

CRITICAL ANALYSIS OF THE PARLIAMENTARY
PRIVILEGE AND THE REQUIREMENT OF
CODIFICATION.

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Abstract

The concept of Parliamentary privilege is borrowed from the British Parliament. Elected Members of Parliament are endowed with special privileges that are given to them through the Constitution. Article 105 and Article 194 of the Constitution throws light upon the various powers, privileges and immunities of Parliament and its members. These two Articles deal with the immunities available to the Members of Parliament. The Government of India Act, of 1919 allowed members to have freedom of speech. The government of India Act, 1935 contained the provisions relating to the privileges of members of Indian legislatures. Various privileges are granted to the Member under the scheme of Parliamentary privileges. There are instances where Courts and Parliament have been at war concerning the Parliamentary Privileges and to what extent it is free from the interference of the Judiciary, such as *Searchlight Case, in Re Under Art 143, G.K Reddy v. Nafisul Hasan, etc.* Makers of the Constitution felt that they were in short of time to frame a proper code on the privilege of the members of Parliament they adopted the British system and those powers which were enjoyed by the House of Commons will be enjoyed by the Parliament left it to be decided by future

Legislatures. Due to this, the debate surrounding the need for the Codification of the Parliamentary privileges arose. Arguments have been advanced for and against codification and this paper will discuss both perspectives. The paper will first explore the Parliamentary privileges, then it will deal with the Interplay between the Judiciary and Court and in last part it will be dealing with the debate of codification of Parliamentary privileges.

Introduction:

Indian Constitution has adopted the system of Parliamentary privileges which was followed by the British Government.⁷⁸ In India Parliament is made of the President, Lok Sabha and Rajya Sabha. In India, both the Houses of Parliament are the creation of the constitution. The term Parliamentary Privilege is used for describing the law relating to the Privileges or immunities of the Parliament and includes its powers to punish for contempt or breach of Privilege.⁷⁹

It is the immunity from the application of ordinary law which is given to the Members of Parliament, committees and the House. Privilege in this restricted and special sense is often confused with privilege in the colloquial sense of a special benefit or special arrangement.⁸⁰ The constitution of India contains provisions which expressly deals with the privileges. These privileges of the Parliament and its members have been left to be determined by the law, until they are determined they will inherit the powers and privileges which were prevalent in the House of Commons.⁸¹

There is difference between the Indian and British Constitution. While the former is a written one and latter is unwritten. In England the Parliament is supreme and it has inherent powers to make and unmake laws, set aside, override any legislation of Parliament.⁸² Whilst in comparison with the Indian context, there is division of powers which is an essential characteristic of Indian

⁷⁸ K. C. Joshi, Parliamentary Privileges: A Sword or A Shield, 42 JILI, 422, 425 (2000).

⁷⁹ P.K Balasubramanyan, Parliamentary Privilege: Complementary Rule of the Institutions, 2SCC, J-1, 1 (2006).

⁸⁰ Harry Evans, Odgers' Australian Senate Practice (11th Ed.)

⁸¹ Shruti Bedi, The Power to Punish for Contempt under Parliamentary Privileges: An Analysis of the inherent limitations, 51 JILI, 79, 80, (2009).

⁸² Dicey, The Law of the Constitution (1959).

federalism. The distribution of limited executive, legislative and judicial authority among bodies which are coordinate with and independent of each other.⁸³

I. Parliamentary Privilege:

Article 105 and 194 of the Constitution deals with the Parliamentary privilege. These privileges are available to the both Houses of Parliament, members and committees. These two Articles endow the Indian Parliament with the same powers, privileges, immunities which were enjoyed by the British House of Commons. These privileges include freedom to speak in the parliament without being held liable for anything said, done or vote given by them. There can be no civil or criminal proceedings against the Members of Parliament for anything which has happened within the house of Parliament as they are provided with immunity. In *P.V. Narsimha Rao v. State*⁸⁴ Supreme Court held that The Scope of protection of immunity available to the Members of Parliament is quite wide and is not confined only against Judicial proceedings, but available to them against all civil action and Criminal proceedings for anything said or any vote given by them in the House of Parliament, the object of protection is to ensure members are able to speak of their mind.⁸⁵

Freedom from arrest is another privilege which is available to members of Parliament, but this is only with reference to civil proceedings and not in criminal proceedings. In *Indira Gandhi v. Raj Narain*⁸⁶ held that, privilege does not extend to arrest to imprisonment on a criminal charge or for detention under Preventive Detention Act. They also have other privileges such as right to prohibit the publication of proceedings, prevent the strangers from being present in its proceedings, holding secret sessions, right to regulate its own proceedings and Right to punish members or outsiders for contempt.

