



Parliamentary Privileges: A probable solution to N. Ravi v. Speaker, Legislative Assembly, Chennai

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Abstract

Two decades ago, a Constitution Bench presided over by Chief Justice R. C. Lahoti while dealing with a matter noticed an apparent conflict between the later judgment by Seven Judges in Special Reference No.1 of 1964, AIR 1965 SC 745 and the previous delivered by a Constitution Bench of Five Judges in M.S.M. Sharma v. Sri Krishna Sinha, AIR 1959 SC 395 though the former agreed with the latter's statement of law. The area of disagreement having not been expressly alluded to, the reader is left with no option but to traverse through the two judgements – both the majority and minority opinions in the two – the minority opinions equally powerful and appreciated by notable commentators on the subject – with a view to identify the observations which has necessitated a reference to Seven Judges Bench in N. Ravi v. Speaker, Legislative Assembly Chennai, (2005) 1 SCC 604. In short, the observations to the contra appear to turn on to the inter-play of 'Parliamentary Privileges' and 'Right to life and personal liberty' of a citizen.

Our Constitution provides for 'Powers, Privileges and Immunities' to our legislators – compendiously referred to as 'Parliament Privileges' - the rules made by the Parliament as also various state legislatures make adequation provision for effectuating these Privileges as when the need arises. These are available to our elected representatives for their effective functioning and due discharge of duties laid down by the Constitution of India. An examination of the scope and ambit of these Privileges do arise when they apparently run counter to the fundamental rights of the citizens, for the law on the subject is yet to be codified by our legislatures.

This paper notes the definition of the three terms – Power, Privilege and Immunity – as understood through the leading judgements on the point; debates in the Constituent Assembly leading to the constitutional provisions; the parliamentary history of the

codification and the main Privileges as to be found in the rules formulated by the legislatures; the law in both the cases under analysis on the aspect of the particular fundamental rights; the reference and the law generally on the issue including the law developed thus far; a way forward as to the question, that is, a probable solution to the problem at hand while recording the conclusion.

Key words: *Parliamentary Privileges, Fundamental Rights, right to freedom*

I. Introduction

‘Privilege’ is an exemption from a general obligation or an exceptional right though legally it would mean an exemption from a general duty or liability for a particular class of persons. For our legislators, it applies to various rights and immunities enjoyed by them both individually and collectively as members of the elected bodies without which they cannot discharge their functions. The object of these privileges is solely to safeguard the freedom, authority and dignity of Parliament. ¹ As M. H. Beg, C. J. heading the Seven Judges Bench put it in *State of Karnataka v. Union of India*,² “*They are powers which depend upon and are necessary for the conduct of business of each House.*” ³ Therefore, they do not exempt our legislators from their duty to the society, in as much as the normal law of the land binds them as much as they do to fellow citizens unless, of course, there is a statutory exception to the contrary. And again, the C. J., “*For example, the jurisdiction to try a criminal offence, such as murder, committed within a House vest in ordinary criminal courts and not in a House of Parliament or in a State legislature.*” ⁴

Privileges – its scope and content

Describing all these rights as ‘Privileges’ A.K. Sarkar, J (as he then was) in Special Reference No. 1 of 1964, Re, ⁵ though dissenting as to the conclusion, had this to say – “*the right of the House to have absolute control of its internal proceedings may be considered as its privilege, its right to punish one for contempt may be properly described as its power, while the right that no member shall be liable to for anything said in the House may be really an immunity. All these rights are, however, created by one law and judged by the same standard.*” ⁶ Over four decades later, in *Raja Ram Pal v. Hon’ble Speaker, Lok Sabha*,⁷ in his concurring judgement, C.K. Thaker, J recorded that “‘*Power*’ means the ability to do something or to act in a particular way; ‘*Privilege*’ is a special right, advantage or benefit conferred on a particular person; ‘*Immunity*’ is an exemption or freedom from general obligation, duty, burden or penalty.” ⁸

¹ Lok Sabha Secretariat, *Parliamentary Privileges* 1 (Parliamentary Research & Training Institute for Democracies 2019).

² (1978) 2 SCR 1.

³ *Id.* at 55.

⁴ *Id.* at 57.

⁵ AIR 1965 SC 745.

⁶ *Id.* at 793.

⁷ (2007) 3 SCC 184.

⁸ *Id.* at 379.

Recently in *Sita Soren v. Union of India*,⁹ Dr. D. Y. Chandrachud, C.J. leading the Seven Judges Bench and authoring the opinion wrote thus – “*Parliamentary privilege, as codified in Articles 105 and 194 of the Constitution, is integral to deliberative democracy in facilitating the functioning of a parliamentary form of governance. It ensures that legislators in whom citizens repose their faith can express their views and opinion on the floor of the House without ‘fear or favour.’ With the protection of parliamentary privilege, a legislator belonging to a political party with a miniscule vote share can fearlessly vote on any motion; a legislator from a remote region of the country can raise issues that impact her constituency without the fear of being harassed by legal prosecution; and a legislator can demand accountability without the apprehension of being accused of defamation.*”¹⁰

The approach

Having thus recounted the meaning of the term ‘Privileges’ in its various dimensions in the last seven and a half decades, this paper sets about the views of our Founding Fathers as they sought to insert the relevant constitutional provisions, lists them; examines the law laid down in the two judgements – *Pandit M.S.M. Sharma v. Sri Krishna Sinha*¹¹ and *Special Reference No. 1 of 1964, Re*,¹² while noticing the conflicting observations by the two Constitution Benches leading to the reference in *N. Ravi v. Speaker, Legislative Assembly, Chennai*¹³ including the law on the point as developed thus far before embarking on identifying a probable solution with a view to settle the controversy before recording the conclusion.

