

THE CONFLICT BETWEEN FREEDOM OF THE PRESS AND PARLIAMENTARY PRIVILEGES: AN UNFAMILIAR TWIST IN A FAMILIAR TALE

Shivprasad Swaminathan*

This article proposes a novel interpretation of the conflict between the two constitutional principles of parliamentary privilege and freedom of speech. The author argues that the combined effect of the 42nd and 44th Constitutional Amendments was to lower the status of parliamentary privileges from being part of the original constitution, to being introduced into the Constitution through an amendment. This would make these privileges subject to basic structure review and, by implication, subject to Art. 19(1)(a).

I

We tend to look at the Emergency as a dark period in India's Constitutional history. While recollecting the Emergency, a special sense of scorn is usually reserved for the 42nd Amendment, infamous for the crippling blows it purported to inflict on Constitutional liberties. With this background deeply entrenched in our collective memory, if a student of Constitutional law were to earnestly claim that the 42nd Constitutional Amendment passed during the Emergency was probably one of the greatest boons to the freedom of press in India, he is apt to be seen with the suspicion reserved for the likes of someone calling himself a teapot. Notwithstanding the initial perceived implausibility of such a claim, I will be making it here. If that claim were to turn out to be true, we would be compelled to acknowledge a most extraordinarily ironical, albeit heartwarming, result: the Amendment calculated to asphyxiate liberties could unwittingly have done liberties a mighty favour. The result was not part of the intended script of the framers of the 42nd Amendment; to be sure, their intentions were quite to the

* Shivprasad Swaminathan is a Doctoral candidate in Jurisprudence, Balliol College, University of Oxford. Many thanks are due to Gautam Gandotra, in discussions with whom the central idea of this paper emerged and to Arghya Sengupta who commented on a draft of this paper.

contrary. But as we shall see, sometimes in Constitutional reasoning, the best laid plans go awry and one ends up with the exact opposite of what one had set out to achieve.

In bringing out this heartwarming ironic twist hidden in India's Constitutional history, I would turn to a neglected chapter in an otherwise familiar story about Parliamentary Privileges, around which many acrimonious battles of the Indian Constitution have been fought. I do not propose to recount any of the familiar parts of the story except what is absolutely essential for scene setting. Rather, I will focus on a twist in the tale, which turns on a minute detail; a detail that judicial and scholarly discussions about the subject have simply glossed over. Our discussion here will be restricted to the conflict between Parliamentary Privileges and Art. 19(1)(a), though much of what is argued here could *mutatis mutandis* be salient for the conflict between Parliamentary Privileges on the one hand and Arts. 14 and 21 on the other.

II

Arts. 105(3) and 194(3) of the Indian Constitution, shorn of the elliptically referring language, provide that the Privileges of the Indian Parliament and the State Legislature respectively, shall be the same as those of the House of Commons of Britain until such time as the Legislatures and the Parliament make a law codifying their Privileges. As against the press, the Commons enjoyed the privilege of prohibiting publication of even a true and faithful report of the debates or proceedings and punishing for any breach thereof. This privilege originally stemmed from the anxiety of the members to protect themselves from the sovereign.¹ This was a very wide, catch-all privilege, susceptible, in theory, to serious abuse. However, in quintessentially British democratic tradition, the Commons rarely used this privilege against the Press after the early nineteenth century. Free publication of debates continued to be permitted by sufferance of the Commons, so long as debates were correctly and faithfully reported.²

The British Privileges imported to India, soon threatened to condescend to a mere façade for punishing the press for publishing anything that was unpalatable

1 TASWELL – LANGMEAD, CONSTITUTIONAL HISTORY 657 (10th edn., 1946).

2 MAY, PARLIAMENTARY PRACTICE 118 (16th edn., 1957).

to the ruling majority. The power to commit for breach, a privilege afforded to preserve the sanctity of the debates in the House, began to be used for every cold and catarrh. This hydra-headed Privilege sat uncomfortably with Art. 19(1)(a) of the Constitution, guaranteeing freedom of speech (and press, by interpretation).³ Art 19(1)(a) lent a new dimension to the struggle between the press and privileges.