⁸³ U.P. Assembly case, Powers, Privileges and Immunities of State Legislatures, In re, AIR 1965 SC 745, (1965) 1 SCR 413.

⁸⁴ AIR 1998 SC 2120.

⁸⁵ J.N. PANDEY, CONSTITUTIONAL LAW OF INDIA, 636, 640 (57th ed. 2020).

One thing that has to be kept in mind is, the privileges which are enjoyed by the Indian Parliament are not codified they have been inherited from the British Parliament. Not all the privileges which are enjoyed by the British Parliament have been utilized in Indian context, on some of them restrictions have been imposed as they interfere with the concept of division of powers between the legislature and Judiciary.

II. The Interplay between Judiciary and Parliament concerning the Privileges:

The relationship between Parliament and Judiciary is a very unique and fragile relationship which is prone to conflicts. There appears to be an inherent conflict in their roles, the one legislating for the better ordering of society and the other umpiring implementation of that legislation within the bounds of fundamentals of natural justice preventing arbitrary action.⁸⁷ The privileges which have been granted to Parliament sometimes conflict with the judicial power which is exclusively required to be exercised by the Judiciary. Generally, the way in which Parliament exercises Privileges it extends beyond the boundaries of power given to it. We have to keep in mind that in Indian context the powers are required to be in consonance with the provisions of the Constitution.

It is necessary to identify the lengths to which the Privileges of Parliament have been accepted by the Judiciary. There are privileges which are not accepted by the Courts, ones which are accepted and certain privileges exists which have not been brought up before the court for consideration.

The privileges which have been accepted by the Court, includes the ones which are given to Members and the House. Freedom of speech in the legislature, freedom from the arrest in civil cases, exemption from Jury service and exemption from being summoned as witnesses are the privileges of members which have been recognized by the

⁸⁶ AIR 1975 SC 2299.

⁸⁷ D.C. Jain, Judicial Review of Parliamentary Privileges: Functional Relationship of Courts and Legislatures in India, 9 JILI 205, 205 (1967).

Courts.⁸⁸ The privileges of House includes right to settle its own procedure, right to publish debates and proceedings and right to prohibit publication of its proceedings are the ones which the court will refrain from interruption. In *Vinod v. State of H.P.*, Supreme Court held that, there will be no immunity if the proceedings are held in defiance of the mandatory provisions of the Constitution or if the House exercises powers which the legislature does not possess under the constitution.

The privileges which are claimed by the Legislatures but are not recognized by the Courts, there have been disagreement between legislatures and Judiciary on various matters. The area which requires further clarification is whether Parliament has the extra- territorial power to punish for its contempt? Constitution empowers the Parliament with these powers but the State Legislatures have not been given any of such powers.⁸⁹ In *Medhi v. Frank Moares*⁹⁰ It was held that State Legislature has power to punish a person outside the territory.

Judiciary has interpreted the privileges of Parliament and the first case which involved Parliamentary privilege which was *G.K. Reddy v. Nafisul Hasan*⁹¹ in this case a person who was residing in Mumbai was arrested under a warrant issued by the Speaker of UP Legislative Assembly for contempt, he was kept under the speaker's custody. On filing of Writ of Habeas Corpus, Supreme Court authorized his release on the grounds that he was not produced before magistrate which is required under Article 22(2) and this Article has been contravened due to which SC authorized his release.⁹²