II. The Debates in the Constituent Assembly and Constitutional Provisions

The Debates, its precursor

⁹ (2024) 5 SCC 629.

¹⁰ *Id.* at 666.

¹¹ AIR 1959 SC 395.

¹² *supra* note 5.

¹³ (2005) 1 SCC 603.

The genesis of ‘parliamentary privileges’ could be traced to section 28(1) of the Government of India Act, 1935 laying down privileges for members of the Central Legislature regarding freedom of speech in the chambers and immunity with respect to anything spoken or any vote given or any publication under the authority of the Legislature. On independence, the said provision was adopted and remained in force till the coming into force of our Constitution.¹⁴ Based on the memorandum submitted and advise tendered by the Constitutional Adviser, the Drafting Committee included article 85 as the one dealing with the matter.

During the debate on the article on 19th May 1946, the focus primarily was on reference to the House of Commons as derogatory to the dignity of our Constitution and further that it left the matter vague as neither the members nor the public knew the ‘privileges’ which the members enjoyed. Shri H.V. Kamath’s amendment provided that till the Parliament by law listed out the privileges, the members should continue to enjoy the same privileges which were obtained in the Dominion Legislatures in India;¹⁵ Prof. K. T. Shah felt our sovereign legislatures should be the sole judge of the privileges of its members and the body collectively and accordingly, any breach thereof should be dealt with by the House concerned;¹⁶ Shri Shibban Lal Saxena¹⁷ and Shri P.S. Deshmukh went on to suggest that an appendix should be compiled and included in the Constitution listing out the privileges;¹⁸ the former even advocating for absolute privilege for publication of their speeches even if made outside the legislature; Shri Naziruddin Ahmed desired that the press should have freedom to publish the proceedings of the House offering their fair comments.¹⁹

Shri Alladi Krishnaswami Ayyar replied to the debate. According to him, the reference to the privileges as it obtained in England was a purely temporary measure till our Parliament makes a law to this effect and that there was no *infra dig* in the wording of the clause.²⁰ Dr. B. R. Ambedkar chose not to say anything as Alladi and others had already replied to the

¹⁴ SUBHASH C. KASHYAP, CONSTITUTIONAL LAW OF INDIA 1043 (2nd ed. Universal, LexisNexis 2015).

¹⁵ VIII, Constituent Assembly Debates, 144.

¹⁶ *Id.* at 145.

¹⁷ *Id.* at 146.

¹⁸ *Id.* at 147.

¹⁹ *Id.*

²⁰ *Id.* at 149.

debate.²¹ On the 16th October 1946, when the debate was resumed Dr Ambedkar submitted that since the time when the discussion took place, he had made a little research and found that the South African Parliament had passed an Act defining the immunities and privileges of their members. Thereafter the article with a minor amendment – that the privileges extend to the Committees of both the Houses – was adopted.²² The article was later renumbered as article 105.

Article 169, now renumbered as article 194, opened for discussion on the 3rd June, 1949. This article related to the privileges respecting the state legislatures, their members. Shri Jaspat Roy Kapoor speaking on clause (4) thereof submitted that every person who is not a member of the legislature when he is called to appear either before the legislature or its committees should be extended the same immunities as are available to the legislators so that he enjoys the same level of freedom and similar provision has already been made in the case of Parliament.²³ Four members – Shri H. V. Kamath,²⁴ Shri Naziruddin Ahmed,²⁵ Dr. P S. Deshmukh,²⁶ Pandit Thakur Das Bhargava²⁷ – were up in arms. Their principal objection was the reference to the House of Commons and the criticism which featured in the press consequent to passing of article 85; that British Constitution is an unwritten one and the privileges of their members have not been listed in one single document.

Conscious that he had not intervened when article 85 was being discussed and thinking that the matter was settled, Dr B. R. Ambedkar now replied to the debate. As he said, *“It is not easy, as I said, to define what are the acts and deeds which may be deemed to bring Parliament into disgrace. That would require considerable amount of discussion and examination. That is one reason why we did not think of enumerating, these privileges and immunities. But there is not the slightest doubt in my mind and I am sure also in the mind of the Drafting Committee that Parliament must have certain privileges, when that Parliament would be so much exposed to calumny, to unjustified criticism that the parliamentary*

²¹ *Id.* at 155.

²² X, Constituent Assembly Debates, 375.

²³ *supra* note 15 at 578.

²⁴ *Id.* at 579.

²⁵ *Id.* at 580.

²⁶ *Id.*

²⁷ *Id.* at 581.

institution in this country might be brought down to utter contempt and may lose all the respect which parliamentary institutions should have from the citizens for whose benefit they operate."²⁸ According to him, the only course which they could have followed was that the privileges of Parliament shall be the privileges of the House of Commons because listing them all would have taken more than twenty five pages and further the Government of India Act, 1935 also did not provide any complete set of privileges. And, therefore, he suggested that the article may be adopted in the way it has been drafted.²⁹ Thereafter, the article with a minor amendment was added to the Constitution.

The Constitutional Provisions

As a matter of fact, articles 105 and 194 are *mutatis mutandis*. And as they emerged out of the Constituent Assembly, they could be dissected thus. Clause (1) confers on our legislators the freedom of speech within the four walls of the Parliament/State Legislature subject to the provisions of the Constitution and rules and standing orders made by the respective Houses; clause (2) makes the said freedom absolute and unfettered apart from giving a blanket immunity for giving any vote in the House and its committees and also for any publication by the House; clause (3) grants power to the Parliament and state legislatures to enact a law defining the privileges and till it is done those obtaining in the House of Commons to apply in the interim; and clause (4) extends the provisions in the preceding clauses to certain persons prescribed therein.