The struggle first manifested itself in the *Searchlight* case,⁴ where for publishing a full account of a debate, despite an order of the speaker of Bihar State Legislature ordering some portions of the debate to be expunged, the editor of the news paper was committed for breach of privilege and sentenced to imprisonment. The editor moved the Supreme Court for quashing the committal, *inter alia*, arguing that his freedom of the press under Art. 19(1)(a), which gave him the right to publish a fair and accurate report of the proceedings of the house, was violated by the Privileges under Art. 194(3) and hence the latter must be struck down as unconstitutional.

The Supreme Court held that its power of judicial review of legislation, applicable to ordinary law, could not be invoked to impugn Art. 194(3), which *is part of the Constitution*. Applying the *harmonious construction* theory, involving as it did, a conflict between two *equally placed parts* of the Constitution, the Court arrived at – no doubt some would question as baffling – the result that the freedom of the press under Art. 19(1)(a) was subservient to and should yield to the Privileges under Art. 194(3). In passing, the Court observed that if at all the legislatures or the Parliament were to ever codify their privileges, then such code, being an ordinary ‘law’ would be subject to judicial review. Perhaps, alerted by this dictum of the Supreme Court, none of the legislatures in India have till this date codified their Privileges, lest they invite judicial scrutiny.

A more tumultuous sequel followed in the form of the *Keshav Singh* case,⁵ which made the *Searchlight* case look like a vicar’s tea party in comparison. Here again, the Supreme Court reiterated the *harmonious construction* theory propounded in *Searchlight*. However, the Court held that the courts had the power to enquire if a particular privilege claimed by the legislature in fact existed or not, by

3 Romesh Thappar v. State of Madras, 1950 SCR 594 (Supreme Court of India).

4 M.S.M. Sharma v. Srikrishna Sinha, AIR 1959 SC 395 (Supreme Court of India) [hereinafter “*Searchlight*”].

5 In Re Presidential Reference under Article 143 of the Constitution, AIR 1965 SC 750 (Supreme Court of India) [hereinafter “*Keshav Singh*”].

consulting the privileges of the Commons. And if the Privilege claimed did in fact exist, then the courts could not interfere in the exercise of that privilege or in the punishment for the breach thereof. While the Supreme Court did nothing in the way of altering the balance between privileges and Art. 19(1)(a) set out in *Searchlight*, applying the *harmonious construction* theory, the Court held that Art. 21 was to prevail over Arts. 105(3) and 194(3) in a conflict between the two.

Five decades on, the *harmonious construction* theory still holds the field. Any conflict between privileges and fundamental rights is still addressed by applying the *harmonious construction* theory. In 2004 when the editor of *The Hindu*, N. Ram was committed for privilege by the Tamil Nadu Assembly, he approached the Supreme Court for vindicating his rights under Art. 19(1)(a). Though the case was eventually settled and hence never came to be decided upon, news reports indicate that arguments on the petitioner's behalf seem to have proceeded along the lines of the *harmonious construction* theory, albeit arguing that it be used to make Art. 19(1)(a) prevail over Art. 194(3).

Recently in *Raja Ram Pal*,⁶ where the Supreme Court had the occasion to revisit the conflict between privileges and fundamental rights, the court yet again remained committed to the *harmonious construction* theory stating that Arts 105(3) and 194(3) are just as much a part of the Constitution as are the articles embodying fundamental rights and hence there is no way in which it could call the former in question for violation of fundamental rights. Some of the dicta may be briefly sampled:

Art. 105(3) is also a constitutional provision and it demands equal weight as any other provision, and neither being 'subject to the provisions of the constitution', it is impossible to accord to one superiority over the other.

First, it is to be remembered that 105(3) is itself a constitutional provision and it is necessary that we must construe the provisions in such a way that a conflict with other provisions is avoided.

Working within the confines of the *harmonious construction* theory the Supreme Court in *Raja Ram Pal* held:

- a) That it was competent to decide whether any privilege claimed by the legislature actually existed or not;

6 Raja Ram Pal v. Hon'ble Speaker, Lok Sabha & Others, (2007) 3 SCC 184 (Supreme Court of India) [hereinafter "*Raja Ram Pal*"].

