

DISCORDANT PARALLELS OF FUNDAMENTAL RIGHTS AND PARLIAMENTARY PRIVILEGES

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Abstract

The conflict between parliamentary privileges and fundamental rights can be resolved to a large extent by fully recognising the distinctions between the privileges and their procedural aspect. There are two parts in parliamentary privileges, one is substantive, and the other procedural. The substantive part defines the rights and the procedural part defines the mode of use of these rights. The existence of substantive privilege is a matter for courts to decide, and the procedure to exercise the privileges is to be decided by the parliament. This distinction between the substantive and procedural provisions has been made by the Constitution of India. But the distinction is not clear and as a result of that, the conflict between privileges of legislature and fundamental rights has arisen and persists till date. The balance between fundamental rights and parliamentary privilege must be re-examined. But, in the entire process, it is found imperative that mutual respect must subsist and it must be ensured that all attempts at mutual encroachment upon each other's domain must be avoided at all costs. Otherwise, parliamentary democracy itself will be at peril.

Introduction

“Privilege is that which sets Hon. Members apart from other citizens giving them rights which the public do not possess.....Parliamentary Privilege does not go much beyond the right of free speech in the House of Commons and the right of a member to discharge his duties in the House as a Member of the House of Commons.”

Speaker Lucien Lamoureux ¹

¹ See Debates (Canadian House of Commons), 29th April, 1971, P.5338

The concept of parliamentary privilege in India in its modern form is indeed one of graft, imported from England. The House of Commons having been accepted by the Constituent Assembly as the model of the legislature, the privileges of that House were transplanted into the Draft Constitution through Articles 105 and 194.² It originated with the English Parliament in the sixteen century, and it was exercised by colonial legislatures prior to American flexibility to view censure, expulsion and other disciplinary actions as points on a continuum. The punishment that are usually within a legislature's authority include withdrawal of privileges, fine, imprisonment, reprimand, censure, suspension and expulsion. Formal disciplinary procedures generally are regarded as a drastic step reserved for serious situations. Most often is made to obtain a satisfactory, but informal, solution to the matter.³

Parliamentary privileges are some of the peculiar rights enjoyed by each House collectively as a constituent part of the Parliament and by the members of each House individually, without which they could not discharge their functions and which exceed those possessed by the other bodies or individuals.⁴

Part III of the Constitution contains a long list of Fundamental Rights which are conferred to the citizens of India from Article 12 to 35. Fundamental Rights were deemed essential to protect the rights and liberties of the people against the encroachment of the power delegated by them to their Government. They are limitations upon all the powers of the Government, legislation as well as executive and they are essential for the preservation of public and private rights, notwithstanding the representative of political instruments.⁵

Both Fundamental rights and Parliamentary Privileges guarantees freedom for the citizens of India. But Fundamental Rights are subject to certain reasonable restrictions whereas Privileges are independent rights and not subject to restrictions.

² .Raja Ram Pal vs. Hon'ble Speaker, Lok Sabha and Ors, (2007) 3 SCC 184,272

³ Jack Maskell, Expulsion and Censure, Actions taken by Full Senate against Members, CRS Report for Congress, 12th November, 2008 [Order Code 93-875]

⁴ May-Parliamentary practice, Ch.III, P.42 (16th ed).

⁵ Hartado v. People of California, 28 Led 232, per Mathew, J.

Before setting out on a discussion regarding the topic at hand, it is found profitable that I do refer to the landmark judgment, which I do so, delivered by our Hon'ble Supreme Court in *Raja Ram Pal vs. Hon'ble Speaker, Lok Sabha*,⁶ wherein the issues of powers, privileges and immunities of the Legislatures and precisely the power to expel a Member of Parliament were subjected to a threadbare discussion and analysis.

The factual matrix of aforementioned case inter alia involved allegations that the Members of Parliament (hereinafter referred as MPs) had been complicit in unethical and corrupt practices of taking extraneous (monetary) consideration in relation to their functions as legislators. Be that as it may, without reiterating the oft-repeated facts of this landmark case, it happened that on 23rd December, 2005, the Lok Sabha Secretariat issued the impugned notification notifying the expulsion of those MPs with effect from the same date. Similarly, the Rajya Sabha had accepted the recommendations of the Ethics Committee and, a motion agreeing with the recommendation was adopted on 21st March, 2006 thereby expelling the concerned Member from the membership bringing to an end his membership. On the same date, a notification was issued by Rajya Sabha Secretariat. The two members of Rajya Sabha have also challenged the constitutional validity of their expulsions.

