INTRODUCTION

History of humanity records various instances of conflict between the governed and the government. It also records that gradually the governed asserted itself against the government and established its rights to freedom and liberty.

The Fundamentals of the Indian Constitution as enshrined in preamble secures to its citizens, justice, social, economic and political; liberty of thought, expression and belief, faith and worship; equality of status and opportunity; and to promote among them all fraternity assuring the “dignity of the individual and the unity of the nation. The essence of these objectives permeates throughout the entire constitution. The fundamental rights were implemented in Part III to give effect to these objectives.

As per the Oxford dictionary the term privilege refers to the “special right, advantage or immunity to the particular person. It is a special benefit or honour”. Both parliamentary houses have the rights to operate effectively and efficiently, and to carry out their duties without interruption or intervention of any sort. Collectively, each house and its representatives are granted the rights individually.

FUNDAMENTAL RIGHTS AND PARLIAMENTARY PRIVILEGES

Even prior to the present Constitution of India, the idea of Fundamental Rights were present in a tenuous form in the Indian polity by way of Sections 298 and 299 of the Government of India Act, 1935. Such rights are considered fundamental, since they are most important to the individual's attainment of his maximum intellectual, moral and spiritual statute. These rights though subject to the qualifications defined in the Constitution itself, are inviolable in the sense that no law,

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ordinance, custom, usage or administrative order, can abridge or take away a ‘Fundamental Right’.
“The statement of Fundamental Rights thus limits the range of state activity in appropriate
direction in the interest of the liberty of the citizens.”

In *Maneka Gandhi v. Union of India*[^214], Bhagwati J., observed that fundamental rights reflect the
fundamental values which the people of this country have cherished since the Vedic times and are
calculated to protect the dignity of the individual and to establish conditions under which every
human being can grow his personality to the fullest extent possible.

Although in *Maneka Gandhi*[^215], *Sunil Batra*[^216], *Hoskot*[^217] and *Hussainara Khatoon*[^218], the
Supreme Court has taken the view that the provisions of Part III should be given widest possible
interpretation yet the absolute concept of liberty and equality is very difficult to achieve in modern
welfare society.

The Supreme Court in the historic judgment of *Judges Transfer Case*[^219] held that any member of
the public having sufficient interest can approach the court for enforcing constitutional or legal
rights of such persons or group of persons who cannot approach the court because of poverty or
for any other reasons, even by means of a letter.

But the position is quite different with Parliamentary privileges. Privileges, though part of the law
of the land, are to a certain extent enjoys an exemption from the ordinary law.

Under Article 105 (3), Parliament may pass a law specifying its privileges, whereas any law that
contravenes any of the fundamental rights is invalid. If a State legislature makes a law prescribing
its forces, privileges and immunities under the first part of clause (3), the legislation will be subject
to Article 13 and clause (2) of that article if it violates or abbreviates the constitutional rights
guaranteed under Part III.

Article 19 (1) (a) of the Constitution which guarantees the fundamental right to freedom of speech
and expression also includes the right to freedom of press. Though Article 19(1) (a) guarantees

[^214]: 1978 AIR 597
[^215]: id
[^216]: 1980 AIR 1579
[^217]: 1978 AIR 1548
[^218]: 1979 AIR 1369
[^219]: S.P. Gupta Vs. Union of India (AIR 1982 SC 149)
freedom of speech and expression to every citizen of India, this right is subject to reasonable restrictions under clause (2) of Article 19. The right guaranteed under Article 105 is an independent right and is not subject to restrictions under clause (2) of Article 19 (1). Thus, it is clear that the freedom of speech under Article 105 is different from the freedom of speech under Article 19, which is subject to restrictions.

Would Fundamental Rights override the privileges and would privileges be subject and subservient to Fundamental Rights?

Article 13 (2) of the Constitution contains the power of Judicial Review. The Supreme Court will strike a 'rule' that is in breach of any fundamental right.

