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A Privileged Legislature or a Weapon to stifle the Voice of the Republic?

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ABSTRACT

The article focuses on legislative privileges and their misuse by legislative authorities to penalise non-members of the Parliament for the breach of parliamentary privileges and its impact on Indian democracy. The article starts with a comparative analysis of the legislative privileges in the United Kingdom and India, further focusing on whether the legislative privileges are too broad in India. Next, it analyses the grounds for legislators' abusing this power. Moving ahead, it discusses examples of unjustified restrictions on citizens' freedom of expression in the name of contempt of the Houses. Finally, it seeks to strike a balance between the power of Parliament to punish and the freedom of citizens to express themselves freely.

Keywords: *Legislative Privilege, Article 105, Article 194, Legislative Immunity, Constitutional Rights, Constitution of India*

I. WHAT IS LEGISLATIVE PRIVILEGE?

Legislative privileges are the rights granted to the Legislature to carry out its legislative functions effectively. The rights, privileges, and immunities of Members of Parliament (MPs) and State Legislative Assemblies (MLAs) are outlined in Articles 105 and 194 of the Constitution of India 1950, respectively.

The articles state that the members of Parliament or the State Legislative Assemblies are immune from any civil or criminal liability for any statement made or performed while discharging their duties. The privileges are claimed only when the individual is a member of the House and are waived off as soon as the person ceases to be a member of either of the houses. These privileges are bestowed on the members for exercising vital constitutional functions in a disciplined manner, without any hindrance.

Further, the members enjoy privileges individually and collectively as a part of the Parliament. Individual privileges enjoyed by the members include freedom of speech under parliamentary authority, the power to make rules of procedure, internal autonomy, freedom from arrest, and

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freedom from appearing as witnesses. The privileges enjoyed by the members collectively as part of Parliament are the right to prohibit the publication of the proceedings, the right to exclude strangers, the right to punish members and outsiders for breach of their privileges, and the right to regulate the internal affairs of the House.

Nevertheless, it is to be noted that both Article 19 (1) (a) and Article 105 of the Constitution of India addresses freedom of expression. Article 105 applies to Members of Parliament who are not subjected to any reasonable limitations. The citizens of India are covered by Article 19 (1) (a), but only within reasonable limits.

In *Dr. Jatish Chandra Ghosh v. Hari Sadhan Mukherjee and Others*³, it was held that the provisions of Article 194 of the Constitution of India, even though disallowed by the speaker, were a part of the proceedings of the House and publishing them would not attract any sections of the Indian Penal Code because Article 194 (1) not only speaks about freedom of speech but also gives the right to ask questions and publish them in the press.

II. A COMPARISON OF THE STATUS OF LEGISLATIVE PRIVILEGES IN THE UNITED KINGDOM AND INDIA

The legislative immunities and privileges prevailing under the Indian Constitution are based on the privilege patterns of the British Parliament. At the time of the adoption of the offences in the Indian Constitution, clause 3 of Article 105 and Article 194 provided that the privileges, immunities, and powers of the House of Parliament and State Legislatures, including their members and committees, shall be defined by the Legislature by law from time to time. Until so defined, they shall be those of the House of Commons of the United Kingdom at the time.

(A) The Position of Legislative Privileges in the United Kingdom

To examine the nature of privileges and immunities, Erskine May's Parliamentary Practice⁴ offered a detailed statement of law outlining the stages through which parliamentary privileges arose in the United Kingdom.

The first stage of the struggle between Parliament and the courts was over the connection between the "Lex Parliament and English common law." The House of Commons held that "they solely were the judges of the scope and application of their privileges, not examinable by any court or susceptible to any appeal."

However, during this period, "elements of the opposing view stated that the decision of

³A.I.R. 1961 S.C. 613 (India).

⁴ ERSKINE MAY, PARLIAMENTARY PRACTICE 281 (Lexis Nexis 2011).

Parliament on issues of privilege could be called into question in other courts, that the *Lex parliamentaria* is part of the common law and is widely acknowledged by the courts, and that the resolutions at either House declaratory of privilege will not bind the courts". This view gained momentum as time progressed.

According to Erskine May, in the second half of the nineteenth century, several previous claims to jurisdiction made by the House of Commons in the name of privilege were unconstitutional in a court of law. As a result, the principles of the law of Parliament as part of the general law were within the judicial understanding of the judges, and the common law's obligation to establish its bounds could no longer be disputed. Simultaneously, it was established that a realm existed in which the jurisdiction of the House of Commons was absolute and exclusive.

For the third phase, the judges believed that when a matter is a proceeding of the House that begins and ends within its walls, it is plainly outside the court's jurisdiction unless criminal offences are involved. Besides, the House of Commons made a significant decision regarding the limitations of the term and the protection provided to proceedings in Parliament in the late twentieth century.

First, the nature and scope of the members' privileges were to be assessed by the courts rather than the legislative body, following the English notion that the courts have the authority to judge whether the House holds a specific privilege.

Second, the courts had the authority to decide whether any of the privileges of the British House of Commons that existed at the time the Constitution was instituted had become in conflict with the provisions of the Constitution.

