

CODIFICATION OF PARLIAMENTARY PRIVILEGES AND FREEDOM OF SPEECH

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Abstract

Since the commencement of humanity, there have been continuous conflicts and clashes between the government and ones governing it. Gradually it was the ones being governed who were endowed with the rights to freedom and liberty against the established government. The judiciary and Legislature being the two of the three pillars of the democratic governance in India have undergone unparalleled fights side-by-side and stood diagonally opposite to each other under the constitutional framework. Parliament in India is one of the most important pillars standing with an aim to achieve the goals of national reconstruction and nurturing the values of freedom, secularism and democracy. As Dicey says, “is harder to define than the extent of the indefinite powers or rights possessed by either House of Parliament under the head of privilege or law and custom of Parliament”. Black’s Law Dictionary defines Parliamentary/Legislative Privilege as – the privilege protecting (1) any statement made in a legislature by one of its members, and (2) any paper published as part of legislative business¹.

The issue of Parliamentary Privilege is one where the Indian Legislature claims exclusivity in matters of its domain and jurisdiction due to the nature of the work it is associated with it is imperative to enable the members perform in a free and frank atmosphere, and where Indian Judiciary tends to have no say into it but they may scrutinize the proceedings of the House on the ground of illegality or unconstitutionality². The apex court had been on several occasions been forced to dwell upon issues pertaining to privileges, protection of fundamental rights of citizens, media and to uphold the constitutional spirit and values. Though this interference is not welcomed by the legislatures, yet their contribution cannot be denied. This judicial discourse can be broadly be divided into three phases; MSM Sharma phase; Keshav Singh Phase and prevailing- Raja Ram Phal Phase. There has been a tremendous and a sharp shift between in the judicial opinion that the judiciary held over these phases that sets to conclude the present scenario of the immunities, powers enjoyed by the Parliament and the State Legislatures.

Keywords: Parliamentary Privileges, Article 19(1)(a), Article 105, Article 194, codification.

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¹ Bryan A. Garner, BLACK’S LAW DICTIONARY, Deluxe Eighth Edition, 2004, p.1235

² Keshav Singh’s case, AIR 1965 SC 1186; A.J. Faridi v. Chairman, U.P. Legislative Council, AIR 1963 All 75; Syed Abdul v. State of West Bengal Legislative Assembly, AIR 1966 Cal. 363; Om Prakash Chautala v. State of Haryana, AIR 1998 P&H 80; S. Ramachandran, M.L.A v. Speaker, AIR 1994 Mad. 332

The law that relates to the privileges and immunities given to the Parliamentarians including power to punish for contempt or breach of any privilege falls under “Parliamentary Privileges”. Individual or collective are granted so to enable them to carry out their constitutional functions independently, properly and efficiently. And as constitution itself empowers the legislators, it is important to understand the limits and extend of the privilege that is provided. Article 105 relates to the “Powers, privileges and immunities of the Parliament and its members” and article 194 to members, committees of state legislatures³. Clause 2 provides for freedom of speech – something said and freedom of expression – vote. The language of Article 105 is “mutatis mutandis” the same as that of Article 194 except that for the expression “Parliament” in Article 105 the expression “legislature of a State” is used in Article 194⁴. Hence, a discussion on Article 105 would be relevant to Article 194 also.

Article 105(1) guaranteeing freedom of speech in accordance to the rules and standing orders laid down, provides immunity from the process of courts pertaining to anything said within the four walls of the House. It stands as an effective exception to the freedom of speech as guaranteed under Article 19(1)(a) of the constitution. The immunity extends not only to the members but also to dignitaries like Attorney General and certain ministers though not a members have right to speak in while the House is in session. The immunity provides for free, frank and fearless participation in the debates expressing views either in the favour or against the motion before the House. However such an expression is subjected to reasonable restriction and forbids unrestricted license of speech. Those being while exercising freedom of speech, a member cannot raise a discussion as to the conduct of a Supreme Court or High Court Judge,⁵ except when a motion for his removal is in consideration. If such violation happens, the presiding officer of the House itself shall have jurisdiction over the matter than any judicial body.⁶ The provision of 10th Schedule, para 2 (relating to anti-defection) are not violative of Article 105(1) and 194(1).⁷ The immunity under article 105(2) doesn’t extend to the speech made outside the premises of the house even if it is a verbatim demonstration of what was said by him or any other person in the house while the debate was going on. The rules and standing orders of the House which regulates the procedure in House⁸ suggests that freedom of expression of members under article 194(1) are subject to Rules of Procedure of Legislature.⁹ Clause 2 provides for complete immunity from the legal proceedings despite any of the words or sentences tend to violate the fundamental rights of any other person as under article 19(1)(a). Proceedings tend to include – civil, criminal and writ proceedings as well.¹⁰ The immunity is complete as it provides for fearless speech without fear of legal consequences.¹¹ Any derogatory statement against the judiciary in the house shall not attract

