

'A Case of Constitutional Conflict
Between
The State Legislative Assembly and the High Court'
Supremacy of the Constitution Vindicated

By MR. JUSTICE MIRZA HAMEEDULLAH BEG

I. How the Problem arose

The fundamental principles on which orderly and civilized Government rests, broadly covered by the term "Rule of Law", are laid down for us in our Constitution. The Constitution assigns to the Judiciary the function of authoritatively and finally interpreting the Constitution and of expounding its meaning. In 1964, however, the U. P. Legislative Assembly put forward a claim to determine for itself the ambit of its constitutional power to punish citizens for its contempts. This claim seems to have been advanced upon the footing that such power to interpret the Constitution on such a matter was itself a privilege conferred upon the Assembly by the Constitution. It sought to enforce this claim by ordering the production, by way of punishment, of two Judges of the Allahabad High Court in custody because they had entertained the Habeas Corpus petition of a citizen, Keshav Singh, and had passed an interim order of release of the petitioner on bail after the petitioner had been arrested on a warrant issued by the Speaker of the Assembly and sent to gaol for its contempt. The petitioner's complaint to the High Court was that the Legislative Assembly had stepped beyond the limits of its constitutional power to punish its contempts. He alleged that he had done nothing which could be construed as its contempt. No doubt, the petitioner had concealed a number of very material facts initially, and, after the whole set of facts had been revealed, the High Court itself held that Keshav Singh had been quite properly punished, his petition was dismissed, and he was sent back to prison to serve the remaining part of his short sentence. But, the unfortunate series of events which resulted from the filing of the Habeas Corpus petition of Keshav Singh necessitated a reference of several questions of grave constitutional importance by the President to the Supreme Court of India. And, these questions had to be answered by the Supreme Court before Keshav Singh's case could be finally decided by the High Court. The basic difficulty in the case was caused by the following words in Article 194(3) of the Constitution:

". the powers, privileges, and immunities of a House of the Legislature of a State, and of the members and the committees of a House of such Legislature, shall be such as may from time to time be defined by the Legislature by law and until so defined, shall be those of the House of Commons of the Parliament of the United Kingdom and of its members and committees, at the commencement of this Constitution."

2. Certain Inherent Difficulties

The answers given by the Supreme Court of India to the questions sent to it by the President disclosed the difficulties which were the inevitable results of trying to import and fit the flexible, elusive, changing, and so characteristically and peculiarly British contents of Constitutional Law as the "Powers, Privileges, and Immunities" of the House of Commons into the logical 'scheme of a necessarily rigid Federal structure of our Constitution. The fluidity of the unwritten British Constitution puzzled the trained logical mind of the Frenchman de Tocqueville so much that he declared in desperation: "The English Constitution has no real existence" (see Dicey, "Law of Constitution, " 10th Edition, page 22). Perhaps no branch of British Constitutional Law is so thorny and apparently so lacking in logic as the law relating to the "Powers, Privileges, and Immunities" of the House of Commons. The logic behind its development and its contents at any given time cannot be perceived or understood divorced from British Constitutional history. This is a basic truth which the Supreme Court brought out; and, it then explained the underlying historical reasons.

Just as it is not possible for even the legally omnipotent British Parliament to change certain physical facts, so also it was not legally possible to transplant here without some transmutation certain incidents and appendages of legal power, position, and mutual relations of the House of Commons and the King's Courts which depend upon the peculiarities of British Constitutional history. The British historical background, possibly resulting in certain attitudes or conventions or understandings which are not, strictly speaking, in the realm of legally enforceable or established rules at all, cannot be engrafted on the body of our written Constitution by mere implication. The qualifying word 'possibly' is used here because the precise result, at any given time, of the historical process which has shaped and determined the character and contents of every part of the largely conventional British Constitution cannot be given with complete certainty. The exact result at any particular time (the relevant time for us is 1950) must remain a matter of controversy as the divergence of views between the majority and minority opinions of their Lordships of the Supreme Court on this matter itself shows. Consequently, the majority of their Lordships of the Supreme Court preferred to base their opinions on the clear meanings of the express words of the Constitutional provisions as a whole, about which there was no uncertainty, rather than to accept the vague alleged implications of Article 194 (3) of the Constitution. But, both the majority and the minority judgments, after extracting the threads which could be extricated from the tangled skein of British Constitutional history, have tried to weave them into the very different texture and pattern of our written Federal Constitution to the extent to which it was possible to do so. This was done because it was the apparent intention of our Constitution, as revealed by its Article 194 (3), that this should be done until more suitable provision could be made by appropriate legislation.