In considered view of above, our Hon'ble Supreme Court had framed the following questions for adjudication, namely,

- (i) Whether the Supreme Court, within the constitutional scheme, have the jurisdiction to decide the content and scope of powers, privileges and immunities of the legislatures and its members?
- (ii) If it is so, can it be found that the powers and privileges of the legislatures in India, in particular with reference to Article 105, include the power of expulsion of its Members?⁷
- (iii) If such power of expulsion indeed exists, whether the Supreme Court possess jurisdiction to interfere with the exercise of said power or privilege conferred on

⁶.Raja Ram Pal vs. Hon'ble Speaker, Lok Sabha and Ors, (2007) 3 SCC 184

⁷ *ibid*

Parliament and its Members or Committees and if so, whether this jurisdiction circumscribed by certain limits? ⁸

- (iv) Whether such power of expulsion is subject to judicial review? If so, what is the scope of such judicial review?⁹

It was inter alia held by our Hon'ble Supreme Court that there was no transgression of any of the fundamental rights in general and Articles 14, 20 or 21 in particular. The Court had herein, decisively, retained for itself the power to review an exercise of such legislative privileges. Such review stands upon the basis of pre-requisites of constitutionality and legality. Constitutionality involves the test of Fundamental Rights, and legality pertains to the absence of *bonafides*. Consequently, wherein a privilege contradicts any Fundamental Right, the exercise of such privilege is liable to be quashed.¹⁰

The aforementioned ruling had rendered Parliamentary or legislative privileges submissive to Fundamental Rights. It vested the Supreme Court the ultimate authority for deciding whether and when a Fundamental Right has been violated. It was however made clear that the privileges may be subject to Fundamental Rights on a case-to-case basis.¹¹

Importance of Fundamental Rights

The Constitution of India has included a number of fundamental rights¹² in part III of the Constitution from Article 12 to 35; those rights are declared as fundamental rights with an intention to impose express prohibition against legislative interference with these rights and the provisions of a constitutional sanction for the enforcement of such prohibition by means of a judicial review ¹³is a clear indication that these rights are to be paramount. The fundamental rights perform two fold functions; first, negative injunctions not to be interfere with certain of the citizen's liberties and secondly, the positive obligation to protect the citizen's right from encroachment by society. Fundamental rights consist of those principles which are thought in

⁸ *id*

⁹ *id*

¹⁰Dr Sonia B. Nagarale, Legislative Privileges in India(2017 Ed.), p.237.

¹¹Dr Sonia B. Nagarale, Legislative Privileges in India(2017 Ed.),p.238.

¹² Article 12-35,Part III,Constitution of India

¹³ Article 13,Part III,Constitution of India

themselves conducive for cohesion and survival of the society in the form of a written constitution or a bill of rights as the United States constitution has done. On the other hand, if the society determines to give certain rights to individual thinking it to be not dangerous to cohesion and survival, it is termed as privilege. These are some similarities in the two concepts, as both allow individuals to do or not to do things to which they have rights. But if the rights are only privileges, then interference by the community with such rights will be not regarded as dangerous to cohesion or survival. Thomas Erskine May¹⁴ clarifies the difference between rights in a strong sense and rights in a weak sense.

“Fundamental rights or right in a strong sense, are those things which a community must allow an individual to do or not to do at his choice if there is to be cohesion or survival. Privileges or right in weak sense, are those things which the community currently allows individuals to do because they present no dangers to cohesion and survival although freedom in relation to these activities is not regarded as essential to those attaining those goals.”¹⁵

The model of inclusion of fundamental right in the constitution of India, though it has been taken from the constitution of the United States, the Indian constitution does not go so far, and rather effects a compromise between the doctrines of Parliamentary sovereignty and judicial supremacy, on the other hand, the Parliament of India cannot be said to be sovereign in the English sense of legal omnipotence- for, the very fact that the parliament to legislate only subject to the limitations and prohibitions imposed by the constitution enables our Parliament to legislate only subject to the limitation and prohibitions imposed by the constitution, such as, the Fundamental Rights, the distribution of legislative powers, etc. In case any of these limitations are transgressed, the Supreme Court and the High Courts are competent to declare a law as unconstitutional and void. So far as the contravention of fundamental rights is concerned, this duty is specially enjoined upon the courts by the constitution (Art. 13) by way of abundant caution, clause (2) of Art. 13 say.¹⁶

¹⁴Malcolm Jack(ed.)Erskine May's Treatise on the law,Privileges,proceedings and usage of parliament.24thedn,LexisNexis Butterworth (2011)

¹⁵*ibid*

¹⁶Article 13 ,Constitution of India.