Both article 105(3) and 194(3) were amended vide the Constitution (Forty- Fourth) Amendment At, 1978 with a view to omit the reference to the House of Commons and instead providing that the powers, privileges and immunities of the Houses of Parliament and state legislatures shall be as it were on the date of coming into force of the said amendment. The amendment, though, has not bettered the position, for apart from the privileges expressly conferred by the Constitution, we need to fall back upon the British position for other kinds of privileges if the matter has not been settled by the Hon'ble Supreme Court. It is

²⁸ *Id.* at 583.

²⁹ *Id.*

noteworthy to know that these articles did not provide for publication of parliamentary proceedings by the media.

In 1956, the Parliament enacted the Parliamentary Proceedings (Protection to Publication) Act which, however, was repealed during the emergency in 1976. Thereafter, the law was revived by the new government and a special provision guaranteeing the right of the media to report freely and without censorship the legislative proceedings was inserted in the text of the Constitution as article 361-A vide the Constitution (Forty-Fourth Amendment) Act, 1978. This protection, though, is not available if proceedings of a secret sitting are published. In the context of the said act and *a fortiori* the relevant constitutional provision, a Constitution Bench speaking through S. M. Sikri, C. J. in *C. K. Daphtary v. O. P. Gupta*³⁰ ruled that the protection was available if the publication was made for public good and had not been made with malice.³¹

III. History of Codification of Privileges

The efforts by Parliamentarians, Lok Sabha and its Committees

The question of undertaking a legislation on the subject had engaged the attention of the Presiding Officers even before our Constitution was adopted. Individual members also chipped in during the term of the Second Lok Sabha. On the day fixed for private members business, on 20th February, 1959, Shri Naushir Barucha moved for consideration his Parliamentary Privilege Bill which sought to define, in certain respects, powers, privileges and immunities of Parliament and its members and spoke at great length about the need and justification for his bill.³² About half a dozen members spoke – mainly in favour of and for referring the bill to a Select Committee. Intervening, the Law Minister – Shri Ashok K Sen, amongst the worthies who used to appear in the Hon'ble Supreme Court of India particularly

³⁰ AIR 1971 SC 1132.

³¹ *Id.* at 103.

³² Lok Sabha Debates, 2nd Lok Sabha, 7th Sess., Feb. 20, 1959, at 2241.

in high stake matters – opposed the bill on various grounds. As he said, *“After all, it is now acknowledged more or less universally that matters of privilege should be left uncoded rather than codified...Though in England, Parliament may, if it chooses, pass any law concerning privileges without any limitation whatsoever either by way of extending it or restricting it, in this country the moment we think of passing any law we shall have to contend with the limitations which the Constitution imposes upon us...It is all right to stick to those which have been inherited by reason of article 105 of the Constitution. But the moment we try to legislate, some of the laws we have inherited may be condemned if we try to codify them by passing laws ourselves, for, the whole of the limitations in Part III of the Constitution and other limitations will have full play the moment Parliament seeks to legislate.”*³³ After a debate extending almost three hours, the motion for consideration of the bill was negatived.³⁴

Apparently, viewed from the perspective of our elected representatives even before seven decades, codification of parliamentary privileges was neither necessary nor desirable as it had the potential to harm the prestige and sovereignty of these elected bodies though the matter continued to command the attention of various Presiding Officers including in the maiden Conference of Chairman of Committees of Parliament and State Legislatures held at New Delhi on the 14th and 15th March, 1992³⁵ but with no tangible result.

Misgivings among various stake holders – the public and press particularly – continued to mount about the exact scope of parliamentary privileges. The Committee of Privileges of the Tenth Lok Sabha, therefore, at its sitting held on the 11th May, 1992 informally taking stock of the situation felt that the changing socio-political scenario necessitated a fresh look at the codification of parliamentary privileges. After considering the matter in great detail – securing the opinion of eminent persons from across the spectrum and studying various cases of privileges – the Committee in its report tabled in the Lok Sabha on the 19th December, 1994 recommended against codifying parliamentary privileges on the premise that what constitutes a breach of privilege or contempt of House can be best decided according to the facts and circumstances of each case as and when they arose instead of specifying them in so many words.³⁶

³³ *Id.* at 2276.

³⁴ *Id.* at 2304.

³⁵ *supra* note 1 at 5.

³⁶ *supra* note 1 at 7.

Despite the committee concluding that allegations of misuse of parliamentary privileges suffered from lack of any basis, misconceptions about them continued to linger on compelling the successor committee - this time of the Fourteenth Lok Sabha - to revisit the concept of parliamentary privileges *de novo*. Addressing the basic reasons and primary factors from which the need in certain quarters and demand from others for codification of parliamentary privileges emanated, the Committee proceeded to clarify the extent and scope of privileges of the members and dispel certain misconceptions that continued to prevail, by means of eliciting opinions from people from all walks of life – legislature, legal profession, media and academicians – not to forget foreign Parliaments by circulating a questionnaire comprehensive in all respects.³⁷

In its report tabled in the Lok Sabha on the 30th April, 2008, the Committee summed up their observations/conclusions as follows:- In brief, (i) Parliamentary privileges are available to members solely to enable them to perform their duties unfettered; these are not available to them while not performing any parliamentary duties (ii) These are not special rights for they do not compromise the fundamental precept that all citizens are equal in the eyes of law; (iii) These are only enabling but indirect rights of members to put across their views and express the concerns of their constituents fearlessly; (iv) Both the Houses of Parliament have used their penal powers very sparingly – in the first five and half decades, there have been just six instances – one of admonishment; four of reprimand and one of expulsion; that these powers have been used more to deal with the misconduct of their members is demonstrated by the fact that during the same period thirteen members had been expelled and five suspended from the services of the House; (v) facts testify that the power of privileges has never been misused; (vi) No occasion for codification of parliamentary privileges, therefore, arises – considered view all along has been against codification and the majority who responded to the questionnaire also did not favour codification of privileges. Recommending, therefore, against codification the Committee felt that an awareness needs to be created regarding the true import of the term parliamentary privileges and the ground realities that exist.³⁸ The report, though apparently well-reasoned was not unanimous. Dr Sebastian Paul, an

³⁷ Fourteenth Lok Sabha, *Eleventh Report on "Parliamentary Privileges – Codification and Related Matters"* (Committee of Privileges Apr. 2008).