3. Constitutional Duty and Function of the Judicial Organ

In this country, when a House of Legislature exercises a quasi-judicial function in punishing its alleged contempts, the duty of determining whether a House of Legislature has or has not overstepped the

bounds of its legal authority in doing so is certainly vested in the judicial organs of the State; and, the Judiciary has to perform its duty when properly called upon to do so. Even in England, the courts have successfully asserted their power to decide jurisdictional questions of this nature and determine the existence and scope of alleged privileges of the House of Commons. This exercise of such judicial power by the King's Courts has been acquiesced in by the legally sovereign Parliament which could have easily passed a law denying such powers to the courts; but, the British Parliament has not chosen to do so.

As there has been no legislation in this country also so far, defining "the powers, privileges, and immunities" of a House of the Legislature of State, the only method legally left open by our Constitution for obtaining, in cases of dispute, determinations of basically important questions relating to the existence, content, and scope of any privilege, power, or immunity of a House of Legislature is that of adjudication by courts. Of course, every authority or organ of State, whether Executive, Legislative, or Judicial, has the right and duty of determining the ambit of its own powers or jurisdiction for its own satisfaction so that it does not exceed the limits of its legal authority in exercising it, but, "When a citizen complains of an actual" excess of power" or "misuse of power" for a collateral purpose (a "détournement de pouvoir" as the French lawyers call it) or "abuse of power" on the part of any authority or organ of State, however exalted, as a citizen is permitted to do under a civilized democratic Constitution, who is to decide the questions which may arise? According to elementary principles of justice, the authority alleged to have perpetrated a wrong could not be made the Judge, or, much worse, the sole and exclusive judge of its own cause in a case in which the citizen's grievance is against that authority itself. If decisions of an authority, however exalted, and responsible, could not be questioned at all anywhere, even if grossly beyond the reasonable scope of its powers, it would constitute a standing invitation to that authority to exceed its powers.

4. The Basis of the Claim of the Assembly was, "Lex Parliamenti"

Counsel for various State Assemblies who appeared before the Supreme Court seemed to base their claims on a theory that "Lex Parliamenti" constituted a separate system of law and of rules with which the Judiciary had no concern. Even the rule that courts do not look behind the General Warrant issued by the Speaker, laid down in the case of *Sherrif of Middlesex (1840)*, appears to have been attributed to "Lex Parliamenti" by the counsel for the Assemblies, although a presumption of propriety and legality of a General Warrant, when such a Warrant was produced before a court, could only be an optional and not absolute rule of evidence for the courts themselves to observe. If that rule was part of some "Lex Parliamenti" with which the courts had nothing to do, the courts could not, strictly speaking, be required to observe or enforce it at all. Moreover, in the case of *Sherrif of Middlesex (1840)* itself, it had been declared by Coleridge, J., that the "presumption" employed by the English Courts was not to be confounded with any "privilege" of the House of Commons. The presumption could not arise if the Speaker's warrant disclosed a palpably unsustainable ground of imprisonment. This distinction made by English Courts clearly meant that they could and did entertain, examine, and investigate a petitioner's grievance upon a Habeas Corpus petition directed against imprisonment under the Speaker's warrant as Mr. Justice Sarkar, holding the minority view in our Supreme Court, also indicated.