“The State shall not make any law which takes away or abridges rights conferred by this part and any law made in contravention of this clause shall, to the extent of the contravention, be void.” To this extent, our constitutions follow the American model rather than the English.

The scope of the Fundamental Rights has been extended over the years as a matter of judicial interpretation. The different fundamental rights contained in part III of the constitution do “not represent entirely separate streams of rights which do not mingle at many points. They are all integrated part of the Constitution.”¹⁷ Thus each fundamental right is no longer regarded as being mutually exclusive of all other fundamental rights because of the overlapping subject matter of fundamental rights.¹⁸

Part III of the constitution of India has been taken from the Universal declaration of Human Rights of the United State of America. Dr.B.R.Ambedkar described them as the most essential part of the Constitution to protect the rights, liberties of the people against the encroachment of the power delegated by them to their government. Fundamental rights represent the basic values cherished by the people of the country to live with dignity as a human being.

Importance of Parliamentary Privileges

The object and purpose of conferring privileges on the legislature is to safeguard its freedom, authority and dignity. Privileges are necessary for the proper exercise of the functions entrusted to the legislature by the Constitution. They are conferred on each House of the legislature, collectively, to enable it to protect its members and to vindicate its own authority and dignity and on members and officers, in their individual capacity, because the House cannot perform its functions without the impeded use of the services of its members and officers.¹⁹

Accordingly, privileges are “absolutely necessary” to enable the legislature to perform its functions.²⁰

¹⁷Maneka Gandhi v.Union of India,(1978)1 SCC 248,para 202

¹⁸RustomCavasjee Cooper and ors v. Union of India,(1970)1 SCC 248,para 52;Delhi Transport Corporation v.DTCMazdoor Congress,1991 Supp(1)SCC 600,paras 297-298;Raja Ram Pal,para353-356.

¹⁹ Kaul and Shakhder, Practice and Procedure of Parliament,6th ed.(2009)(Kaul and Shakhder(6th ed.))at 219.

²⁰ Malcolm Jack(ed.)Erskine May’s Treatise on the law,Privileges,proceedings and usage of parliament.24thedn,LexisNexis Butterworth (2011)

A “ privilege” is a special right, advantage or benefit collectively enjoyed by each House of the Legislature and individually by its members which is distinct from the common rights enjoyed by all persons.²¹

Parliamentary privilege in essence, is essential to the conduct of Parliament’s business as it is to the maintenance of its authority and independence, at issue, is the integrity and the autonomy of the institution itself. While certain rights and immunities , notably those attached to the freedom of speech in parliamentary proceedings are bestowed upon members individually, they do not exist for their personal benefits. Parliament privilege exists, rather to protect the Houses ‘themselves collectively and their members when acting for the benefit of their House, against interference, attack or obstructions’.²²

Without parliamentary privileges, parliament could not discharge their functions efficiently and effectively. These privileges have been developed to allow functioning of Parliament to proceed with the business of making legislation and reviewing the activities of the Executive without illegitimate interference. The content and extent of these privileges have evolved with reference to their necessity. The privileges of Parliament include those rights, which are absolutely necessary for the execution of its power. It is important to bear in mind that the purpose of parliamentary privilege is to secure the proper dignity, efficiency and independence of Legislature and not to protect individuals from due process. This legal institution is not a personal immunity; it is an occupational immunity, which is provided to ensure that the duties of representatives may carry out perfectly. This immunity is not meant to place a Member of Parliament above the law, but to protect him from possible groundless proceedings or accusations that may be politically motivated.²³

In our country, such privileges are available to both Houses of Parliament, various State Legislatures along with the committees and Members thereof. However, the existing constitutional provisions relating to such privileges of the Houses of Parliament, Committees,