³⁸ *Id.* at 55.

independent member from Kerala who by then had legislative experience of four terms wrote a brief but powerful dissent arguing for codification of privileges.³⁹

IV. Main Privileges of Parliament and State Legislatures

Privileges as enunciated by their Rules and Conduct of their Business in the House

Apart from the privileges conferred by the Constitution noted above *qua* the principal article 105 - the rules formulated by the two Houses⁴⁰ also lists main privileges of Parliament. For Lok Sabha, they are – (a) right of the House to receive immediate information of the arrest, detention, convictions, imprisonment and release of a member;⁴¹ (b) prohibition of arrest and services of legal process within the precincts of the House without obtaining the permission of the Speaker;⁴² (c) all parliamentary committees are empowered to send for persons, papers and records relevant for the purpose of the inquiry by a Committee and a witness may be summoned by a Parliamentary Committee who may be required to produce such documents as are required for the use of a Committee;⁴³ (d) a parliamentary committee may administer oath or affirmation to a witness examined before it;⁴⁴ (e) the evidence tendered before a Parliamentary Committee and its report and proceedings cannot be disclosed or published by anyone until these have been laid on the Table of the House.⁴⁵

Additionally, each House enjoys certain consequential powers necessary for the protection of its privilege. They are – (a) to commit persons, whether they are members or not for breach of privilege or contempt of the House; (b) to compel the attendance of witnesses and to send for papers and records; (c) to prohibit the publication of its debates and proceedings;⁴⁶ (d) to exclude strangers from the secret sittings of the House;⁴⁷ and (e) to regulate admission to and order withdrawal/removal of strangers from any part of the House.⁴⁸ Identical privileges also

³⁹ *Id.* at 61.

⁴⁰ INDIA CONST. art. 118

⁴¹ Lok Sabha Secretariat, *Rules of Procedure and Conduct of Business in Lok Sabha* (16th ed. 2019), Rules 229, 230.

⁴² *Id.*, Rules 232 & 233.

⁴³ *Id.*, Rules 269 & 270.

⁴⁴ *Id.*, Rule 272.

⁴⁵ *Id.*, Rule 275.

⁴⁶ *Id.*, Rule 249.

⁴⁷ *Id.*, Rule 248.

⁴⁸ *Id.*, Rules 386, 387, 387A.

obtain for members of Rajya Sabha and committees serviced by them.⁴⁹ State Legislatures have also made similar provisions, understandably, by virtue of powers conferred by the Constitution of India on them.⁵⁰ For instance, the state of Andhra Pradesh which too has a bicameral legislature, the respective privileges are to be found in the rules made by their Legislative Assembly⁵¹ and Council.⁵²

V. The law in M. S. M. Sharma

In the writ petition filed the petitioner/journalist, the principal issues which came up for consideration by a Five Judges Bench were (a) whether our legislatures had the privilege under article 194(3) to prohibit, in entirety, publication of proceedings which were seen and heard in full view or even that part which were ordered to be expunged from the records of the House and (b) does the privilege of the House prevail over the fundamental right of the petitioner under article 19(1)(a).⁵³

Chief Justice S. R. Das for the majority of four Judges, after discussing the position as it obtained in the British Parliament through the authoritative works on the subject observed that *“the House of Commons had at the commencement of our Constitution the power or privilege of prohibiting, the publication of even a true and faithful report of the debates or proceedings that take place within the House. A fortiori the House had at the relevant time the power or privilege of prohibiting the publication of an inaccurate or garbed version of such debates or proceedings.”*⁵⁴ And taking aid from the unamended article 194 (3) – though the Constitution (Forty-fourth) Amendment, 1978 makes the position no better – further observed that *“Our Constitution clearly provides that until Parliament or the State Legislature, as the case may be, makes a law defining the powers, privileges and immunities of the House, its members and the Committees, they shall have all the powers, privileges and immunities of the House of Commons as at the date of commencement of our Constitution*

⁴⁹ Rajya Sabha Secretariat, Rules of Procedure and Conduct of Business in the Council of States [Rajya Sabha], 9th ed. (New Delhi, 2016).

⁵⁰ INDIA CONST. art. 208(1).

⁵¹ Andhra Pradesh Legislature Secretariat, Rules of Procedure and Conduct of Business in the Andhra Pradesh Legislative Assembly (Amaravati, 2017).

⁵² Andhra Pradesh Council Secretariat, Rules of Procedure and Conduct of Business in the Andhra Pradesh Legislative Council (Amaravati, 2016).

⁵³ *supra* note 11 at 402.

⁵⁴ *Id.* at 407.