³ Professor MP Jain, Indian Constitutional Law, Sixth Edition Reprint, 2011, p.343

⁴ Ibid at p.91

⁵ Sharma v. Sri Krishna, AIR 1959 SC 395

⁶ A.K. Subbiah v. Karnataka, Legislative Council, AIR 1998 SC 2120

⁷ Kihoto v. Zachilhu AIR 1993 SC 412

⁸ Durga Das Basu, Shorter Constitution of India, 12th edition, 1999, p.404

⁹ Ref. under Article 143, AIR 1965 SC 745

¹⁰ A.K. Subbiah v. Karnataka, Legislative Council, AIR 1998 SC 2120

¹¹ Tej Kiran v. Sanjiva, AIR 1970 SC 1573; Church of Scientology v. Jhonson-Smith, [1972] 1 Q.B. 522

contempt even though it infringes the provision of the constitution.¹² The Rajya Sabha in its 12th Report stated that any question with respect to the disclosure, enquiry or scrutiny of the proceedings from a member of the parliament shall be deemed to be an interference with freedom of speech and will amount to contempt of court or breach of privilege if any suit is filed in court for what is said on the floor of the house. So was confirmed by Lok Sabha as well.

The Supreme Court in the case of *Tej Kiran Jain v. Sanjeeva Reddy* held that “once it is proved that parliament was sitting and its business was being transacted, anything said during the course of that business was immune from proceeding in any court”.¹³ “Anything said” does not extend to words or actions outside, except spoken while performing essential duties as minister or functionary of the state,¹⁴ or those which have been disallowed¹⁵.

Freedom of publication is available to all those publishing reports or papers under the authority of the house. As under a 105(1) and 105(2), circulation to audience or among members becomes immaterial. *Stockdale v. Hansard*¹⁶ has laid the development of law where a suit for damages was filed against a book containing the defamatory matter under the authority of House of Commons, and held that no privilege is attached to the publication. This facilitated the framing of “Parliamentary Papers Act, 1840 granting absolute privilege and immunity to the publications made under the authority of the house¹⁷”.

The Calcutta High Court quoting the English decision in *Wason v. Walter*¹⁸ which protects the unauthorised yet faithful publication of the proceedings of the house stated its non-application in India, as there exists no exceptions for such publication under defamation¹⁹. Also, a member is supposed to have qualified privilege and not an absolute one,²⁰ as would be liable for defamation, if proved publication actuated with malice.²¹ In some ways the privilege is similar to the Fourth Exception to Section 499 of the Penal Code as conferred on persons reporting court proceedings. Privilege could be asserted even in respect of a part of the debate which the reporter alone finds newsworthy provided that it is a fair report, untainted with malice²². Henceforth, article 361-A²³ was inserted where the protection given was at a much higher status, as the need for awareness within the community with regard to

¹² Surendra v. Nabakrishna, AIR 1958 Ori. 168

¹³ Tej Kiran Jain And Others vs N. Sanjiva Reddy And Others 1970 AIR 1573, 1971 SCR (1) 612

¹⁴ DE SMITH, PARLIAMENTARY PRIVILEGE AND THE BILL OF RIGHTS, 21 Mod. L.R.,477-82

¹⁵ Jatish v. Harisadhan, AIR 1961 SC 613

¹⁶ (1839) LJ (NS) QB 294

¹⁷ Surendra v. Nabakrishna, AIR 1958 Orissa 168

¹⁸ LR 4 QB 73 (1868)

¹⁹ Suresh v. Punit, AIR 1951 Calcutta 176

²⁰ Jatish v. Harisadhan, AIR 1961 SC 613

²¹ .K. Daphtary v. O.P. Gupta, AIR 1971 SC 1132; Ramalingan v. Daily Thanthi, AIR 1975 Mad. 309

²² Cook v. Alexander, (1973) 3 WLR 617 : (1973) 3 All ER 1037 (CA) (Court of Appeal through Lord Denning, M.R.)

²³ Article 361- A enacts that no person shall be liable to any proceedings, civil or criminal, in respect of any publication of a substantially true report of any proceeding except secret sitting of the House.

the substantially true report was felt, paving ways for such publications that included newspapers, air-broadcasters, pamphlet, booklet etc²⁴.

