Endless fight between judiciary & legislatures

May in his book parliamentary practices (16th Ed. 172) "This is an aspect of the matter which cannot be ignored that House of commons …… claims to be the absolute & exclusive judge of its own privileges and that its judgments are not examinable by any other court or subject to appeal. On the other hand, the court regards the privileges of parliament as a part of law of land, of which they are bound to take judicial notice. They consider it their duty to examine any questions of privilege arising directly or indirectly. In a case which falls within their jurisdiction and to decide it according to their own interpretation of law. The decisions of the courts are not accepted as binding by the house, in matter of privilege, nor the decisions of the house by the courts, thus the old dualism remains unsolved. An example of this dualism may be shown in the case of stockale Vs. Hansard and the subsequent case of the sheriffs of middlessex, which are part of history"/

Article 105 and 194 of the constitution of Indian deals with the powers, privileges and immenities of parliament and its member and state Legilatures and their members, As sub section 3 of both these articles refers to the privileges of British house of commons at the commencement of the constitution. These articles were amended by the 42nd Amendment Act. These amendments were subsequently deleted by the 44th Amendment Act. But the 44th amendment also amended articles 105 and 194. The departure made from the original sub clause (3) by the 42and Amendment Act was to add that the privileges may also be such as may be evolved by the houses of parliament or the state legislatures. This was an attempt to create new privileges for parliament and state legislature. But we know that parliament or state legislatures can not create new privileges. It is clear from the passage of May's parliamentary practice and vindicate its own privileges. It is aged that by itself neither house can create new privileges. In 1704, the lord communicated a resolution to the commons at a conference "that neither house of parliament had any power by and vote, or declaration, to create to themselves any new privilege that is not warranted by the known laws and emotions of parliament, which are assented to by the commens". Hence the amendment to article 105 and 194 are merely symbolic and cannot be effective to create new privileges, which is impossible, Hence the conclusion necessarily follows from the language of article 105 and 194 as amended by 44th Amendment that the privileges are defined they should be those of that house and of its members and committees immediately before the commencing into force of section 15 of the constitution, 44th Amendment Act 1978.

As the power to evolve privileges has been repealed the present position is the same as it was before the amendment.

The privileges of house of commons have been defined by may redline as follows :- "A some of the fundamental rights of the house and of its individual members as against the prerogative of the crown/the authority of the ordinary court of law and special rights of the house of lords". May has defined it' when any of hese rights and immenities" of the members, individually and of the assembly in its collective capacity, which are known by the general name of privileges, are discarfed or attacked by any individual or authority, the offence is caused breach of privilege, and is punishable under the law of parliament" These privileges have been counted by seervai as under : -

(i) Protection from Civil Assest – 40 days before or after the meeting of parliament.

(ii) Freedom of speech, debate and proceeding in parliament. It is primarily a privilege of individual member.

(iii) Protection from evidence as regard proceedings of the house without prior permission, It is also a privilege of individual member.

(iv) Privilege of excluding strangers and prohibiting of publication of its proceedings.

(v) The power to enforce its privilege and to protect itself from insult, indignity or obstruction is it self a privilege of the house and consist in the poser to commit for contempt by a general or unspeaking warrant. It is the only important part of privilege these days.

This last privilege has gathered a momentum these days. The Manipur and Tamil Nadu assembly speakers went on a unfortunate confrontation directly with the supreme court after deciding either to ignore the court's stay order or willfully not obeying the same. The T.N. Speaker, even, directed its legislature secretary not to respond to the summon issued by the supreme court in a writ petition challenging the order of speaker himself. He also asserted that the legislatures are independent, sovereign and beyond interfere noe from any external institution. The Manipur speaker, with certains, reservation reached on a respectable compromise with the order of the supreme acburt. Hence that matter ended happily but the matter of Tamil Nadu speaker has caused a furore. Now the entire discussion on this privilege can start most conveniently with the case brought by stockable Vs. Hansard, an English decision on the topic-which decided that "the publication of parliamentary reports, notes, and proceeding was an

essential incident to the constitutional functions of parliament, that the house had sole and exclusive jurisdiction to determiner the existence to the extent of its privileges. That to dispute those privileges by legal proceeding was a breach of privilege and trial for any court to assume to decide upon matters of privilege inconsistent with the determination of either house of parliament was contrary to the law of parliament". Further in the case of Honsard Vs. Gossett. It was held that the warrant of the house was to be constued with the warrant of a Magistrate. In the case of Sheriffs of middlessex, the majority of judges of the committee of the commons took the view that they could not admit the right of any court of law to decide on the properly of these forms of warrants which the house through its higher officer has thought proper to adopt on a particular occasion. But in considering the courses to be adopted by the house in consequent of this judgments, the committee recommended to the house that every legitimate mode of asserting and definding its privileges should be exhausted before it prevented by its own authority, the further progress of the action". The house of commons thus asserted the power and the privilege to commit for contempt on unspeaking warrant and that power was upheld.