*and yet, to deny the those powers, privileges and immunities, after finding that the House of Commons had them at the relevant time, will be not to interpret the Constitution but to re-make it.”*⁵⁵

On the second issue, the Chief Justice observed that *“the provision of clause (2) of article 194, therefore, indicate that the freedom of speech referred to in clause (1) is different from the freedom of speech and expression guaranteed under article 19(1)(a) and cannot be cut down in any way by any law contemplated by clause (2) of article 19.”*⁵⁶ And he concluded thus - *“In our judgement the principle of harmonious construction must be adopted, and so construed, the provisions of article 19(1)(a), which are general, must yield to article 194(1) and the latter part of its clause (3) which are special.”*⁵⁷ Since the petition was one under article 32 and article 19(1)(a) being out of the way, the Chief Justice also observed that the petitioner cannot complain of the breach of his right under article 21 if he is deprived of his personal liberty consequent to the proceedings before the Committee of Privileges because such deprivation will be in accordance with the procedure established by law.⁵⁸ Subba Rao, J (as he then was) recorded his dissent and concluded that article 19(1)(a) was preserved despite the provisions of article 194(3) and since the legislature had the power only to prohibit the *mala fide* publication of the proceedings and the petitioner not having done so, the legislature had no power to take any action in this matter.⁵⁹

Since the aforesaid matter was withdrawn, the petitioner was before an Eight Judges Bench in *M. S. M. Sharma v. Sri Krishna Sinha*⁶⁰ seeking to argue that the previous decision of the Court proceeded on a wrong appreciation of the legal position basing his claim on article 19(1)(a).⁶¹ Chief Justice B. P. Sinha heading the Bench ruled that the questions determined by the previous decision cannot be reopened in the present case; the petitioner has no fundamental right which is being threatened or infringed by the proceedings taken by the opposite party and that the validity of the proceedings inside the legislature cannot be called in question on the allegation that the procedure laid down by law has not been followed.⁶² It

⁵⁵ *Id.*

⁵⁶ *Id.* at 409.

⁵⁷ *Id.* at 410.

⁵⁸ *Id.* at 411.

⁵⁹ *Id.* at 422.

⁶⁰ AIR 1960 SC 1186.

⁶¹ *Id.* at 1189.

⁶² Article 212 seeks to bar the courts from inquiring into the proceedings of the legislature on the ground of any alleged irregularity of procedure.

is a special jurisdiction of the legislature itself to conduct its own business and no court can go into these questions.⁶³

VI. The law in Special Reference No. 1 of 1964

The main question in this reference was whether the Uttar Pradesh Legislative Assembly had the privilege of committing a person to prison for contempt by a general warrant, that is, without stating the facts which constituted the contempt, and if it does so, have the courts of law the power to examine the legality of such a committal? The dispute, as a matter of fact, centred around the jurisdiction of the high court to entertain a petition for *habeas corpus* even in cases where a general or unspeaking warrant has been issued by the legislature directing the detention of the party in contempt.⁶⁴

Answering the question so posed in the affirmative, P.B. Gajendragadkar, C J for himself and six other Judges including K. Subba Rao, J (as he then was) – who was the sole minority in *M. S. M Sharma, 1959 (Supra)* – reasoned as to why the dominant characteristic of the British Constitution cannot be claimed by our Federal Constitution; also though our legislatures have plenary powers, they function within the limits prescribed by the Constitution and undoubtedly the sovereignty claimed by the Parliament in England cannot be claimed by our legislatures literally, before repelling the arguments advanced by the Uttar Pradesh Legislative Assembly that the question of determining the nature, scope and effect of the powers of the House cannot be said to lie exclusively within the jurisdiction of the Hon'ble Supreme Court though waxing eloquently on the 'grandeur' and 'majesty' of the task which the Constitution assigns to the legislatures in the country.⁶⁵ In the context of article 194(3), identifying the areas like freedom of access, passing of acts of attainder and impeachment which the House of Commons possessed and our legislatures did not, the Chief Justice observed that "*it would not be correct to say that all powers and privileges which was possessed by the House of Commons at the relevant time can be claimed by the House*".⁶⁶

After analysing *M S M Sharma, 1959 (Supra)* thread bare, the Chief Justice observed that "*Therefore, we do not think it would be right to read the majority opinion as laying down a*

⁶³ *supra* note 60 at 1190.

⁶⁴ *supra* note 5 at 760.

⁶⁵ *Id.* at 763.

⁶⁶ *Id.* at 764.

*general proposition that whenever there is a conflict between the provisions of the latter part of Article 194(3) and any of the provisions of the fundamental rights guaranteed by Part III, the latter must yield to the former. The majority decision, therefore, must be taken to have settled that Article 19(1)(a) would not apply, and Article 21 would".*⁶⁷ The majority agreeing with *M S M Sharma, 1959* (Supra) also ruled that when the legislature makes a law in those areas left untouched by articles 194(1) and (2) – as is clear from the first part of article 194(3), in exercise of its powers conferred by article 246 read with Entry 39 of List II, the said law needs to meet the challenge of article 13.⁶⁸ A law made by Parliament relatable to Entry 74 List I, as mandated by article 105(3) cannot also escape the wrath, *a fortiori*, of the said article 13.

A. K. Sarkar, J (as he then was), in his dissent and basing himself on the views of authorities on the point opined that the power to commit by a general warrant with the consequent deprivation of the jurisdiction of the court to adjudicate on the matter was a privilege of the House and not a right available to a superior court.⁶⁹ In his view, article 21 did not have precedence over the privileges any more than article 19(1).⁷⁰

VII. The Reference and law generally

On the submissions made in *N. Ravi v. Speaker, Legislative Assembly*⁷¹ that certain observations made in Special Reference No. 1 of 1964 (Supra) run in conflict with the law laid down in *M.S.M. Sharma, 1959* (Supra) notwithstanding that the former was in agreement with the majority decision in the latter, it has been ordered that *N. Ravi* (Supra) needs adjudication by a seven-Judge Bench considering that the issue has very wide ramifications and was likely to arise in future. Unfortunately, in the absence of the said ‘certain observations’ in the aforesaid order, one can only go through the relevant judgements with a view to identify the points of disagreement particularly and take a tentative view which, perhaps, may be the finding by the Seven Judges Bench. Since the said Bench will be a co-ordinate Bench, it cannot overrule Special Reference No. 1 of 1964 (Supra) but only clarify or perhaps, lay down more clearly the law for future application and dispel the

⁶⁷ *Id.* at 765.