In order to understand how the privilege of State Legislature was shun by the Judiciary it is pertinent at this stage to bring in *Keshav Singh Case* to understand the interplay between

these two organs. In *re under Art 143*⁹³, in this case Keshav Singh who was not a member of house was punished for contempt and sentenced to seven days of imprisonment. His lawyer filed a *Habeas corpus* and the division bench of Allahabad High Court granted bail. The Assembly subsequently passed resolution requiring the Judges and advocate to present themselves before the Assembly and ordered detention of Keshav Singh. A writ was filed before the full Judge bench of Allahabad High Court. President referred the matter to Supreme Court. Supreme Court held that Judges were not guilty of Contempt of the House by issuing an interim bail order. Under Article 226 HC has the power to release a person from illegal detention. The courts in India can examine the validity of the detention of a person sentenced by the Assembly under a general or unspeaking warrant. English Law courts cannot because the House of Commons is highest law Court as a result warrant which is issued by it is not subject to view by other courts. In Indian context, legislatures do not discharge the judicial functions as the historical and constitutional basis does not support it.⁹⁴

III. The need for Codification of privileges

Before getting into the debate of requirement of Codification, it is pertinent to note that India follows a system where there is written Constitution and it's the grund norm. The concept of Parliamentary privileges which is prevalent in India is adopted from the House of Commons in England. In England, there is unwritten Constitution and Parliament is supreme. It necessary to get over from the colonial hangover, while borrowing from Britain the philosophy of privileges Indian parliament became infected with the disease of distorting and disrupting the constitutional scheme.⁹⁵

Various arguments have been made for and against codification of Parliamentary privileges. In the year 1994, committee of privileges of Lok Sabha viewed this subject

⁸⁸ Id

⁸⁹ Id. 3

⁹⁰ AIR 1954 Assam 201.

⁹¹ AIR 1854 SC 636

⁹² K. C. Joshi, *Parliamentary Privileges: A Sword or A Shield*, 42 JILI, 422, 425 (2000).

⁹³ AIR 1965 SC 745.

⁹⁴ J.N. PANDEY, *CONSTITUTIONAL LAW OF INDIA*, 636, 639 (57th ed. 2020).

⁹⁵ N.S Nigam and M.G Vineetha, *Codification of Parliamentary Privileges- A Need Based Perspective*, 8 Stud Adv, 154, 154, (1996).

and arguments made in this regard.⁹⁶ The committee based its decision on the majority of its opinion which was not in favor of codification of Parliamentary privileges and advised not to do it.⁹⁷ Once again Committee of Privileges looked into this question and 11th Report of the Committee was laid in this regard before the table of Lok Sabha in the year 2008. The committee after taking into consideration opinion from the eminent persons, legislatures, legal professionals, media, academia and foreign Parliaments.⁹⁸ After analyzing the opinions from the experts' persons, case laws it based its opinion on the majority of those who it consulted did not want codification of the privileges.⁹⁹ The committee stated that there is no requirement of Codification and recommended against it.¹⁰⁰

When the privileges interfere with the rights of the citizens, Judiciary always comes to the rescue. In *Justice Ripusdan Dayal (Retired) v. State of Madhya Pradesh*¹⁰¹ held that special rights for any category including elected legislators have to defer to the fundamental rights of citizens. When codification of privileges is done it will give the legislators an upper hand to make them in accordance with their convenience and it can minimize judicial intervention while assuaging the fears of the public by assigning it the Status of ordinary legislation.¹⁰² The disability which codification suffers is when a new situation arise, it will not be possible for legislation to adjust themselves and give members additional privileges and it's the set-up which is positioned to cultural privileges.¹⁰³

Effective arguments have been advanced for need of Codification of Privileges and it has genesis in multiple sources. Justice M.N. Venkatachalia who headed the Constitutional Review Commission 2000 wanted the

privileges to be codified and expressed an opinion in favor of codifying it, which will allow the legislatures to perform their functions effectively and freely.¹⁰⁴ Codification will allow these privileges to be exercised in accordance with the constitutions and subject to the fundamental rights. In *M.S.M Krishna Sinha*¹⁰⁵ Court in this held that privileges will be void if they contravene the fundamental rights. This is one of prominent reasons why Parliament is not inclined in codifying its privileges. Justice Subba Rao, stated in this case that "It may not be out of place to suggest to the appropriate authority to make a law regulating the powers, privileges and immunities of the legislature instead of keeping this branch of law in a nebulous state, with the result that a citizen will have to make research into the unwritten law of the privileges of the house of commons at the risk of being called before the legislature."¹⁰⁶

