privilege. In the present case, there has been a tendency to conflate the interests of the executive wing of government with that of the legislature, so that legislative privilege may be invoked to protect the reputational interests of the executive wing of government, particularly that of the Chief Minister. Any attempt by the Supreme Court to circumscribe the scope of these privileges by naming the functions that they are to achieve would prevent the excessive range of interests that Indian legislatures have tended to protect using these powers.

3. Language of 'Privileges'

It is odd to come across a republican constitution that speaks in the language of privileges of the legislature. Despite the proud proclamation of the republican character of our Constitution in the Preamble, the inability of the courts to develop legal principles that reflect the republican aspects of the independence struggle has diminished our constitutional and political tradition. Madison in the *Federalist Papers Number 39* opposes "republicanism" to a state founded on aristocratic, monarchical or feudal power. At the very least, a republican constitution embodies the principles of legal authority that derives from the people at large and admits of no royal privileges, prerogatives or immunities.⁵ The United States Constitution does not grant Congress or the House of Representative the "privilege" to punish those who offend its sensibilities. It leaves it to the ordinary courts to mould remedies that protect the functioning of the Houses.

Given that our Constitution does use the word "privilege" in Articles 105 and 194, the courts are obliged to provide a reasonable construction of the term. The use of the word privilege to describe the powers of legislature no doubt has its origins in the English common law and political tradition. As its inclusion in a republican constitution is anachronistic and hinders clarity of thought, the court should clarify the precise nature and scope of the "privilege" enjoyed by the legislatures in tune with the principles of public authority in a republican constitution.

The ideas about the interpretation of the Constitution set out above must not be seen as a disgruntled academic semantic complaint about the use of inappropriate words. As Adam Tomkins argues, the metaphorical use of the word "Crown" in English public law has prevented public lawyers from asking difficult questions that would have allowed them to develop "a modern and sophisticated understanding of the State"⁶ and ensured that they

did not “under-estimate the continuing and extraordinary powers of the Crown”.⁷ The use of the word “privilege” in Articles 103 and 163 of the Constitution has a similar effect. The language of privilege suggests a mystical source of power that lies beyond and above the Constitution, when the written Constitution sets out to be the exclusive and supreme source of secular and temporal power in the State. While no constitutional arrangement of power can be completely written in a single document, or even in several documents, we must remember that conventions and other sources of constitutional authority are subject to the express arrangements and language of the Constitution. The granting of unnamed and unregulated privileges to the Houses of Legislature invites them to take an anachronistic view of such a power and thereby violate other constitutional guarantees.

4. Legislative Privilege and the Courts

The history of legislative privilege may be usefully divided into three stages. The early origins of the privilege clauses are closely tied to the history of conflict between the House of Commons and the Tudor and Stuart monarchs, during which successive monarchs utilized criminal and civil law to suppress and intimidate critical legislators. Subsequently, the courts and Parliament locked horns to delineate their respective boundaries of power. The more recent history of the privilege clause is tied to its use by legislatures against citizens. In this last stage, citizens look to the courts to protect their rights of liberty and speech, thereby pitting these two types of powers against each other.

Though it is this last stage that we are concerned about in this essay, it is rewarding to pay attention to the previous conflicts between the courts and the legislatures on the exercise of privilege, as they provide us with insight into the historical context and attitudes that ground these conflicts. Two historical precedents will enhance our ability to see through the patterns arising out of such a conflict. The first of these relates to the state of the law in England.

In 1839 Hansard had, by order of the House of Commons, printed and sold to the public a report by the inspectors of prisons which noted that an indecent book published by Stockdale was circulating in Newgate prison. When Stockdale brought an action for defamation, Hansard was ordered by the House to plead that he had acted under an order of the House of Commons and that the House had declared that the case was a care of privilege. The court rejected this defence⁸ and held that no resolution of the House could place anyone beyond the control of the law, and when dealing with persons outside the House, the courts would determine the nature and existence of privileges of the Commons. Though courts are willing to grant the House a wider brief to deal with matters of privilege internal to the House, they concede far less latitude to the House when dealing with outsiders.