²¹ Thakker J. in *Raja Ram Pal vs, Hon’ble Speaker, Lok Sabha*, (2007) 3 SCC 184, Para 466

²² C.R. Munro, *Studies in Constitutional Law* 2nd ed. Oxford University Press, p. 136

²³Dr KS Chauhan, *Parliament: Powers, Functions and Privileges, A Comparative Constitutional Perspective*, 1st edn.2013 LexisNexis p. 385

Members of Parliament and State Legislatures have not exhaustively enumerated them. The Constitution of India specifically defines only a few privileges. But, regarding the rest, it gives liberty to the concerned Legislature, as the case may be, to define them by law. Till they are so defined, the Constitution provides for the incorporation of those privileges enjoyed by the House of Commons of Parliament of United Kingdom and of its Members and Committees immediately prior to the commencement of Constitution of India.

Sustainability of Fundamental Rights with Parliamentary Privileges

A controversy persists regarding the relationship between the fundamental rights and privileges which the Houses of Parliament and State Legislatures enjoy under Art. 105(3) and 194(3) of the Constitution respectively, that is, whether the former controls the latter in any way?

MUTUAL CONFLICT

There has been some confusion on the question whether the Fundamental Rights control in any way the privileges which the House enjoy under Article 105(3). In case of a conflict between such a privilege and a Fundamental Right, which one of them will prevail over the other?

This question arose for the first time in *Gunupati*.²⁴ In one of its issues, the *Blitz* published a news item casting derogatory aspersions on the Speaker of the UP Legislative Assembly. The Speaker referred the matter to the Committee of Privileges for investigations and report. The Committee summoned D.H. Mistry, editor of *Blitz* to appear before it to clarify the position. Mistry neither appeared before the committee nor did he send any reply.

Thereafter, the Assembly adopted a resolution authorising the Speaker to issue an arrest warrant against Mistry with a view of enforcing his presence before the House to answer the charge of breach of privilege.

Accordingly, Speaker issued a warrant and Mistry was arrested in Bombay on the charge of committing contempt of the UP Legislative Assembly. He was brought to Lucknow and lodged in a hotel for a week without anything further done in that matter. In the meantime, a petition for a writ of Habeas Corpus was moved in Supreme Court on his behalf on the ground that Mistry's Fundamental Right under Article 22(2) of Constitution of India had been violated.

²⁴*Gunupati Keshavram Reddy v. Nafisul Hussain*, AIR 1954SC 636

Article 22(2) envisages that a person arrested must be produced before the Magistrate within 24 hours of his arrest. The Supreme Court accepted the contention that as Mistry was not produced before the Magistrate, his Fundamental Right under Article 22(2) was infringed and accordingly, the Court ordered his release.

This pronouncement created an impression that the fundamental Right would control parliamentary privileges. However, In *Searchlight* case, the Supreme Court held by a majority that the privilege enjoyed by the House of Parliament under Article 105(3) and 194 (3) by the State Legislature, were not subject to Article 19(1)(a) and thereafter a House is entitled to prohibit the Publication of the report of the debates of the proceedings even if the prohibition contravenes the Fundamental Rights of speech and Expression of the publisher under Article 19(1)(a).

The ruling in *Gunupati's* case²⁵ was held not binding as it was not a 'considered opinion' on the subject. The Court argued that Article 105(3) was not declared to be 'subject to the Constitution', and therefore, it was as supreme as any provision of the Constitution including the Fundamental Rights. Any inconsistency between Article 105(2) and 19(1)(a) could be resolved by a 'harmonious construction' of the provisions, and Article 19(1)(a) being of a general nature must yield to Article 105(2) which was of a special nature.

The factual situation of *Searchlight* case was as follows:

A member of Bihar Legislative made a speech on the floor of the House. The Speaker ordered certain portion of the speech to be expunged; the *Searchlight* however published the entire speech containing the expunged portion as well. The House referred the question of breach of its privilege by the newspaper to its Committee of Privilege, he moved a writ petition in the Supreme Court under Article 32 claiming that the said notice and the proposed action by the committee infringed his fundamental right to freedom of speech and expression and guaranteed by Article 19(1)(a). But, as stated above, the Supreme Court rejected the Editor's contention.