The earlier view held by the Supreme Court (Pandit MSM Sharma v. S.K. Sinha\(^{220}\)) was that the power of Judicial Review under Article 13 (2) would not extend to privileges under Clauses 1 and 2 because the language of these clauses itself precluded Judicial Review. With respect to Clause 3, the Supreme Court was of the view that the uncodified rights were not 'law' under the scope of Article 13(2) and were thus not capable of being struck down.

Whilst Article 105(3) provides a strong mandate to codify rights, Parliament taking cue from the aforesaid reasoning of the Supreme Court has resolved to leave the privileges uncodified out of fear that if privileges were to be codified in the form of a statute, they would be struck down in case of a conflict with Fundamental Rights. This fear also stems from the fact that several privileges enjoyed by the Indian Parliament today have fallen into desuetude in England many years ago. Several privileges are likely to clash with Fundamental Rights, and if codified into a statute, those privileges are almost guaranteed to be struck down. As a result, members today continue to enjoy a large number of privileges that are in conflict with Fundamental Rights in actual practice and which have ceased to enjoy the status of privileges in England and other countries of the world.

\(^{220}\) AIR 1954 S.C.636
Controversy also exists with respect to the procedure to be followed in cases of breach of privilege. Parliament is yet to lay down a set procedure for dealing with instances of breaches of privileges. The Indian Parliament continues to follow a policy of differential procedure for each case of breach of privilege that comes up before it, guided solely by the exigencies of the hour and popular public opinion in a particular case.

Hitherto, the Supreme Court refused to interfere with such iniquitous procedure because of its restrictive interpretation of Article 122 of the Constitution. The Court assiduously avoided any review of Parliamentary procedure even if the procedure was one that affected the life and liberty of a citizen (whether MPs or otherwise) under Article 21.

**Raja Ram Pal v. The Hon'ble Speaker, Lok Sabha**

In Raja Ram Pal v. The Hon'ble Speaker, Lok Sabha, Constitution Bench headed by Chief Justice Sabharwal brought about the first substantive reform in India's privilege law. The Court held that the power of the Judicial Review under Article 13(2) must apply, on a case-by-case basis, to the rights that circumvent its earlier decisions. The Court also gave a wide interpretation to Article 122. It held that while Article 122 precluded an inquiry into the procedure of Parliament on grounds of procedural irregularity, the Article could not oust a review of a procedure if the procedure was found ‘illegal’ or ‘unconstitutional’. In other words, the Court restricted the scope of Article 122 to matters of procedural *irregularity* and instead of reading the word ‘irregularity’ as being all encompassing, it chose to read it restrictively, distinguishing it from an illegal and an unconstitutional procedure.

**CASE ANALYSIS**

The earliest instance of a breach of privilege in independent India arose in the Constituent Assembly, when one of the members complained that the sentry at the gates of the Assembly was restricting entry of horse drawn carriages into the premises.

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221 AIR 2007 SC 1448
However the first Supreme Court case on the point was that of *G.K. Reddy v. Nafisul Hassan*\(^ {222}\) in 1954. G.K. Reddy, the editor of the magazine *Blitz* was committed for contempt by the Uttar Pradesh Legislature. In the Supreme Court, the Attorney General admitted that Reddy had not been produced before a Magistrate within 24 hours. The Supreme Court held that his Fundamental Right under Article 22(2)\(^ {18}\) had been violated and ordered his release.

**MSM Sharma (I)\(^ {223}\)**

Five years later, the GK Reddy case was overruled by the Supreme Court in *Pandit M.S.M. Sharma v. S.K. Sinha* (hereinafter referred to as the ‘Searchlight case’). In 1954, the Editor of a newspaper *Searchlight* was held guilty of contempt of the Bihar State Legislature when his newspaper carried a report of proceedings expunged by the Speaker of the Bihar Legislature. The editor applied to the Supreme Court seeking an injunction of the contempt proceedings, defending the publication of the report as being protected by the freedom of speech and expression guaranteed by Article 19 (1) (a). This argument was in furtherance of the general proposition that the guaranteed Fundamental Rights of citizens would be applicable to the privileges and that the privileges would be subject and subservient to them. He further contended that his right to life and personal liberty guaranteed by Article 21 would be violated if he were produced before the Committee of Privileges of the Bihar Legislature, which was empowered to order his imprisonment. He argued that the procedure likely to be followed by the Committee was not ‘law’ within the meaning of Article 21.