- b) That the harmonious construction theory yielded the result that Arts. 20 and 21 *could* prevail over Art. 105(3) and 194(3) and that the court would assess this on a case by case basis.

In *Raja Ram Pal* the Supreme Court did nothing more than apply the *harmonious construction* theory that has been around for five decades. *Raja Ram Pal* does nothing in the way of providing any systematic relief for claims under Art. 19(1)(a) which even now remains subservient to Arts. 105(3) and 194(3). On the question of conflict of Art. 19(1)(a) and Arts. 105(3)/194(3), the law laid down in *Searchlight* case still holds the field and *Raja Ram Pal* does nothing to change it.

Summing up, under the current position of law, the dice are loaded heavily in favour of privileges, and against Art. 19(1)(a). Though the courts have noted that there is a conflict between Art. 19(1)(a) on the one hand and Arts. 105(3) and 194(3) on the other, they have been unable to resolve that conflict in favour of Art. 19(1)(a) primarily (if not exclusively) because Arts. 105(3) and 194(3) being parts of the constitution are not amenable to challenge. The press has quite understandably found this position very uncomfortable. One demand that is raised not infrequently by the press is that the legislatures codify their privileges. The demand is understandable. Though nothing less can actually help the press, this probably is too much of a demand. The legislatures are surely mindful of the fact that that if they codify the privileges, the resultant 'code' would be 'law' under Art. 13 and thus subject to judicial review. They must also have in mind the Supreme Court's dicta in the *Searchlight* alerting them to this possibility. Unfortunately, no immediate relief for claims under Art. 19(1)(a) appears anywhere on the horizon. For any court seeking to give a new traction to the *harmonious construction* theory so as to tilt the balance in favour of Art. 19(1)(a), the insurmountable wall would be the ratio of *Searchlight*. It may seem that a bench larger than *Searchlight* (*i.e.*, at least a seven judge bench) alone could bring to fruition any such idea.

III

What if somehow the situation referred to in the preceding section were to be turned on its head? What if Arts. 105(3) and 194(3) could be subject to judicial review for violation of Art 19(1)(a)? What if the sting of *Searchlight* could be nullified in a flash, without having to wait for a seven judge bench to overrule *Searchlight*? What if somehow the Parliament and State legislatures would be forced to codify their privileges, despite being mindful of the fact that the resultant code would be 'law' under Art. 13 and subject to judicial review? Given the current position of the law the odds of any of these possibilities coming to obtain would seem

fantastic. However, as it turns out, the path for each of these eventualities coming about may well have been laid out already and all of that is made possible by a hidden, hitherto unnoticed, twist in India's Constitutional history.

After *Searchlight* and *Keshav Singh*, the law was tilted heavily in favour of privileges. Yet, overzealous of keeping courts from interfering with Privileges, the Parliament, by the 42nd Constitutional Amendment,⁷ substituted Arts. 105 (3) and 194(3) with fresh clauses that retained the contents of the original provision and further added that henceforth the privileges of the parliament and legislatures would be such as the Parliament or legislatures "*themselves evolve from time to time.*" Prior to this Amendment one could at least guess, or hope to guess, the privileges by consulting those of the House of Commons. But with this curious 'dog-law'⁸ kind of provision, likely to give Bentham a hiccup or two, the press would have had no way of knowing what exactly constituted privilege of the Parliament until they were actually committed for breach. This also purported to nullify the judicial interference that the Court had assumed in the *Keshav Singh* case as now with this Amendment, privilege was what the Parliament "claimed to have evolved" and the courts would have no way of determining about the existence of privilege, as the Parliament could in any case conjure up an unprecedented privilege and claim that it had "evolved" it. To say the least, the impact of such a provision on the freedom of the press would have been momentous. Fortunately, the 44th Amendment, in a wave of undoing the wrongs wrought by the 42nd Amendment, restored the old position by *substituting* the two articles by fresh ones with the content of the old Arts. 105(3) and 194(3) as they existed prior to the 42nd Amendment.⁹

Curiously, several Constitutional scholars and the Supreme Court, failed to discern one potentially pertinent point. The twist in the tale lay right before their eyes; in the 42nd and 44th Amendments. However, nobody chose to attach any importance to these; legal commentators of repute led by H.M. Seervai and the Supreme Court, following Seervai, refer to the Amendments as mere "cosmetic" changes.¹⁰ But these ostensibly "cosmetic" changes potentially have the most profound effects as we shall now see.