The petitioner also contended that the proceedings before the Committee of privileges threatened his Fundamental Right under Article 21 as well. According to Article 21, no person shall be deprived of his personal liberty otherwise than in accordance with the procedure

²⁵ *ibid*

established by law. The editor's contention was that the committee of privileges violated Article 21. The Court also rejected this contention. The Court argued that the House can make rules under Article 118 in case of a House of Parliament, or Art. 208 in case of a House of the State Legislature. Therefore, the rules made by the House regulating the procedure for enforcing its power, privileges and immunities would fulfil the requirement of Article 21.

After the decision, the committee of privilege proceeded to consider the case of the breach of privilege against the editor of the Searchlight. Again, the Editor came before the Supreme Court under Article 32 effectively seeking reconsideration of its earlier decision. He again repeated his argument that the state legislature could not claim a privilege contrary to Article 19(1)(a) which included the freedom of publication and circulation. He also claimed that the privilege conferred on the assembly under Article 194(3) were subject to Article 19(1)(a).

Thus, Searchlight II²⁶ raised substantially the same questions as had been agitated in Searchlight I. The Court however refused to reconsider its earlier decision. Thus, the Court reaffirmed the proposition of law laid down by it in Searchlight I.²⁷

Though the Supreme Court in the Searchlight cases was concerned specifically with the question of application of Article 19(1)(a) to the area of legislative privilege, an impression got around, because of certain observations caused by the Court and the way the Court treated the earlier case of Gunupati²⁸ that, perhaps all the fundamental rights were inapplicable. Reconsidering the mutual relationship between fundamental rights and the legislative privileges in the Keshav Singh's case,²⁹ the Supreme Court held that in Searchlight excluded only Article 19(1)(a), and not other fundamental rights, from controlling the Parliamentary Privileges.

The Court held that Article 21 would apply to Parliamentary Privileges and a person is free to come to Court for a writ of Habeas Corpus on the ground that he has been deprived of his personal liberty not in accordance with law, but not for capricious or malafide reasons. The Court argued in this connection: Article 226 confers on the High Court the power to issue writ

²⁶M.S.M. Sharma v. S.K. Sinha II, AIR 1960 SC 1186.

²⁷ M.S.M. Sharma v. S.K. Sinha I, AIR 1959 SC 395.

²⁸ *ibid*

²⁹ Keshav Singh: In Re: AIR 1965 SC 745.

of Habeas Corpus. A person may complain under Article 21 that he has been deprived of his personal liberty not in accordance of law but for malicious or malafide reasons. The Court will then be bound to look into the matter. Therefore, an order of the House for punishing a person for its contempt cannot be final and conclusive. The Court can very well go into it.

The Supreme Court left open the question whether any of the Fundamental Rights would apply to the legislative privileges as it was not pertinent to the issue in hand.

Later, disposing of the Keshav Singh's case,³⁰ the Allahabad High Court held that when the Legislature acts under the rules framed by it laying down the procedure for enforcing the power to commit for contempt that would be compliance of Article 21 requiring procedure to be laid down by law for deprivation of personal liberty. It was also held that Art. 22(2) has no application when a person has been adjudged guilty of contempt of the House and has been detained in pursuance of such adjudication.

'The Supreme Court has specifically accepted the position in Searchlight I that if a law were to be made by a Parliament or State Legislature under Art. 105(3) or Art. 194(3) to define its privilege then such a law would be subject to Art. 19(1) (a). Such law would one made in exercise of its ordinary legislative powers under Art. 246. Consequently, if such a law takes away or abridges any of the Fundamental Rights it will contravene the peremptory provisions of Art. 13(2), and thus, such a law would be void to the extent of such contravention.

In our parliamentary democracy, where Parliament enjoys almost supreme powers, legislators face no threat from government. In fact privileges have become a tool in the hands of the ruling party. The recent instances, both national and local, once again revived the debate about the need for codifying privileges and giving primacy to a citizen's right to free speech over legislative privileges.³¹

Why shouldn't our legislators' freedom of speech, like the freedom of speech of citizens, be subject to the sovereignty and integrity of the nation, public order, friendly relations with