**The 1964 Presidential Reference\(^ {224}\)**

In 1964, one of the first open standoffs between the Courts and the Legislatures surfaced. The Uttar Pradesh Legislature found a private citizen, Keshav Singh guilty of Contempt of the Legislature. Keshav Singh had committed a breach of privilege of MLA NN Pandey by printing and publishing certain contumacious pamphlets. He was summoned to the Legislature. Thereafter he wrote a disrespectful letter to the Speaker and acted in an unruly manner when being

\(^{222}\) AIR 1954 S.C. 636  
\(^{223}\) AIR 1959 S.C. 395.  
\(^{224}\) (1965) 1 S.C.R. 413
reprimanded in the Legislature. A warrant was issued by the Speaker for Keshav Singh’s detention for a period of seven days. However the warrant did not contain the facts constituting the alleged contempt. Keshav Singh moved the High Court of Uttar Pradesh seeking issuance of the writ of Habeas Corpus. A Division Bench ordered his release on interim bail pending decision on the habeas corpus petition. In an unprecedented move, the Uttar Pradesh Legislature issued Contempt notices not just to the lawyer of the accused but also to the Judges of the High Court for having entertained the petition. The Legislature passed a resolution to the effect that all of them including the High Court judges were to be produced before it in custody. This marked the beginnings of a first rate Constitutional crisis. The following day, Mandamus petitions were filed by the judges as well as the advocate for Keshav Singh.

A Full Bench of the Uttar Pradesh High Court comprising 28 Judges (all except the two Judges) made directions restraining the Speaker of the Legislature from issuing warrants and restraining the Marshal of the House from executing the warrant if it had already been issued. Taking note of the rapidly deteriorating situation, the President of India exercising his discretionary power of a Reference, sought the Supreme Court’s opinion on the issues involved. .

A bench of seven Judges opined upon a multitude of issues connected with the controversy. In doing so, the interpretation of the Searchlight case became sine qua non. The Court led by Chief Justice Gajendraghadkar placed a radically different interpretation on the law of privileges, making them generally subject to Fundamental Rights and secured for itself the power to determine the legality and constitutionality of legislative procedure. However, being an advisory opinion, it did not enjoy the same force of an actually decided case.

Majority of the bench preferred to show themselves bound by the Searchlight judgment, attributing to it the very conclusions it wished to draw. Having so interpreted it, the majority forthwith found itself bound by the Searchlight judgment.

\textit{P.V. Narsimha Rao v. State (JMM Bribery Case)}

\footnote{Constitution of India. Art. 143: Power of the President to consult Supreme Court}

\footnote{AIR 1998 SC 2120}
The court in this case has held that the privilege of immunity from courts proceedings in Article 105 (2) extends even to bribes taken by the Members of Parliament for the object of the vote in Parliament in some specific way.

The Supreme Court's majority (3 judges) did not agree with the minority (2 judges) and clarified that the term "in respect of" in Article 105(2) must have a specific sense in order to understand an act that has a relation or link with the speech made or the vote provided by a Member in Parliament or any of its committees. So interpreted, it would include within its ambit, acceptance of a bribe by a member in order to make a speech or to cast his vote in parliament or any committee thereof in a particular manner.

Therefore, the bribe taker MPs, who had voted in parliament against no-confidence motion were held entitled to the protection of Article 105(2) and were not answerable in a court of law for alleged conspiracy and agreement. However, the court held that the bribe taker MP, who did not vote on the motion of no confidence, had no right to defence under Article 105(2). The defence provided for under Article 105(2) was not open to the bribe giver MPs it was kept. The court further ruled that the Lok Sabha could take action against the alleged bribe givers and the alleged bribe takers, whether or not they were parliamentary members, for violation of privileges or contempt. However, the court was unanimous that parliamentarians who gave bribes or took bribes but did not take part in the vote do not demand immunity from the proceedings of the court under Article 105(2). The ruling has caused so much confusion and unhappiness that a lawsuit for appeal is pending in court.

