Source : www.thehindu.com Date : 2021-02-26

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Relevant for: Indian Polity | Topic: Judiciary in India: its Structure, Organization & Functioning, Judges of SC & High Courts, Judgments and related Issues

Ajit Mohan, Managing Director of Facebook India. | Photo Credit: REUTERS

When the Delhi Assembly summoned Facebook honcho Ajit Mohan to depose before its Peace and Harmony Committee, it unwittingly provoked a litigation that may have far-reaching implications on federalism, the separation of powers and fundamental rights in India.

Parliamentary privileges are a set of rights and immunities that are essential for the functioning of Parliament. The right to free speech in the House, guaranteed to the Commons since 1689, and the right to call for evidence and witnesses, are central to the role of the legislature. In our Constitution, both Parliament and State Assemblies were conferred with the same privileges as the Commons. Apart from discussions about judges, no other speech is barred for legislators in the text of the Constitution.

On the face of it, federalism imposes an insuperable challenge to the traditional broad reading of parliamentary privilege. The argument goes: Unlike the House of Commons, the powers of State Assemblies are more limited. If the State Assembly cannot pass a law on a subject, how can it claim a right to discuss it or call witnesses for it?

However, this framing is misleading. First, legislation is not the only goal of discussions. Legislatures also have a separate non-judicial power of inquiry which has been judicially regarded as being inherent to the legislature, flowing perhaps from what Walter Bagehot would call the expressive and informative function of the House. Politically, the Assembly is the voice of the people of a State and their discussions are an expression of popular will. Atomic energy is the exclusive preserve of the Union. Does that mean a State Assembly cannot inquire into the possible ecological implications of a nuclear waste site within the State? Cannot State legislatures hear testimony from soldiers and pass resolutions to honour the armed forces? At least four states have passed resolutions against the Citizenship (Amendment) Act as affecting their people.

Second, the legislative lists frequently overlap and courts resolve any conflict by adopting a test of pith and substance of the law in question. But how would this apply pre-emptively at the inquiry stage when the discussions may or may not lead to legislation?

Comment | The balance between fundamental rights and parliamentary privilege must be re-examined

Third, we live in the era of co-operative federalism. How can the Union and the States cooperate if they are barred from even discussing or taking evidence on issues beyond their limited legislative competence?

Fourth, there is the delicate issue of whether the courts can or ought to sit in judgment on the proceedings of State Assemblies determining what can or cannot be discussed based on the courts' view of the topic. No theory of judicial review would justify such a deep dive into the "political thicket" to examine the proceedings of the House, something our Constitution expressly bars.

The experiences of Canada and Australia, both common law federal jurisdictions, are also

instructive. The Canadian chronicler Maingot hints about restrictions based on legislative competence but is careful to add that they are self-imposed, not court mandated. In Australia, the Privy Council in appeal from the High Court held that "it is hardly possible for a Court to pronounce in advance as to what may and what may not turn out to be relevant to other subjects of inquiry on which the Commonwealth Parliament is undoubtedly entitled to make laws".

In 1399, the Commons recognised free speech in the House as a tradition by reversing the judgment of treason on Sir Thomas Haxey. It is this ancient privilege that found its way into our Constitution. It is a landmark of liberty as it allows elected representatives to challenge the most powerful people of the land on behalf of commoners. This ancient tradition would be effaced if the court were to appoint itself an arbiter of legislative discussions. It is difficult to craft any discernible principle upon which such unprecedented power could be judiciously exercised without inhibiting free speech that is the hallmark of our legislative tradition.

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