⁶⁸ *Id.* at 766.

⁶⁹ *Id.* at 798.

⁷⁰ *Id.* at 806.

⁷¹ (2005) 1 SCC 603.

confusion which might crop up on the inter-relationship between the fundamental rights and parliamentary/legislative privileges.

The inconsistency between the observations of the majority in Special Reference No. 1 of 1964 (Supra) and that in M.S.M. Sharma, 1959 (Supra) has also been noticed by R. F. Nariman, formerly a Judge of the Hon'ble Supreme Court in his twin volume book. According to him, as per the former, on a reading of the majority and minority in the latter, article 21 would be given full play when it concerns contempt proceedings that have been taken by a legislative body against citizens while the majority in the latter held that only article 19(1)(a) must yield to legislative privileges contained in article 194(3). In his view, A. K Sarkar, J (as he then was) dissented complaining that M.S.M. Sharma, 1959 (Supra) ought to have led to the opposite conclusion and that therefore, K. Subba Rao, J's dissent was vindicated in this case.⁷² Be that as it may, K. Subba Rao, J (as he then was) has clearly held in M.S.M. Sharma, 1959 (Supra) that when there is a conflict, the privilege should yield to the extent it affects the fundamental right.⁷³ This was in the context of article 19(1) alone for he does not appear to have dealt with the argument *qua* article 21 while holding in favour of the petitioner that his right under article 19(1)(a) remained intact.

VIII. The law as developed so far

The law as developed in the last over seven decades, apart from the two judgements referred to and dealt with extensively above. as evidenced from certain landmark judgements majority of whom have been handed down by Constitution Benches in combination of five Judges, could be summed up briefly thus: (a) a petition for the writ of *habeas corpus* will lie for infraction of article 22 (2)⁷⁴ of the Constitution, even if a person is detained by the Speaker of a Legislative Assembly without the authority of a Magistrate;⁷⁵ (b) a valid detention order cannot be challenged by a member of Parliament on the anvil of article 105(3) on the ground that such an order stifles his freedom of speech and expression;⁷⁶ (c) the word 'anything' in

⁷² 2 R.F. NARIMAN, DISCORDANT NOTES, THE VOICE OF DISSENT IN THE LAST COURT OF RESORT, 91 (Penguin Allen Lane, New Delhi, First Edition 2021)

⁷³ *supra* note 11 at 419.

⁷⁴ It provides that a person cannot be arrested and detained in custody beyond a period of 24 hours without an order to the effect by the Magistrate.

⁷⁵ Gunupati Keshavram Reddy v. Nafisul Hasan, AIR 1954 SC 636.

⁷⁶ K Ananda Nambiar v. Chief Secretary to Govt of Madras, AIR 1966 SC 657.

article 105(2) means ‘everything’ implying, therefore, that so long as the Parliament is in session, whatever spoken thereat is totally immune from judicial proceedings, the narrow limitation being the respective rules under which it functions;⁷⁷ (d) both the Houses of Parliament, in exercise of their powers, privileges and immunities, are competent to even expel their respective members although judicial scrutiny of such actions do exist albeit on limited grounds;⁷⁸ (e) any irregularities by way of an executive act, attributable in this case to the Chief Minister, has to be handled by means of the penal law and not the mechanism of legislative privileges;⁷⁹ (f) the reports of the Parliamentary Standing Committees cannot be challenged in a court of law though their criticism by the citizens would not amount to violation of parliamentary privilege in as much as it is not directed against any member of Parliament;⁸⁰

Further, (g) neither the text of article 194(3) nor Entry 39 List II to the Seventh Schedule⁸¹ authorise the state legislatures to create the offices of Parliamentary Secretaries because the Constitution itself makes legislative arrangements with respect to the legislature and its offices and creation of such offices would make the law lack connection with the subject matter of the said entry;⁸² (h) in view of the pronouncement in *Bimolangshu* (Supra), the Manipur Legislature was incompetent to enact the saving clause in their Repealing Act of 2018;⁸³ (i) the Legislative Assembly can always proceed if there is a breach of its privilege and for which purpose it can compel attendance and direct one and all to appear before its Committee and depose on oath;⁸⁴ (j) Privileges and immunities are not gateways to claim exemptions from the general law of the land in particular the criminal law, for to do so would be to betray the trust which the electorate imposed on their representatives;⁸⁵ (k) assembly resolution suspending the members beyond the remainder of the existing session is unconstitutional⁸⁶ being opposed to the rules procedure, serving as a limitation on the legislative privileges, as formulated in consonance with article 208 of the Constitution; (l) on

⁷⁷ *Tej Kiran Jain v. N. Sanjiva Reddy*, AIR 1970 SC 1573.

⁷⁸ *Raja Ram Pal v. Hon’ble Speaker, Lok Sabha*, (2007) 3 SCC 184.

⁷⁹ *Amarinder Singh v. Special Committee, Punjab Vidhan Sabha*, (2010) 6 SCC 163.

⁸⁰ *Kalpna Mehta v. Union of India*, (2018) 7 SCC 1.

⁸¹ It deals with privileges of the legislative assemblies, its members.

⁸² *Bimolangshu Roy v. State of Assam*, (2018) 14 SCC 408.