7 42nd Constitution (Amendment) Act (1976), §§ 21 and 34.

8 Bentham used the epithet 'dog-law' to describe the common law which worked and still in many cases works in a such a way that a person does not know that he had committed a violation of law till the court makes him accountable for it .

9 44th Constitution (Amendment) Act (1978), §§ 15 and 26.

10 SEERVAI, CONSTITUTIONAL LAW OF INDIA 2180 (4th edn., 1996); Rao, *Codification of Parliamentary Privileges in India: Some Suggestions*, (2001) 7 SCC (Jour) 21. The Supreme Court uses the very same adjective to describe the Amendments in *Raja Ram Pal*.

The 42nd Amendment substituted Arts. 105(3) and 194(3). The concept of substitution involves 'deletion' and 'replacement' of a provision with a new provision. Because of this substitution brought about by the 42nd Amendment and then the 44th Amendment, the *source* of Arts. 194(3) and 105(3) now is *not* the original Constitution but a *Constitutional Amendment*; initially the 42nd Amendment, and now the 44th Amendment, to be precise. What we are faced with then is a conflict between Art 19(1)(a) – a part of the original constitution – on the one hand and Arts. 105(3) and 194(3), which are creatures of a Constitutional Amendment on the other. That being the case, the very basis of the harmonious construction theory is nullified. The treatment to be given to a conflict between an Amendment and a provision of the original Constitution is the Basic Structure theory propounded in the *Kesavananda*,¹¹ which has it that any Constitutional Amendment violative of the Basic Structure is unconstitutional. The crucial question that arises here is whether Art. 19(1)(a) is part of the Basic Structure?

That answer to that question is to be found in the judgment of the Supreme Court in *Coelho*.¹² The following conceptual structure of a Basic Structure challenge to a Constitutional Amendment seems to emerge from *Coelho*:

- a) An Amendment that abrogates or abridges rights guaranteed by Part III of the Constitution does not *ipso facto* violate the Basic Structure doctrine.
- b) Such an Amendment abridging the rights guaranteed by Part III will be struck down only if it is violative of the Basic Structure.
- c) The Basic Structure of the Constitution is to be *inter alia* found in Arts. 14, 19 and 21 and the principles underlying therein. As Sabharwal, C.J.I. observed

All Amendments to the Constitution made on or after 24th April, 1973 by which the Ninth Schedule is amended by inclusion of various laws therein shall have to be tested on the touchstone of the basic or essential features of the Constitution as reflected in Art. 21 read with Art. 14, Art. 19 and the principles underlying them.

11 *Kesavananda Bharati vs. Union of India*, AIR 1973 SC 1461, (Supreme Court of India) [hereinafter "*Kesavananda*"].

12 *I.R. Coelho v State of Tamil Nadu*, (2007) 2 SCC 1 (Supreme Court of India) [hereinafter "*Coelho*"].

In explaining why Arts. 14, 19 and 21 are the indelible constituents of the Basic Structure of the Constitution, Sabharwal, C.J.I. notes:

Dealing with Arts. 14, 19 and 21 in [the] *Minerva Mills* case,¹³ it was said that these clearly form part of the Basic Structure of the Constitution and cannot be abrogated. It was observed that three Articles of our Constitution, and only three, stand between the heaven of freedom into which Tagore wanted his country to awake and the abyss of unrestrained power. These Articles stand on altogether different footing.

From the Supreme Court's judgment in *Coelho* it emerges that any Amendment brought about after 24 April, 1973 purporting to circumscribe the Fundamental Rights contained in Arts. 14, 19 and 21 would be unconstitutional because each of these Fundamental Rights is amongst the indelible constituents of the Basic Structure of the Constitution.¹⁴ It would follow that Arts. 105(3) and 194(3) introduced by the 42nd Amendment would be unconstitutional, to the extent of their conflict with Art. 19(1)(a), and must yield to the latter; that is to say, those privileges of the Parliament/legislatures that conflict with Art. 19(1)(a) are liable to be struck down or where possible read down so as to make way for Art 19(1)(a). The realization that Arts. 105(3) and 194(3) are *creatures* of a Constitutional Amendment and not parts of the original constitution dramatically reverses the old picture of the conflict between privileges and Art. 19(1)(a).