³⁰ *ibid*

³¹ *Mustafa, Faizan.* "Bring the House up to date." *The Hindu*, last updated 11.07.2017. <http://www.thehindu.com>

foreign states, incitement of an offence or defamation as mentioned in Article 19(2)? The ‘sovereign people of India’ have a restricted right to free speech but ‘their servants or representatives’ have an absolute freedom of speech in the Houses. Even if one may reluctantly concede such a privilege to them in the interest of the smooth conduct of the House, why should there be the power to send people to jail for the breach of privileges? The Supreme Court’s decision in *M.S.M. Sharma* (1958), giving primacy to the privileges over free speech, was made in the first decade of the Republic during which the court had a lot of respect for legislators — most of them were freedom fighters. However, by 1967, the Supreme Court was convinced that Parliament should not have absolute powers.³²

Our legislators have the power to be the sole judges to decide what their privileges are, what constitutes their breach, and what punishment is to be awarded in case of breach. Is this not too wide a power which clearly impinges on constitutionalism, i.e. the idea of limited powers? The fault lies with the framers of the Constitution, who, while drafting the lengthiest constitution of the world, have left the vital area of legislative privileges undefined.³³

Articles 105 and 194 clearly lay down that the “power, privileges and immunities of the legislature shall be as may from time to time be defined by the legislature, and until so defined, shall be those of the House of Commons”. The expression “until so defined” does not mean an absolute power not to define privileges at all. Legislators have been arguing that codification of privileges will harm the sovereignty of Parliament. Is Indian Parliament really sovereign? We want a uniform civil code but our parliamentarians do not want a codification of their privileges which will not require more than a couple of articles.³⁴

Moreover, the drafters of the Constitution also committed the mistake of putting Indian Parliament on a par with the British House of Commons. De Lolme’s statement about the supremacy of British Parliament, that “Parliament can do everything but make a man a woman and a woman a man”, is not applicable to India. British Parliament was also the highest court till 2009. Thus, Indian legislatures and British Parliament differ not merely as regards their general political status but also in the matter of legal powers. Unlike England, in India the

³² *id*

³³ *ibid*

³⁴ *ibid*

Constitution is supreme, not Parliament. Today by sovereignty, we mean “popular sovereignty” and not “parliamentary sovereignty”. The opening words of the Constitution are “we the people” and not “we the legislators of India.”³⁵

The codification of privileges is basically resisted because it would make the privileges subject to fundamental rights and hence to judicial scrutiny and evolution of new privileges would not be possible. In fact, the British House has itself broken from the past. Acts and utterances defamatory of Parliament or its members are no more treated as privilege questions. The U.S. House of Representatives has been working smoothly without any penal powers for well over two centuries. Australia too codified privileges in 1987.³⁶

It is strange that our legislators, to cover up corruption, not only took cover behind privileges but also pleaded in courts that they were not even ‘public servants’. In the *Hardwari Lal* and *A.R. Antulay* cases, the court did accept their contention and held that MLAs are not ‘public servants’. In the *P.V. Narasimha Rao* case, though they were held as public servants, the Supreme Court, in a controversial judgment, held that they can legally take bribes and vote as per the desire of the bribe-giver and they will not be liable for corruption because, under legislative privileges, they cannot be questioned “in respect of any vote” given by them.³⁷

Our legislators also have protection from arrest in civil cases 40 days before the session, during the session and 40 days after the session. The exemption from arrest is also available for meetings. If we count the days of three parliamentary sessions and meetings then our MPs have protection from arrest for more than 365 days in a year. Is it not absurd?³⁸

The Constitution Review Commission headed by Justice M.N. Venkatachaliah had recommended that privileges should be defined and delimited for the free and independent functioning of the legislatures.³⁹

³⁵ *ibid*

³⁶ *ibid*

³⁷ *ibid*

³⁸ *ibid*

³⁹ *ibid*

The restrictive interpretation of the Supreme Court holding freedom of speech subject to legislative privileges is not in tune with modern notions of human rights and there is an urgent need to have a fresh look at the vexed question of freedom of press *vis-à-vis* legislative privileges.⁴⁰