⁸³ *State of Manipur v. Surajkumar Okram*, 2022 SCC OnLine SC 130.

⁸⁴ *Facebook v. Legislative Assembly, National Capital Territory of Delhi*, (2022) 3 SCC 529.

⁸⁵ *State of Kerala v. K Ajith*, (2021) 17 SCC 318.

⁸⁶ *Ashish Shelar v. Maharashtra Legislative Assembly*, 2022 SCC OnLine SC 105.

an interpretation of either articles 105(2) or its *mutatis mutandis* 194(2), no immunity attaches to ‘bribery’ because it is a crime. This is neither essential to the casting of a vote or the ability to decide as to how the vote should be cast. Also, this applies equally to a speech or in a proceeding before the Parliamentary Committee. Consequently, the principle to the contrary adumbrated in *P. V. Narasimha Rao v. Central Bureau of Investigation*⁸⁷ that held the field for close to three decades is no more a good law.⁸⁸

IX. A way forward

On a reading of the law laid down by the majority in their judgements, viz., *M.S.M. Sharma*, 1959 (Supra) and Special Reference No. 1 of 1964 (Supra) the conclusions which emerge are – (a) article 19(1)(a) must yield to article 194(3) and *a fortiori* article 105(3); (b) article 21 is available to a citizen for challenging action of the legislature if he is hauled up for contempt. Considering that this is also clearly discernible from the judgement in Special Reference No. 1 of 1964 (Supra) and that the Seven Judges Bench, as and when constituted in *N Ravi* (Supra) can only clarify and not overrule Special Reference No. 1 of 1964 (Supra), it would be difficult to assume that any other view will be possible.

As is too well known, *Post Maneka Gandhi v. Union of India*,⁸⁹ era has been one of creative interpretative exercise of fundamental rights by the constitutional courts and it is now impossible to read the provision regarding the right to life and personal liberty either literally or in isolation or much less unaided or uninfluenced by the other articles in the chapter on fundamental rights. It is also too late in the day to go only into the procedural aspects of deprivation of life and personal liberty and ignoring all together its substantive depths to which the nation is now used to in the last five decades.

The adjudication of *N Ravi* (Supra), already pending for the last two decades, must be done with utmost expedition for many a reason. Firstly, despite being specifically empowered to make a law in this direction - the Parliament under entry 74 List I and the state legislatures by

⁸⁷ (1998) 4 SCC 626.

⁸⁸ *supra* note 9.

⁸⁹ (1978) 1 SCC 248.

virtue of entry 39 L II to the Seventh Schedule to the Constitution of India have totally been remiss! That more than seven decades have gone by since our Constitution was enacted and still the elected and the electors have no clue as to what constitutes ‘Parliamentary/Legislative Privileges’ or for that matter the punishment for its violation speaks rather poorly about the country, the mother of democracy and its own parliamentary/democratic process. As on date, under the latter part of articles 105(3), the Parliament and 194(3), the State Legislatures have all the powers which they had before coming into force of section 15 of the Constitution (Forty-fourth) Amendment Act, 1978. And what powers they had before the said date – all the powers, privileges and immunities of the House of Commons as on the 26th January, 1950. May be *not* to make a law suits the legislators – who otherwise are charged with the duty of enacting a law! Or if such a law is made, it shall be subject to the rigour of article 13, the fundamental rights and hence, judicial review, may be another of law makers’ concern.

Secondly, there is a marked difference between the English Constitution and Ours. The former has an unwritten one; is unitary with Parliamentary supremacy while in India we have a written Constitution with a federal set up with the Constitution being the supreme law with all the three principal organs owing their very existence to the fundamental law and deriving its jurisdiction and powers therefrom. Hence, the sovereignty claimed by the Parliament in England cannot be claimed by any Legislature in India. It is also debatable as to how much of the ‘Privileges’ claimed by House of Commons still exists or have fallen into disuse.

Thirdly, some members do believe that it is time that the privileges are clearly spelt out with a view to leave little or no room for any ambiguity. Such a feeling gained currency even during the term of the last Lok Sabha – the Seventeenth – when a Member of Parliament was expelled; her membership stood terminated. The validity of the said action is currently under challenge – it is likely that the matter may meet the same fate as in Raja Ram Pal (Supra) - though the member in question having been re-elected to the current Eighteenth Lok Sabha constituted in the year 2024, the outcome in her case is now more in the academic realm.

Fourthly, due to advancement in every sphere be it education or technology, the electorate of today do not feel shy of questioning the legislators; their actions and forever our representatives are in the public gaze. Fifthly, the live telecast of proceedings in Parliament makes even the power of expunction available to the Presiding Officers almost of no consequence – at best the words uttered in the debates are only removed from the official records!

Sixthly, the way matters reach and their kind and are taken up by the Hon'ble Supreme Court for adjudication and their finding – one can recall the judgement in *Anoop Baranwal v. Union of India*⁹⁰ where the legislative void with regard to the appointment of Chief Election Commissioner/Election Commissioners was noticed and directions were issued pending enactment of law by the Parliament – the Court might seriously 'nudge' the legislators in this direction as we cross seventy-five years of our Constitution. Last but not the least it is in the interest of citizens too to know what constitutes 'Parliamentary Privileges' in their elementary understanding.

X. Conclusion

Having laid down clearly, in our Constitution, the kind of privileges which our legislators shall have, the framers left it to the wisdom of both the Parliament and state legislatures to enact a law codifying them. True, it would not have been appropriate to incorporate them in the text itself for the Constitution leaves it to the Parliament to make a law in several particulars; putting them as a schedule was perhaps not thought of because our democracy was just about evolving.