The theory that Lex Parliamenti was a separate system of law altogether, unknown to the King's Courts, was put forward for the last time in England in the case of *Stockdale v. Hansard (1839)* in the first half of the nineteenth century, and shattered beyond repair by the judgment of that case. By that time, the Constitution of England had assumed a very definite democratic pattern. Many of the theories advanced, claims made, and doctrines propounded before the English Constitution was fully formed and stabilized, lost their relevance and validity in a changed context. It was declared that, under the Constitution all it stood in the nineteenth century England, the House of Commons could certainly not make any law by a mere resolution; and, its resolution could not have the force of a judgment of a court of law binding upon the King's courts. After this decision, given in *Stockdale v. Hansard (1839)*, it would have been logical for the King's courts to have discarded the assumption on which the presumption attaching to the General Warrant of the Speaker was based. Nevertheless, soon afterwards, in the case of *Sherriff of Middlesex (1840)*, an English Court, perhaps inconsistently, fell back upon the apparently obsolete basis of a Constitution which was no longer in existence. But, it did so upon the peculiar facts before it. It is, however, not necessary that an English Court should have adhered to this presumption on the grounds given there if such a question had arisen in 1950 in a different context. : Mr. Justice Sarkar, who held the slightly divergent minority opinion of one against six in the Supreme Court, observed: "I do not think that the House of Commons was itself ever a Court. " If this was the position, the basis on which the presumption of legality and propriety of the Speaker's General Warrant rested—that it could be equated with a Warrant of a Superior Court—was shaky even in England.

5. Erskine May's Exposition

The authority cited frequently by both sides to the controversy was that of Sir T. Erskine May who, in his treatise on "Parliamentary Practice", dealing with the "Misconceptions as to the Nature and Authority. of Parliamentary Law and Privilege", pointed out, under the heading of "Confusion of Legislative and Judicial Jurisdiction of Parliament", that the Judges' opinion in Thorpe's case, 1452, confirmed by Coke's dictum, according to which 'the ordinary law courts could not judge of matters belonging to Lex Parliamenti, on the ground that the High Court of Parliament "hath no higher" was out of date even in the seventeenth century. He proceeded to observe as follows about the views of Coke and Blackstone :

"The views belonged to a time when the distinction between the judicial and legislative functions of Parliament was undrawn or only beginning to be drawn and when the separation of the Lords from the Commons was much less complete than it was in the seventeenth century. Views about the High Court of Parliament and its powers which were becoming antiquated in the time of Coke, continued to be repeated far into the eighteenth century, although after the Restoration *Principles began to be laid down which were more in accord with the facts of the modern Constitution. But*

much confusion remained which was not dismissed by the use' of the phrase "privileges of Parliament."

Sir Erskine May went on to indicate the three notions resulting from this "confusion of thought" in the course of English Constitutional history. He wrote:

"Three notions arise from this confusion of thought:

(1) That the courts, being inferior to the High. Court of Parliament, cannot call in question, the decision of either House on a matter of privilege.

(2) That the *lex et consuetudo parliamenti* is a separate law, and, therefore, unknown to the Courts.

(3) That a Resolution of either House declaratory of privilege is a judicial precedent binding on the courts. "

It is surprising that even after what Sir T. Erskine May had attributed to confusions of thought, which had apparently been cleared up by the time that Sir Erskine May brought out his famous treatise in 1844, these very notions should have been put forward by the counsel for the State Assemblies as the law applicable in this country under our written Constitution where there ought to be no place for confusion.

6. Misconceptions Removed

During the course of a bitter struggle for power between the King and the Commons in Seventeenth Century England, utterly novel claims were made on behalf of the House of Commons to combat the pretensions of Stuart Kings to rule by Divine Right. In this period, Charles the First was tried and executed. Even after the Restoration of Monarchy, but soon after the revolution of 1688, when James II was driven from England, two of the King's Judges, one of whom was believed to be a Royalist, were called to the Bar of the House and punished (See *Jay v. Topbam*, 12 State Tr., 822). But, these episodes in English history have been regarded by British constitutional lawyers and Judges as examples of gross and unconstitutional excesses and of clear abuse and usurpation of powers during a passing phase. The British Parliament itself proclaimed, at the Restoration, that all that had taken place during the "Interregnum" was to be blotted out of the annals of British Constitutional history. British Judges had declared that the punishment of two of the King's Judges stood on no better footing. What were thus proclaimed and declared to be breaches of the British Constitution could not possibly furnish any legally existing basis at all for even a claim by the House of Commons to possess or exercise such powers in 1950. The British Constitution was placed on a new and stable foundation by the Act of Settlement, 1701, and then the position of the judiciary became firm and secured. No repetition of unconstitutional acts of the kind indicated above could be thought of in England after that. Lord Denman, in *Stockdale v. Hansard* (1839), referring to the above mentioned punishment of the two Judges, said:

"Our respect and gratitude to the Convention Parliament ought not to blind us to the fact that this sentence of imprisonment was as unjust and tyrannical as any of those acts of arbitrary power for which they deprived King James of his Crown. "

Misconceptions which could result from citing and representing instances of gross and flagrant violations of the Constitution in England, during a past era of severe conflict, as examples of what was legally permissible there, could only be removed by a cool examination and dispassionate consideration of the whole position, after considerable study and research, such as the one which took place during the reference in the Supreme Court.