Dicey described (Law of the constitution page 57-58) "either house or parliament has the fullest power over its own proceeding and can like a court commit for contempt any person, who in the judgment of the house, is guilty of insult of affront to the house. The case of the sheriffs of middle sex carries this right to the very farthest point …… the court …….. do no claim any right to protect their own official from being imprisoned by the house of commons for alleged contempt of the house even though the so called contempt is nothing else an act of obedience to the court …… parliament privileges has from the nature of things never been the subject or precise legal definition. Keir and Lenoson (cases in constitutional law page 125) described that the cases of Paty and Sheriffs of Middle sex prove that the claim takes practical effort and is not merely Bruthem fulmen and by conceding to the house of Parliament. In their capacity of Superior courts, the right of committing for contempt without cause shown the courts have really yield the key of fortress by giving them power of enforcing against the world at large their own views to the extent of their privileges".

May described (Parliamentary practice page 90) the whole sum matter thus". The house of commons has the power to send for persons whose conduct has been brought before the house on a matter of privilege by an order for their attendance, without specifiying in the order the

object or the causes whereon their attendance is required and in obedience to the order members attend in their places and other persons at the Bar".

Hence it is clear that the privileges of parliament are part of the commons law. No court of law can challengte it or dispute it or sit over to decide it. It is only parliament, which can do needful in this respect.

The British Parliament has also created many legislatures (colonial such as India before independence) and the question has arisen whether those legislatures enjoyed the privileges of British Parliament including his power to commit for contempt by 'General Warrant'. In Keilly Vs. Carson (1842) c. Moo page 63, Fenton Vs. Felconer (1856 I.P. C. 29). It was repeatedly held that power possessed by house of commons to to commitfor contempt by a General warrant would not be implied from the mere creation by the British Parliament of a colonial legislature. But when expressly powers and privileges of British Parliament are conferred on colonial legislatures generally, then this power carried with at the power to commit for contempt by general warrant. This finding has further been reiterated by privy council in other cases also. Hence it became a law for colonial legislatures.

Under the Government of India Act 1935, the privileges of the provincial legislatures were contained in section 28 and 71. It denied the power to legislatures which the house of commons had exercised of committing a refractory party of contempt. This positions was deleted by Indian independence Act 1947…… Section 28 was omitted but section 71 for provincial legislature remained unchanged. It, thus, left the matter at the discretion of fedral legislatures to enlarge his power or keep it as it is.

The frames of the constitution had before them the privileges of the British House of commons or the limited privileges of the certain legislatress created by British Parliament including Indian legislatures. Dr. Ambedkar the chairman of the drafting committed was aware of the claim made by the British house of commons to commit for contempt by an unspeaking warrant and he left the constuent assembly in no about of his view that vary poser was being conferred on the legislatures in India. Hence the privileges of the British House of commons were conferred on Indian Legislatures with all awareness.

The first case in which the supreme court dealt with the warrant issued by the speaker was G.K. Reddy Vs. Nafisul Hasan (AIR 1954 S.C. page 636). This case laid down no law about the privileges of legislatures because no question ws raised befors the court. Subsequently in the

case of M.S.M. Sharma Vs. S.K. Sinha, (AIR 1959 S.C. page 395). The court had to decide whether the publication of alleged portion of the Bihar Assembly proceeding in search light, constituted a breach of privilege. He also denied that the house of the commons had privileges which Bihar legislature claimed but the court by the majority by four to one held that the privilege of prohibiting the publication of its proceedings amounts the breach of privileges and it is not subject to the fundamental right of the citizens. Subsequently in 1964 in the presidential reference the questions was raised before the supreme oburt belonging to Uttar Pradesh Vidhan Sabha. One keshav Singh, having been held guilty of contempt of assembly was produced before the House in the custody on March 14 1964, He was premanded under the orders of the house was also held guilty for the IInd attempt for his disrespectful behaviour towards the house and he was sentenced to 7 days imprisonment by the house. Subsequently Mr. Soloman Advocate of Keshav Singh presented a petition before the Lucknow Bench of Allahabad High Court against the state of U.P., Speaker and Chief Minister. He prayed that the action of the assembly was illegal and he be set liberty and during disposal of his petition. He be released on bail. Upon this petition two judges made an order releasing Keshav Singh on bail. The assembly subsequently issued notice to both the judges and advocate of the contempter and ordered that Keshav Singh, both judges and advocate should be takeninto custody and brought before the house for explanation. The two judges presented a petition for restraning the implementation of the notice issued by the assembly against them. 28 judges (full court) passed stay order on the notice and resolution of the assembly. The speaker of the assembly then referred a resolution to the privileges committee and withdrew the warrant issued against the judges and advocate but privileges committee decided to call for the judges and advocate for submitting their explanation but in view of the stay order of the full court it was thought proper that the matter may be further serious, Hence the reference was made to the Supreme Court. The main question of the reference was whether it was privilege of the British House of the commons to commit a person for contempt by an unspeaking warrant. It was held that the power of committee for contempt by an unspeaking warrant was a privilege of the house under Article 194 sub clause (3). The majority opinion stated that it was the scheme of the constitution and particularly Articles 32, 26 and 211 have shown that the court could examine an unspeaking warrant of the house to as certain whether a contempt had in fact taken place but dissenting opinion of justice Sarkar held that Sharma's case clearly established that fundamental rights did not over-ride the privileges of the