CONCLUSION

In a democracy where public representatives are elected every five years, the electors need to know the performance of their legislators. At present there is no robust system of public scrutiny except the annual reports of the Comptroller and Auditor General (CAG), the details of which have to be disseminated by the media. But even the CAG has no punitive powers except to point out anomalies. So there is virtually no report card system by which a legislator can be held publicly accountable, except when he/she is caught with their hands in the till. But even then, most corrupt legislators, including those with criminal charges are re-elected because the reason why he/she is elected are subjective and based on personal likes and dislikes of the voters and the amount of money the candidate spends in an election. It is therefore the role of the media to provide reliable reports of government functioning so that members of the public who are not influenced by money power can make at least make informed choices. Also the reason why legislative proceedings are not held in camera but that there is a press gallery means inside the House means that the deeds and words of legislators (both from the Treasury and the Opposition) inside the Assembly or Parliament are telecast/reported (unless expunged because of use of unparliamentary language) for public consumption, so that the public gets to know what actually transpires inside the House.⁴¹

The next question is whether public criticism of the goings-on inside the Assembly/Parliament can be construed as breach of legislative privilege. In a democracy, the people who are the voters and who elect their representatives are the ultimate masters, we are told. But are we

⁴⁰ *ibid*

⁴¹ Mukhim, Patricia. "Parliamentary privileges v. Fundamental Rights." *The Shillong Times*, March 31, 2017. <http://www.theshillongtimes.com>

really? Do public representatives who are actually public servants really understand the meaning of “public servant?” In normal circumstances, a master can reprimand a servant and point out his faults and failings in the conduct of his duties. In this case since the MLAs/MPs are paid out of public funds the public have every right to critique their performance inside and outside the House when those are in the public good. Critiquing assembly debates is surely not a personal, verbal attack on any single MLA. Since every minute spent inside the House is also paid for from the public exchequer, MLAs/MPs cannot waste the time of the House in banal discussions. And since the public is not easily fooled, we also know that not much preparation and due diligence is observed by political parties before the assembly sessions. Judging by the supplementary that follow each reply, it would seem that the right questions are not asked because of the lack of preparation. The supplementary are as important as the starred questions and require very assiduous preparation so that any attempt at filibustering by the Treasury bench is stopped in its tracks and Government is therefore held accountable. Allegations of government misdemeanours remain only allegations unless supported by statistical evidence. There is a lot of statistics in the public domain regarding dismal public health indicators; poor educational outcomes; about the manner in which land is being alienated in the state.⁴²

Legislative privilege is not yet legally codified and is therefore left to the interpretation of the Speaker. Legislative privilege contradicts the very idea of the Fundamental Right to Freedom of Speech and Expression, in which is included press freedom. Right to Freedom of Expression is the basic component of a democracy. Take away that right and that’s the end of democracy. Attempts to invoke the breach of privilege clause at the drop of a hat is, a poor attempt to flex legislative muscle and muzzle the public voice. Article 105 defines the power, privileges and immunities of each House of Parliament and of the Members and the Committees of each House. The Article comprises four clauses. Clause (1) says that “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”. Clause (2) declares that “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,

⁴² *ibid*

paper, votes or proceedings”. Clause (3), which has undergone an amendment under the Constitution 44th Amendment Act, 1978, read before the amendment as follows: “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 Parliament of the United Kingdom and of its Members and Committees at the commencement of this Constitution”. After the aforesaid amendment, clause (3) now reads 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 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 section 15 of the Constitution (Forty-fourth Amendment) Act, 1978.” Clause (4) reads thus: “(4) The provisions 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.” Article 194 follows the same principles in respect of the State Legislatures. Going by Article 105 and by extension Article 194, there is no breach of privilege by a member of the public when that person critiques the speeches made in the assembly. If the citizens choose to remain silent and do not contest such frivolous attempts at curbing their fundamental rights, we will soon degenerate into an autocracy.⁴³

Thus, the position appears to be that it is wrong to suppose that no Fundamental Right applies to the area of legislative privileges. Some Fundamental Rights, like Article 19(1) (a), do not apply. Perhaps, Article 19(1)(b) to 19(1)(g) would also not apply. On the other hand, some Fundamental Rights e.g., Article 21 do apply, while the position with respect to others, eg, Article 22(1) and 22(2), is not clear.

There is however, no doubt that if Parliament were to enact a law defining its privileges as is envisaged by Article 105(3), then such a law would be free from the controlling effect of the Fundamental Rights. Such provisions of law which contravene Fundamental Rights would be invalid. It is the duty of Courts to protect the rights of citizens who had in theory reserved to

⁴³ *ibid*

themselves certain rights and parted only with the others to the legislature. Every institution created under the constitution of India, therefore should function within the allotted field and not encroach upon the rights of the people who created the institution.