7 Modern Concept of Parliamentary Privilege Clarified

The concept of a privilege of the House of Commons has itself undergone a change in the course of British Constitutional History. The origin of the concept of a "privilege", as a grant by the King to the representatives of his people, is borne out by the customary "humble petition" by the Speaker to the King and a repetition of the grant afresh at the commencement of each Parliament even today in England. Sir Erskine May has, dealing with this origin, observed:

"What originated in the special protection of the King began to be claimed by the Commons as customary rights, and some of these claims in the course of repeated efforts to assert them hardened into legally recognised privileges."

During the struggle between the King and the Commons, these privileges were used as means of defense by the House of Commons against the encroachments attempted by the King upon the rights of the representatives of the people. The King's Courts, presided over by Common Lawyers, upheld claims to these privileges against the King, and, thereby converted them into legally recognised and enforceable rights. Later, when they were sought to be abused and utilised at times as weapons of attack against the rights of subjects, the British Parliament stepped in, and, by means of Parliamentary Privileges Acts of 1737 and 1770, restricted and checked misuse of claims to "privilege" by members of Parliament who could not obtain, it was clarified, immunity from legal proceedings under the "pretence" of privilege. Thus, the British Parliament has itself tried to confine claims to privilege to their proper sphere and purpose.

Our Supreme Court, after considering the whole history of Parliamentary Privilege in England, thus stated the concept which emerged finally in the nineteenth century when an equilibrium was reached and the limits of privilege were "prescribed and accepted by Parliament, the Crown, and the Courts":

"The distinctive mark of a privilege is its ancillary character. The privileges of Parliament are rights which are 'absolutely necessary for the due execution of its powers'. They are enjoyed by individual Members because the House cannot perform its function without unimpeded use of the

services of its members; and by each House for the protection of its Members and the vindication of its own authority and dignity. "

It may be observed that English Judges, who have never lagged behind in protecting fundamental rights and freedoms of subjects, even though these are not enumerated in a written Constitution like ours, had also rejected long ago the concept of any Parliamentary privileges enjoyed "against the rights of the people under the laws of the land". One is reminded here of the remark of Sir C. K. Allen, in a foreword to a book by Mrs. Seighart entitled "Government by Decree": "In saying that 'no liberty is secure without a court to uphold it' Mrs. Seighart utters a simple truth which is confirmed by a thousand years of English history. "

8. The Result: See: Special Reference NO. 1 of 1964

(A. I. R. 1965 S. C. p. 745).

The Supreme Court of India, following the law under the British Constitution which, in this respect, differs from the American Constitution and law, upheld the claim of the Houses of State Legislature to punish strangers for contempts committed outside the Houses of Legislature, subject to the ultimate supervisory jurisdiction of the High Courts and the Supreme Court. It made it clear that Judges of the High Court not only enjoy protection against the discussion of their conduct as Judges in Houses of the State Legislature by reason of the specific provisions of Article 211 of the Constitution, but also immunity from proceedings by a House for any alleged contempt by merely performing a judicial function in exercise of their duties. The opinion given to the President was:

"The existence of a fearless and independent judiciary can be said to be the very basic foundation of the Constitutional structure in India, and so, it would be idle, we think, to contend that the absolute prohibition prescribed by Article 211 should be read as merely directory and should be allowed to be reduced to a meaningless declaration by permitting the, House to take action against a Judge in respect of his conduct in the discharge of his duties. "

9. Supremacy of the Constitution

The supremacy of the Constitution, interpreted finally by the courts, is one of the ways in which harmonious working of the Constitution is secured, and the so-called "dualism", which must give rise to constitutional conflict, is avoided. Whatever may be the position under the British Constitution in 1950, there is no room for contending that such "dualism" exists under our written Constitution. Any attempt to introduce the discarded dualism into our Constitution will add to confusion and provide a breeding ground of friction between the different organs of the State. The so-called dualism also implies absence of remedy for the citizen, even if he is imprisoned for having done something which could not possibly constitute a contempt of a House of Legislature, whenever the Speaker of a House issues a general warrant and thus precludes the courts from scrutinising the grounds upon which imprisonment was ordered.