Almost seven decades ago, K. Subba Rao, J (as he then was) dissenting in *M. S.M. Sharma*, 1959 (Supra) counselled thus – *“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 to make a research into the unwritten law of the privileges of the House of Commons at the risk*

⁹⁰ 2023 SCC OnLine SC 216.

of being called before the Bar of the Legislature".⁹¹ This holds good even today for judicial interference in some of the matters could have been avoided, had there been a codified law on the point. It is worth to recall that the current Lok Sabha – the Eighteenth – is yet to constitute its Committee of Privileges. The other House – the Rajya Sabha – has since constituted its Committee of Privileges with the Deputy Chairman being its Head and assisted by ten members belonging to different political parties. Though the committee has met twice this year, the subjects which it is seized of is yet to be placed in the public domain.

One needs to grant to our legislators that though they have not yet codified the Parliamentary/Legislative Privileges and leaving the constitutional courts to step in from time to time, they have been able to create a mechanism for dealing with questions relating to privileges as and when they arise. The Constitution of India provides that each House of Parliament may make rules for regulating its procedure.⁹² Both the Houses of Parliament have made such rules – Rules of Procedure and Conduct of Business in Lok Sabha; and in Rajya Sabha. Rules 222 to 233 of the former provides for the mechanism to deal with questions of privilege. Questions affecting the Privilege may either be considered by the House or may be referred to a Committee of Privileges for examination, investigation and report. For Rajya Sabha, the respective rules are contained in Rules 187 to 203 with the identical provision for consideration of the question of Privilege either by the House itself or by its Committee of Privileges. Power to make rules regulating their procedure has also been granted to the legislatures of states by the Constitution.⁹³ For instance, in Andhra Pradesh, the question as to privilege is contained in Rules 168 to 179 for their Assembly and Rules 249 to 252 for their Council.

Going back to the question of publication of parliamentary proceedings, it must be remembered that we are in the age of social media where live proceedings of Parliament are shown on their video channels both by Lok Sabha and Rajya Sabha and therefore, it is quite natural that the words used by legislators come into the public domain at once unless the mikes of the person speaking is switched off! The power of expunction ordered by the

⁹¹ *supra* note 11 at 419.

⁹² *supra* note 40.

⁹³ *supra* note 50.

Presiding Officers of the words used by members would only remove them from official records and nothing more.

Keeping in view the fetters which were placed on freedom of the press and media during the emergency during the years 1975-77, the Janata Party which came into power during the Sixth General Elections in 1977, enacted the Constitution (Forty Fourth) Amendment Act, 1978 inserting article 361A making a special provision guaranteeing the right of media to report freely and without censorship the proceedings in Parliament and state legislatures though this was not to apply to any secret sittings of the House.

Hon'ble Supreme Court having extended the contours of right of freedom of speech and expression *qua* electors through a series of judgements – one can read with profit a dozen - Union of India v. Association for Democratic Reforms,⁹⁴ Peoples Union for Civil Liberties (PUCL) v. Union of India,⁹⁵ Shambhu Prasad Sharma v. Shri Charandas Mahant,⁹⁶ Resurgence India v. Election Commission of India,⁹⁷ Kisan Shankar Kathore v. Arun Dattatray Sawant,⁹⁸ Mairembam Prithviraj @ Prithviraj Singh v. Pukhrem Sharatchandra Singh,⁹⁹ Lok Prahari v. Union of India,¹⁰⁰ Shailesh Manubhai Parmar v. Election Commission of India,¹⁰¹ Public Interest Foundation v. Union of India,¹⁰² Brajesh Singh v. Sunil Arora,¹⁰³ Bhim Rao Biswanth Rao Patil v. K Madan Mohan Rao,¹⁰⁴ and Association for Democratic Reforms v. Union of India,¹⁰⁵ - it would be worth considering whether or not the conduct of legislators inside the four walls of legislative chambers be known to the public at large and disseminated for them, for after all an informed citizenry and by extension the voting public has a right to know about the elected representatives, their opinions and views in a vibrant and healthy democracy wedded to rule of law.

⁹⁴ AIR 2002 SC 2112.

⁹⁵ AIR 2003 SC 2363.

⁹⁶ 2012(6) SCALE 166.

⁹⁷ 2013(11) SCALE 348.

⁹⁸ 2014(6) SCALE 675.

⁹⁹ JT 2016 (10) 361.

¹⁰⁰ (2018) 4 SCC 699

¹⁰¹ 2018(10) SCALE 52.

¹⁰² 2018(11) SCALE 414.

¹⁰³ 2021 SCC OnLine SC 571.

¹⁰⁴ 2023 SCC OnLine SC 871.

¹⁰⁵ 2024 SCC OnLine SC 150.

And as for application of article 21, bulk of case laws is already in existence since the path breaking pronouncement in *Maneka Gandhi (Supra)* regarding inclusivity of fundamental rights, particularly here for our purpose – nature, content and scope of the words - ‘life’, ‘personal liberty’ and expression ‘procedure established by law’. For the appreciation of fundamental rights, one can recall the ringing words of M. B. Shah, J in *Peoples Union for Civil Liberties (PUCL) (Supra)* delivered two decades ago – as he rebuffed Parliament’s attempt to amend the law to get over incidentally his own judgement in *Union of India v. Association for Democratic Reforms (Supra)* to make the electoral process more accountable *qua* the electorates - *“It is established that the fundamental rights themselves have no fixed meaning, most of them are empty vessels into which each generation must pour its content in the light of its experience. The attempt of the Court should be to expand the reach and ambit of the fundamental rights by process of judicial interpretation.”*¹⁰⁶

¹⁰⁶ *supra* note 94 at 453.