Legislatures and harmonious construction requires that the general provisions of the fundamental right should yield to the special provisions of the privileges of the legislatures, if those privileges were not destroyed. He further held that to allow articles 32 and 226 to prevail over the privileges of the legislature was not to harmonize the two independent provisions but to destroy one of them. It is not surprising that the majority opinion did not deny to the house the absolute control over its own proceedings. But the privilege is contained in Article 194 (3) and if that privilege is not controlled by either provisions of the constitution neither can other privilege contained in Article 194(3) be so controlled. Therefore, there is a clear self contradiction in the central argument of the majority opinion. He majority opinion states that the power the commit further contempt by the general warrant is not a privilege of the house but the court had not scrutinized such general warrants on the grounds of committee resumption or agreement. Seervai observed that the court needs no civility or consideration from the house. As regards the theory that a warrant of the house is presumed to be correct. The presumption is either a Rule of law or not. It is then part of lex pamliamenti, it is not for us to construct new ideas about the privileges of the house of commons, ideas which had not ever been imagined in England. Our job is not to start the innovation as of privileges by our own researches. It is also important that after the judgment of the Supreme court in the presidential reference, the committee of privileges of Vidhan Sabha of Uttar Pradesh disregarded the order of the Allahabad High Court as unauthorized interference in the proceedings of the house and the committee did not take cognizance of it. The committee observed "Having held that ……..were guilty of the contempt of the house by the above mentioned acts. The committee feels confidence that the respondent would not have done what they had done. Had they realized by the importance to implementation of the matters at the time but in view of the importance of the harmonious functioning of the two important organs of the State i.e. the Legislature and the judiciary and the recent judicial pronouncement, the committee feels that the end of justice would meet and the dignity of the house vindicated if the house expresses displeasure. The committee according recommended that displeasure of the house be expressed". This displeasure was accordingly confirmed which is still on the law books. No one challenged this displeasure in any court of law and it stood finalized. Further the supreme court once again in the case of Tej Kiran Vs. Sanjiva Reddy (AIR 1970, S.C. page 1573) held that once it was proved the parliament was transacting its business anything said during the course of that business was immune from the proceedings in any court and no

question arose whether what was said, was relevant to the business or not. Now latest legal position is clear that any thing said during the business of parliament is beyond judicial review and it is not subject to the proceedings of the court. This judgments has given a just contrary opinion to the presidential reference of 1964 and it is a settled principle of jurisprudence that the latest law should prevail. By the above perusal, it is clear that whatever, happened in Supreme court in these days with regard to the speaker of the Manipur and Tamil Nadu is highly un-fortunate and it has created a constitutional crises in the Nation. With due regards to all, it is submitted that if one authority goes beyond its jurisdiction or transplate ins power, problems may arise. Hence the authorities should act within their jurisdiction and well defined powers. Eash authority should also observe to maintain harmony and one should understood and respect the feeling and authority of other. Now there is a heavy demand for the codification of the privilege has been raised for the first time in 1959 before the Ist Lok Sabha Speaker G.B. Mavlankar. He was against the codification of the privileges because the privileges of members are not to be conceived with the reference to those or that party. Secondly an attempt to the legislation will made the substantial curtailment of the privileges as they exists today and thirdly the legislation might crystalise the privileges leaving no scope to vider or change them. He, therefore, opined that it is better not to define specific privileges at the moment. Here I may say that it is also an important fact that when the powers of the legislatres are unlimited. How can a consequential burden of such powers such as privileges shall be limited in the operation. The experience in Canada and Australia were contents to enjoy the privileges of the British house of commons. South Australia however. Made an experiments of defining the privileges of its legislatures by the parliamentary privileges Act. 1958. Practical working of the Act shown the great un-wisdon of the codifying those privileges and in 1972 the act was repealed and replying Act reverted the privileges of the British House of commons. It is also important that other counties having parliamentary form of democracy like England, had not yet codified the privileges and their working is very smooth. Hence it is advisable, keeping in view the above discussion, that it is no way else to condify the privileges but our all important organs of society should have patience to act within their jurisdiction and they should regard and respect each other's authority and power to maintain the balance and harmony in the society.

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