I can imagine some alert readers clutching at the arms of their chairs at this move. The objection to the above move would be this: though there has been a substitution, at least in part, the content of the old provision has been reintroduced. If that is so, the objection would be that I am trying to take too technical a view of the situation in arguing that the source of Arts. 105(3) and 194(3) is a Constitutional Amendment. Far from being too technical, this turns out to be the only jurisprudentially respectable way of conceptualizing the situation.

A legal norm is the meaning of the deontic sentence expressing it. A deontic sentence is one that requires, the performance of some action or abstinence, or that some state of affairs ought or ought not to obtain. The deontic sentence expressing the norm is usually referred to as the norm formulation. The norm formulation is nothing but a bare syntactical linguistic construction. The legal norm being a meaning of this deontic sentence is dependent upon the norm formulation. If the norm formulation is changed so is its meaning. These norms

13 *Minerva Mills Ltd. v. Union of India*, AIR 1980 SC 1789 (Supreme Court of India).

14 Note that for the ratio of *Coelho* to apply to a Constitutional Amendment, the Amendment needs to be post *Kesavananda* i.e. post 24th April 1973. The 42nd and 44th Amendments both being post *Kesavananda*, fall within the purview of the *Coelho* rule.

have no independent existence except as meanings of these norm formulations.¹⁵ If a new norm formulation has been introduced, a new norm has been introduced. Even if a new norm formulation has been introduced substituting an old one with the same content, we would be logically constrained to admit that a new norm is in place; though the content of the new norm could be identical to the old one, the fact remains that a new norm is in place. Norms, being meanings, are hooked to the linguistic proposition. Now, no one can deny that the syntactical linguistic construction to be found in the text of Arts. 105(3) and 194(3) owes its existence to a Constitutional Amendment. If someone doubts this, as Lewis Carroll once argued, logic would grab the person by his collar and, as it were, bludgeon him into accepting it.¹⁶ If that is so, it logically follows that the legal norms understood as the provisions of Arts. 105(3) and 194(3) owe their existence to a Constitutional Amendment.¹⁷ It follows, then, that, being Constitutional Amendments, Arts. 105(3) and 194(3) must be subject to the test of the Basic Structure doctrine.

Though it hardly needs to be stressed, I must clarify that all this is not the existing state of the law; the existing state of law is still governed by the *harmonious construction* theory laid down in *Searchlight*. For all the consequences that I have drawn attention to here, to follow, it would require a judicial declaration to that effect from either the Supreme Court or a High Court.¹⁸ All the same, if a Court is seized of the matter in light of this newly characterized situation, and proceeds on the premise that Arts. 105(3) and 194(3) are now grounded in a Constitutional Amendment, it is very likely that it will find itself persuaded to take the position outlined in this paper.

15 E. Bulygin, *Norms, Normative Propositions, and Legal Statements*, in, CONTEMPORARY PHILOSOPHY: A NEW SURVEY 127, 128 (G. Floistad ed., 1982); E. Bulygin, *Expressive Conception of Norms*, in, NORMATIVITY AND NORMS: CRITICAL PERSPECTIVES ON KELSENIAN THEMES (S.L. Paulson and B.L. Paulson eds., 1998). Bulygin argues that nearly all leading legal philosophers endorse the 'expressive' conception of norms, set out here.

16 L. Carroll, *What the Tortoise Said to Achilles*, 4(14) MIND 278 (1895). As an interesting aside, Lewis Carroll who wrote fascinating fairy tales, in his professional life was a tutor of logic and mathematics at Oxford.

17 Only dyed in the wool Platonists with the most metaphysically queer ontology could quarrel with this. A Platonist would argue that a norm is an entity which exists somewhere in the universe and is independent of any norm formulation. I seriously doubt if such obscure metaphysics has any place in a world as best understood by us according to the sciences.