Codification will allow us to get over the shackles of British colonialism which we have adopted. We still dependent on the House of Lords in matter of privileges and regardless of the fact of us having an independent constitution we still have the remains of British and only alteration has been done is that it is obliterated by merely omitting words house of lords in Article 105 and 194.¹⁰⁷

Press Commission of India stated this in 1954 on this subject matter "It would therefore be desirable that both Parliament and State legislature should define by legislation the precise power, privileges and immunities which they possess in regard to contempt and the procedure for enforcing them. Such law would have to be in consonance without constitution and could presumably be challenged, if it appears to be in conflict with any fundamental right. If that happens the position would be clarified by the highest

⁹⁶ Parliamentary Privileges, Rajya Sabha at work, https://rajyasabha.nic.in/rsnew/rsat_work/CHAPTER—8.pdf.

⁹⁷ Id.

⁹⁸ Id 18.

⁹⁹ Id 18.

¹⁰⁰ 11 Rpt., (14th LS) Laid on the Table of Lok Sabha on 30.04.2008.

¹⁰¹ 2014 (4) SCC 473.

¹⁰² Shubhank Patel & Rishi Raj Mukherjee, The Codification Conundrum of Parliamentary Privileges, MANUPATRA, (Feb. 1,

2021), <https://articles.manupatra.com/article-details/The-Codification-Conundrum-of-Parliamentary-Privileges>

¹⁰³ Id 24.

¹⁰⁴ Dr. Raj Singh, Parliamentary Privileges in India: A Comparative Study with the United Kingdom, France, Australia, and South Africa, 6 JETIR 720, 724 (2019).

¹⁰⁵ AIR 1959 SC 395 at 410

¹⁰⁶ AIR 1959 SC 395 at 410.

¹⁰⁷ N.S Nigam and M.G Vineetha, Codification of Parliamentary Privileges- A Need Based Perspective, 8 Stud Adv, 154, 158, (1996).

tribunal in land. Article 105 & 194 contemplate an enactment and it is only during the intervening period that Parliament and State legislature have been endowed with powers and privileges of House of Commons.¹⁰⁸

Conclusion

The rationale behind privileges to members is to enable to then to effectively discharge their duties without any fear. The makers of the constitution due to the paucity of time felt that there is no need to dwell on this subject. They felt that at later stage the legislatures can formulate opinions on this matter. Privileges have been provided to ensure protection of Members of Parliament there are different privileges which are given to them and these also includes protection from arrest and freedom of speech. The freedom of speech which has been granted to members of Parliament is not same as the one which has been mentioned in the Article 19(1) (a), the latter is available to the citizens and the one which is enjoyed by the Members of Parliament is different from it.

Judiciary is an organ which is responsible for ensuring compliance with provisions of constitution. There have been various instances where the privileges have interfered with the fundamental rights and Judiciary came at this stage for protection. The *Searchlight case*, *Keshav Singh case*, etc. to name a few where Judiciary played an essential role. In these cases, Court interpreted the ambit of the privileges of the Parliament and subjected it to the fundamental rights. The powers cannot be exercised in contravention of the Article 13. As the privileges have been codified but the extent to which they can be exercised can be inferred from the decisions given by Court, such as they should not contravene the fundamental rights.

The debate surrounding the codification is still going on, until now there seems be to no progress towards the codification. The reason why need codification is because the system which has been adopted is not Indian with regard to privileges. It's a British system, these powers have been

endowed to House of Commons and it's actually a court. If we look at India, Parliament is not Court, the Constitutional principles have sought a scheme where there is division of powers and the Judiciary has the power of interpretation of laws and deciding not the Parliament, without codification it's unclear what direction we are heading as it gives unlimited power to parliament.

¹⁰⁸ Report on the Press Commission, Part 1 421, (1954)