On the basic question of the supremacy of our Constitution one may point out the following observation of our Supreme Court:

"In dealing with this question, it is necessary to bear in mind one fundamental feature of a Federal Constitution. In England, Parliament is sovereign; and in the words of Dicey, the three distinguishing features of the principle of Parliamentary sovereignty are that Parliament has the right to make or unmake any law whatever; that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament, and that the right or power of Parliament extends to every part of the Queen's dominions (The Law of the Constitution by A. V. Dicey, p. xxxiv). On the other hand, the essential characteristic of federalism is 'the distribution of limited executive, legislative, and judicial authority among bodies which are coordinate with and independent of each other'. The supremacy of the Constitution is fundamental to the existence of a federal State in order to prevent either the Legislature of the federal unit or those of the member States from destroying or impairing that delicate balance of power which satisfies the particular requirements of States which are desirous of union, but not prepared to merge their individuality in a unity. This supremacy of the Constitution is protected by the authority of an independent judicial body to act as the interpreter of a scheme of distribution of powers. Nor is any change possible in the Constitution by the ordinary process of federal or State Legislation (The Law of the Constitution by A. V. Dicey, p. Lxxvii). Thus, the dominant characteristic of the British Constitution cannot be claimed by a Federal Constitution like ours. "

It also observed:

"In a democratic country governed by a written Constitution, It is the Constitution which is supreme and sovereign. It is no doubt true that the Constitution itself can be amended by the Parliament, but that is possible because Art. 368 of the Constitution itself makes a provision in that behalf, and the amendment of the Constitution can be validly made only by following the procedure prescribed by the said Article. That shows that even when the Parliament purports to amend the' Constitution, it has to comply with the relevant mandate of the Constitution itself. Legislators, Ministers, and Judges all take oaths of allegiance to the Constitution, for it is by the relevant provisions of the Constitution that they derive their authority and jurisdiction and it is to the provisions of the Constitution that they owe allegiance. Therefore, there can be no doubt that the sovereignty which can be claimed by the Parliament in England, cannot be claimed by any Legislature in India in the literal absolute sense. "

10. A Summary

The Constitutional position of our High Courts, in the context of constitutional supremacy and with special reference to the power of Houses of State Legislatures to punish their alleged contempts, emerging after the historic opinion of the Supreme Court, may be briefly summarised, as follows:

- (i) Political sovereignty of the whole people of India was converted into legal sovereignty of a democratic Republic by the Constitution of India.
- (ii) The Constitution of India may be spoken of as an embodiment of what political philosophers have called the "Permanent: ' or "Real" Will of the whole people. The Constitution is legally Supreme.
- (iii) The following consequences flow from the supremacy of the Constitution:
 - (a) The subordination of all the organs of State to the Rule of Law contained in the Constitution. No person or authority or organ of State can claim to be above the law or to flout the law contained in it. They are all equally subjected to it.
 - (b) The legality of the acts of every person or authority in the State can be tested with reference to the Paramount or Fundamental law contained in the Constitution.
 - (c) Hence, in such a Constitution, at given moments, as Prof. Willis observes about the American Constitution, the supremacy of the judicial organ becomes manifest when it expounds and becomes the mouth piece of the Fundamental or Paramount Law with reference to which the competence and legality of all the actions of other organs is determined. This is, however, a supremacy in the judicial field only.
- (iv) Even though there is no clear cut separation of powers in our Constitution, there is a division, enumeration, and specification of all the essential powers of each organ, whether Executive, Legislative, or Judicial, in the Constitution. In any case, unspecified and merely implied or assumed powers cannot override specified powers.
- (v) The power of judicial supervision so that no organ oversteps its orbit of authority or power, is necessarily a judicial function under the Constitution. The duty of determining the frontiers of all kinds of authority- Executive, Legislative, Judicial-is vested in the judicial organs.
- (vi) The safeguarding of fundamental rights is especially entrusted to the judicial organs which are given special powers, and special obligations are cast upon them for this purpose under Articles 32 and 226 of the Constitution; and, an unconstitutional invasion of these rights by a House of a State Legislature, in purported exercise of power to punish contempts, is open to challenge before Courts.
- (vii) The power of supervision over all courts and Tribunals in a State is also specifically conferred upon the High Court of that State under Article 227 of the Constitution.
- (viii) As punishment for contempt even when awarded by a State Legislature is a quasi-judicial function, its orbit and due exercise are necessarily placed under the supervision of the judicial organ the aid of which may be invoked by an aggrieved person.
- (ix) No orbit is invaded or exceeded when a power is legally and justly and properly exercised by any authority.
- (x) The object of the judicial function is not to destroy but to safeguard and fortify the frontiers of each orbit and to affirm, reinforce, and support all just and correct exercise of powers within each orbit.
- (xi) The orbit of Parliamentary Privilege and powers under Article 194(3) of the Constitution of India, can only be one which can be fitted into a Constitution with other well defined and expressly specified orbits of power and- authority. It cannot possibly contain within it any special conventional rule governing the relationship of the House of Commons with the King's Courts under a bygone British Constitutional set up which had a "King, in Parliament" and the "King's Courts". Such rules cannot exist within a Constitution where there is neither a King nor the King's Courts, but a federal structure of Government ensuring judicial supremacy in the sense pointed out above. In other words, the orbit indicated by the words "shall be those of the House of Commons", in Article 194(3) of the Constitution, is restricted to those powers and privileges which can reasonably co-exist with express provisions of the Constitution.
- (xii) The High Court of a State is an instrument of the Paramount Authority to ensure the Supremacy of the Constitution, and the existence of its express power of supervision" over the quasi-judicial sphere, including that of the U. P. Legislative Assembly's quasi-judicial action in punishing its contempts, cannot be denied under the Constitution as it exists.
- (xiii) The exercise of its constitutional power by the High Court can be challenged by an appeal to the Supreme Court of India but in no other manner.
- (xiv) The limitation of the power of High Courts to interference in cases where jurisdictional errors may be committed by Houses of the Legislature in punishing contempts is consistent with our Constitution, but the elimination of this power of supervision would erect fortresses of absolutism which would be inconsistent with the letter, the tenor, the spirit, and the express objects of our Constitution.

11. Ultimate Guardians of the Constitution

While the Supreme Court and the High Courts in India staunchly uphold the Supremacy of the Constitution, with judicial independence as its logical corollary, its preservation ultimately depends upon

the wisdom, the understanding, the will, and the vigilance of citizens who have made the Constitution what it is and who can also change it. If the legal supremacy of the Constitution is to serve the grand and noble objects set out in the Preamble to our Constitution, it must be backed by a reverence by the citizens for the Law-described as the "King of Kings" by our jurists-and for the function and position of those who are constitutionally charged with the duty of expounding its meaning. Genuine respect for these can only spring from an understanding of the true purposes of the Law which expresses our notions of Right and Wrong, Just and Unjust. European jurists have used various terms (Jus, Droit, Dritto, Recht) to signify what is included also in our view of the Law as "Dharma" or a binding force akin to religion. Our ancient concept of the Law, however, goes beyond what these terms stand for. It embraces that principle of "Virtue", as Montesquieu called it in his "Espirit des lois", which distinguishes a healthy democracy from other forms of government. The late Prime Minister Nehru, one of the great thinkers of the modern age, once said:

"You may define democracy in a hundred ways, but surely one of its definitions is self-discipline of the community. The less the imposed discipline and the more the self-discipline the higher the development of democracy."

This discipline consists of correct habits of thought and action illumined by an adequate understanding of the Law and its operations. So long as these are not sufficiently developed and firmly established} the principles upon which Constitutional Supremacy rests will not be out of danger. The moral prestige, and, indeed, the very existence of our Democratic Republic is bound up with these principles which must be properly understood and defended by ordinary citizens for whose welfare and protection they are designed.