But like all good stories, this one has a sequel! The sheriffs executing the order of the court had proceeded to recover damages of the princely sum of 600 pounds from Hansard. The House committed Hansard and the two sheriffs who had intended to implement the orders of the court. Sensing the resolve of the House, the court backed down⁹ and refused to entertain a writ of *habeas corpus* to release the sheriffs from the custody of the House. This particular sort of dispute was sought to be resolved by the Parliamentary Papers Act of 1840, which overturned the decision of the court in the Stockdale case and established

that a non-member who published material on the orders of the House was immune from prosecution for libel. However, the broader question of whether it would be the courts or the House who would determine the scope of privilege is an open question that is yet to be settled conclusively.

The bright sides to this story are, first, that it reflected the position in English law 163 years ago, and secondly, that this is not the position in Indian law. Moreover, the Nicholls Committee which reviewed the English law on this point went so far as to suggest that the power to punish non-members of the House for contempt should be taken away from the Legislature and passed on to the High Court which would have the limited power to impose a fine.¹⁰ The Committee pointed out that with the passing of the Human Rights Act, 1998, the privileges which accrue to the Houses were thereafter subject to the right to free expression and fair trial guaranteed by Article 12 and Article 6 of the European Convention on Human Rights.¹¹ Though the ideal solution would be the establishment of an independent and autonomous tribunal to try such cases, the least that should be followed is a procedure that affords a person accused of breach of privilege the procedural protections of the notice and hearing before any action can be taken.

The second incident which we will investigate was closer to home and relates to the Indian Supreme Court's ruling in the Keshav Singh case.¹² Keshav Singh had published a pamphlet maligning a member of the State Legislative Assembly. The House found him guilty of contempt and sentenced him to prison for seven days. He challenged this order before the High Court, which granted him interim bail. The House responded by finding that the judges who issued interim orders were themselves guilty of contempt of the House and liable to be punished. The judges moved petitions before the High Court, which sat in a full bench and stayed the orders of the House. As this confrontation seemed to be spiralling out of control, the Union government requested the President to refer the matter to the Supreme Court.

The key argument before the Supreme Court was about the scope and nature of the power of legislative privileges. While the State Legislative Assembly contended that this power was *sui generis*, supreme and independent of the other provisions, the petitioners argued that the power, like all others in the constitution, was subject to the fundamental rights of citizens. The historical parallels between the circumstances in the Stockdale v Hansard and Keshav Singh cases end with the decision of Supreme Court. The court rightly concluded that it had the power to review unspeaking warrants issued by the Legislature for compliance with the due process requirements under Article 21, among others, thereby asserting the supremacy of the Constitution in general, and some fundamental rights in particular, over the exercise of the privileges powers.

5. On 'Rising Intolerance'

Notwithstanding this assertion of constitutional supremacy in the Keshav Singh case, state legislative assemblies continue to exercise their powers of legislative privilege in an indiscriminate and uncontrolled fashion. A motivation for such an exercise might lie with an earlier ruling of the court which found that legislative privilege may be exercised even if it were to violate the rights of citizens to free speech under Article 19(1)(a).¹³ The present case of

The Hindu provides the Supreme Court with an opportunity to overrule this decision and spell out the limited scope and nature of legislative privilege in a republican constitution which guarantees fundamental rights. Legislative privilege, rightly conceived, would extend only to the protection of the autonomy of the House from the executive, and to maintaining its ability to represent the people.

NOTES

1. N Ram interview with Rediff.com. Available at <http://www.rediff.com/news/2003/nov/19inter.htm>
2. For the full text of the Tamil Nadu Assembly Resolution see <http://www.thehindu.com/2003/11/08/stories/2003110809261100.htm>
3. This was established by the Constitution (44th Amendment) Act, 1978.
4. House of Lords Debates 43-1, House of Commons Debates 214-1, 1998-99.
5. Madison, James, Alexander Hamilton and John Jay. *Federalist Papers* (Mentor Books, 1961) pp. 240-43.
6. Tomkins, Adam. *Public Law* (Oxford University Press, 2003) p. 85.
7. *Ibid.*, p. 89.
8. *Stockdale vs. Hansard* (1839) 9 A & E 1.
9. Case of the Sheriff of Middlesex (1840) 11 A & E 273.
10. *Nicholls Report* [271] – [314].
11. *Ibid.*, [280] – [292].
12. Keshav Singh's case AIR 1965 C 745.
13. *MSM Sharma vs. SK Sinha* II AIR 1960 SC 1186.