18 I bracket here and leave open the question of whether a High Court's declaration of unconstitutionality of a Statute/Amendment has force as binding law throughout the territory of India, or whether it is restricted to the territorial limits of the State of which it is a High Court. Though this is an interesting and important question, addressing it will fall way beyond both the scope of this paper and the space dedicated to it.

V

Ironically, what ensures the supremacy of Art. 19(1)(a) over Parliamentary Privileges is the 42nd Amendment, which was intended by its framers to asphyxiate it. What was meant to be poison turned out to be an antidote. Interestingly, had the framers of the 42nd Amendment simply allowed the original provision to remain as it was, not substituting it with a fresh provision, but instead simply *adding* to it, the 'dog-law' clause of evolving privileges from time to time, the situation *could* well have been very different.¹⁹ I say the situation *could* have been different because all of the arguments advanced in this paper would still hold true of the 44th Amendment as it too substitutes a whole new provision in place of the one substituted in place of the original one by the 42nd Amendment. When one sees the real motive behind the framers of the 42nd Amendment choosing the path of substitution, one cannot help being reminded of that old adage of the war being lost for the want of a horseshoe nail. The framers of the 42nd Amendment were troubled by the reference to the House of Commons in the body of the original provisions and wanted to do away with it. Now, they couldn't have dropped reference to the House of Commons from the original provision without syntactically mutilating it beyond sense and comprehension. The only way they could carry out their ambition was by substituting a new provision in place and 'elliptically' referring to the privileges of the House of Commons without referring to it: by referring to the state of law before the 42nd Amendment. That is why Arts. 105(3) and 194(3) that we come across in the text of the Constitution are as elliptically worded as they are. No doubt this linguistic acrobatics must have prompted Seervai and others including the Supreme Court, to dub the changes introduced by the 42nd Amendment as "cosmetic". However, what all missed was that in the midst of all this linguistic acrobatics the framers of the 42nd Amendment had ended up making Arts. 105(3) and 194(3), *creatures* of a Constitutional Amendment. The elaborate legal package including the Basic Structure challenge follows from this. In the "cosmetically" motivated urge to drop the words 'House of Commons' the framers of the Amendment ended up altering the Constitutional status of the provisions in question and along with it the Constitutional destiny of privileges.

The irony doesn't end here. One upshot of the legal position characterized here is that probably the Parliament and the legislatures would be forced to do

19 No doubt in such a scenario the new 'dog-law' clause would still have been amenable to a constitutional challenge but the question is a purely academic one because the 44th Amendment did away with the dog-law clause anyway.

the unthinkable and codify the privileges claimed against the press. How does this bizarre situation come about? On the legal position characterized here, Art. 19(1)(a) trumps any and every privilege that conflicts with it. Oddly enough, Art. 19(1)(a) would fare better against a Constitutional amendment than against a 'law' codifying privileges. Any law codifying privileges could claim to impose restrictions that are permitted under Art. 19(2) and such privileges as can be justified to be 'reasonable restrictions' under Art. 19(2) would to that extent successfully restrict the freedom of the press. However, at present the 'reasonable restrictions' clause under Art 19(2) does not help the cause of Parliamentary Privileges. Reasonable restrictions can only be imposed by a 'law' enacted by the Parliament or State legislatures. *Kesavananda* settles beyond doubt that a Constitutional amendment is not a 'law'. Arts. 105(3) and 194(3), being Constitutional Amendments, thus are not 'laws' and cannot impose reasonable restrictions, with the result that in the conflict between privileges and Art. 19(1)(a), the latter would get a free reign, which it would not have in a situation of a conflict between Art. 19(1)(a) and a law codifying privileges. If desirous of remedying this anomaly, the Parliament or State legislatures end up making a law codifying their privileges, they would surrender the 'constitutional status' of Privileges and the resultant code would be 'law' under Art. 13 and amenable to judicial review, for violating of *any* part of the Constitution (not just the Basic Structure), just as any ordinary law would be. The Parliament and State legislatures would thus find themselves caught between Scylla and Charybdis; they are likely to end up significantly emaciating privileges, whether they codify their privileges or let them remain rooted in a constitutional Amendment.

All said and done, the path for a dramatic reversal in the conflict between privileges and the freedom of the press has been already laid out a long time ago. But no one has noticed. Not just yet!