*Raja Ram Pal Case: The Reference Revisited*227

It has been already enunciated that the events that led to the Raja Ram Pal case, 11 MPs were caught taking bribes on camera by a news-channel. The video which was telecast repeatedly, led to an uproar. In a quick reaction, Parliament stepped in to control the damage. Immediate inquiries were ordered and expeditious verdicts sought. The Committee of Privileges which heard the matter found all the MPs guilty and recommended their immediate disqualification. The

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227 AIR 2007 SC 1448
recommendations were accepted and all 11 MPs were disqualified. The MPs filed writ petitions in the Supreme Court seeking reinstatement.

By a vote of 4:1 the Court formalised the change sought to be brought about by the Presidential Reference and secured for itself the power to review the exercise of privileges by Parliament.

The Court did lay down in unequivocal terms that privileges may be subject to Fundamental Rights on a case to case basis, but its reasoning was derived entirely from the Presidential reference ratio and therefore suffers from the same fallacy. The majority concluded that they were “unable to fathom any reason why the general proposition that fundamental rights cannot be invoked in matters concerning Parliamentary privileges should be accepted.” However the Court also unambiguously reserved for itself the power to review Parliamentary proceedings.

CONCLUSION

In India Legislative Assemblies and Parliament never discharge any judicial role and in any way their historical and constitutional background does not support their argument to be considered as record courts. Therefore no exemption can be asserted from investigation by the courts of general warrants issued by House in India.

It is the responsibility of both the parliament and the state legislatures to look carefully before making any legislation so that it does not harm any rights. It is also the obligation of representatives to use these rights appropriately and not abuse them for other reasons that are not in the interests of the general interest of the country and of the general public. And the fact that "money corrupts and absolute power completely corrupts" is what we must bear in mind. The public and the other governing body will always be on watch for this not to happen under the privileges given.

The Court has developed the proper theory to determine the parliament’s rights that the Indian parliament should follow The Pen, Ink and Indian Rubber Theory Theory. In Hardwari Lal v. The Election Commission of India228, Justice Sabharwal made the following observation: "I conclude that it is basically tautologies to first read something proposed by the respondents on behalf of the Constitution, first to read the King, the Queen, the House of Lords or the Acts of Attainder in the

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228 1977 (2) Punj. & Har. 269
Constitution and then seek to annul them on the clear ground that they cannot be part of the Republican Constitution because of the very existence of things.

Therefore, the theory of pen and ink simply becomes a theory of pen, ink and India rubber whereby one first writes something totally foreign to the Constitution inside it and then continues to rub it off the next moment. This is well-established that if a statute contains anything in it through a reference to another clause then only that which is consistent with the parent clause may be considered to be included. Therefore, the straightforward approach of constructing Article 194 (3) is the normal and the settled one of not reading into it anything that is glaringly anomalous, unworkable and unreasonable.

The Supreme Court in *M.P.V. Sundaramier & Co. v. State of Andhra Pradesh*[^229], alerted: “The threads of our Constitution were certainly taken from other Federal Constitution, but their breadth and appearance underwent adjustments as they were woven into the fabric of our Constitution. Therefore, as the American decisions are useful as demonstrating how the problem is dealt with in the Federal Constitution, great caution should be taken in its implementation in the interpretation of the Constitution”.

In the report submitted on March 31, 2002, the National Commission for the Study of the Working of the Constitution (NCRWC) also recommended that "Privileges of legislatures should be established and delimited for the free and autonomous functioning of parliament and state legislatures." It could therefore be claimed that the codification of privileges should reinforce the rule of law.

[^229]: AIR 1958 SC 468