The limits of the privilege with regard to publication can be appreciated with reference to two cases decided by the Supreme Court. In *M.S.M. Sharma v. Sri Krishna Sinha*²⁵, action was initiated for breach of privileges in respect of a publication of a speech made in the House that had been expunged by the Speaker. The Court held that article 19(1)(a) is subject to Article 194 and Article 105. In *Jatish Chandra Ghosh (Dr.) v. Hari Sadhan Mukherjee*²⁶ a member published questions that were disallowed by the Speaker. In both cases, the publications were found not entitled to any privilege.²⁷

Some of the other privileges are where the members have freedom from civil arrest for a period of forty days before and after meeting of the parliament²⁸. Such privilege does not extend to arrests or imprisonment on a criminal charge²⁹ or contempt of court³⁰ or to preventive detention³¹. The court in *K. Anandan Nambiar v. Chief Secretary, Governor of Madras*³², lay that ministers do not enjoy any special status within the Constitution as compared to an ordinary citizen in respect of valid orders of detention. Also, superiority over law, where the members could change or supersede the law itself, exclusion of strangers, exclusive jurisdiction of House over the proceedings, power of enforcement of privileges, protection from insult etc forms part of the privileges.

Justice Sarkar opined in the *President's Reference No.1 of 1964*³³ that there exists no prima facie conflict between Article 19(1) (a) - a general provision, yielded to Article 194(3) requires harmonious construction to be adopted. Once the privilege is proved to exist, the house itself shall judge depending upon the occasion and manner of its application. No interference by the court is entertained on breach of the privilege. In the case of *In Re Under Article 143*³⁴ or *Keshava Singh case* or *U.P. Assembly case, 1965* the issue before the court was; whether court can entertain order issued by the speaker? ; can the speaker initiate privilege proceedings under Article 226 and 32? Supreme Court stated its affirmation to entertain petition under Article 226 and it does not breach parliamentary privileges. Also, if the fundamental rights of any individual have been violated, recourse to judicial remedy is always open. Article 105 does not take away the right to constitutional remedy. Fundamental

²⁴ An act was first enacted in 1956, but was repealed in 1976 to curb the freedom of press in the wake of emergency. The Act was re-enacted in 1977 when emergency came to an end.

²⁵ AIR 1959 SC 395

²⁶ AIR 1961 SC 613

²⁷ Justice P.K. Balasubramanyan, "Parliamentary Privilege: Complementary Role Of The Institutions", (2006) 2 SCC (Jour) 1, retrieved from site http://www.ebc-india.com/lawyer/articles/2006_2_1.htm#Note8

²⁸ H.M.Seervai, Constitutional Law of India, 4th ed., reprint 2013, vol. 2, p. 2156

²⁹ Kalyan Chandra Sarkar v. Rajesh Ranjan, 2005 (3) SC 307

³⁰ Sir Thomas Erskine May: Parliamentary Practice, 16th Edition., Chapter III, p.82

³¹ Smt. Indira Gandhi v Raj Narain, AIR 1975 SC 2299

³² AIR 1966 SC 657

³³ (1965) 1 S.C.R. at pp. 413

³⁴ (1868) LR 4 QB 73

rights cannot be subjected to article 194 or article 105. *P.V Narsimha Rao v. State or JMM Bribery case*³⁵ court stated ‘what may be politically correct may not be legally correct’. Article 105 provides immunity for bribe takers and holds the bribe givers and members who did not vote despite taken the bribe to be guilty. The case projects an irony where the ones accepting bribe are left scot free. Also, the Income Tax Appellate Tribunal claimed the money given to be donation rather than bribery. Yet, the money being accepted stands established, opening path for the concept of corruption. The end question whether Parliamentary privilege prevents party from execution if money is accepted. The answer stands “yes” as in accordance to the rule above- as the act may be immoral but not illegal. This projects a bizarre interpretation if the clause and goes against the spirit of the constitution as it tends to support corruption.

In 2002, National Commission for review of the constitution in its report submitted several recommendations to make it harmonious with the provisions of constitution. Article 105(2) needs to be amended such that they do not cover corrupt practices in connection with their duties. It shall include both, accepting as well as giving money for any speech or vote in a particular manner thereof. Such an act should attract penal consequences under the law of the land. The court also shall not take cognizance of any offence until prior sanction of the Speaker or the Chairman has been obtained. Similar amendment should be made in relation to the members of State Legislature under Article 194(2). One such limitation to the privilege is given under 52nd Amendment, 1985 and Anti-defection rules, and party whip shall lead to disqualification. The powers so given to the parliamentarians are to maintain the independence and dignity and to enhance the performance of law making, but due to several reasons their credibility is degrading day by day. Money and muscle power is the most craved ground and no political party stands out of this exception. Also judiciary having no say into the proceedings that brings chaos and vandalism under the cover of privileges or immunities. It provides for an umbrella to those who have committed wrong yet is a part of the ministry. Lack in participation of women leads to lack of dedication and commitments towards the fulfilment of goals. Thus article 105(3) provides for the Parliament to make laws to define Parliamentary Privileges. And even after decades, it hasn’t been done yet. Its only after they are duly defined, the bizarre interpretation shall end.

³⁵ AIR 1998 SC 2120