In *R v. Eliot, Holles, and Valentine*⁵, the House of Lords acknowledged that the court should have never assumed jurisdiction over the charge of seditious speech, which was "fully answered by the plea of privilege." Nevertheless, it overturned the decision of the Court of King's Bench, which had found Sir John guilty and had him sentenced for delivering a seditious speech in the House of Commons.

In *R v. Chaytor and others*⁶, it was observed that the House did not claim exclusive jurisdiction over criminal behaviour, even where it pertains to or interferes with committee or house activities. It was thought to be acceptable to ask the police to intervene in the process of prosecution in the courts. Furthermore, criminal procedures were unlikely to be viable without Parliament's participation.

⁵ *R v. Eliot, Holles, and Valentine* (1629) 3 St Tr 292-336.

⁶ *R v. Chaytor and others* [2010] UKSC 52.

In addition, the House believed that before a prosecution could occur, the facts should be investigated, and evidence must be gathered. It was further held that when the House becomes aware that a member may have committed criminal offences concerning the administration of parliamentary business in circumstances that fall outside the absolute privilege, the House should be able to refer the matter to the police for consideration of criminal proceedings or to cooperate and comply with the police for the investigation of the relevant facts.

Hence, the preceding instances demonstrate that a person committing a criminal offence within the House premises does not have an absolute privilege. Instead, he would have a qualified privilege and would be immune only if the conduct was related to the member's effective participation in the House.

(B) The Position of Legislative Privileges in India

The immunity provided to MPs under Article 105 (2) of the Indian Constitution for "any proceedings in any court in respect of anything said, or any vote given by him in Parliament" (similar to Article 194 (2) of the Constitution in the case of MLAs) had become the subject matter of the Constitutional Bench's decision in *P. V. Narsimha Rao v. State*⁷.

The majority of the Court concluded that under Article 105 (2), members of Parliament are immune. So the action of MPs receiving bribes is immune, regardless of what they say or vote in Parliament.

However, the Court said that the word "anything" in this context would be construed broadly. Accordingly, the Court interpreted the phrase "anything" broadly and did not prosecute Mr. P.V. Narsimha Rao.

The judgment of the Constitutional Bench in *Raja Ram Pal v. Hon'ble Speaker, Lok Sabha*⁸, is a significant decision in developing this corpus of law. The case was known popularly as the "cash for query case," in which a sting operation on a private channel revealed several MPs were taking money directly or through intermediaries to raise questions and concerns.

Consequently, an inquiry was held by the House committees, and these MPs were ousted. This prompted the filing of writ petitions to challenge the expulsion.

It was held by the Hon'ble Court that there should be no doubt that whenever Parliament or any State Legislature claims any power or privilege under the provisions of Article 105 (3) or 194 (3) of the Indian Constitution, it is the Court that has the authority and jurisdiction to examine

⁷ (1998) 4 S.C.C. 626 (India).

⁸ (2007) 3 S.C.C. 184 (India).

on any grievance brought before it to determine whether the particular power or privilege that has been claimed is valid.

The principle that emerges unequivocally from this decision is that when a claim of privilege or immunity is brought up in the light of Article 105 (3) or Article 194 (3), the Court is vested with the authority and jurisdiction to ascertain whether the claim is viable on the anvil of the constitutional provision.

Accordingly, the Constitutional Bench ruled that neither Parliament nor state legislatures in India had the power of "self-composition," or the ability to govern their Constitution in the manner claimed by the House of Commons of the United Kingdom. As a result, the ruling stresses the idea of constitutional supremacy in India as opposed to parliamentary supremacy in the United Kingdom.

In *Lokayukta, Justice Ripusudan Dayal (Retired) and Ors. v. State of Madhya Pradesh*⁹, a three-judge bench, stated that privileges are granted exclusively to members as required to carry out their legislative responsibilities. Therefore, it was believed that their need should decide the scope of privileges.

The Court remarked that the extent of the privileges enjoyed is determined by the necessity for privileges, i.e., why they are provided for. The underlying concept of the privileges enjoyed by members is to allow them to execute their responsibilities as members while causing no impediment to the functioning of the House.

Moreover, the Court asserted that the underlying notion is quite apparent. Privileges are those rights without which the House cannot carry out its legislative responsibilities. They do not absolve the members of their responsibilities under any laws which continue to apply to them in the same way that any other law applies to ordinary citizens.

III. ARE LEGISLATIVE PRIVILEGES TOO BROAD A POWER IN INDIA?

Our lawmakers have the authority to act as judges, determining what their rights are, what constitutes a breach, and what penalty is to be imposed in the event of a breach of privilege.

Isn't this an overly broad power that violates constitutionalism, i.e., the concept of limited powers? The issue rests with the authors of the Constitution, who, while drafting the world's longest Constitution, left the critical subject of legislative privileges unclear. The Constitution of India in Articles 105 and 194 also does not explicitly explain the phrase "until so defined" in

⁹ (2014) 4 S.C.C. 473 (India).

any way.

Further, in *Pandit M. S. M. Sharma v. Shri Sri Krishna Sinha and Others*¹⁰, the Hon'ble Supreme Court ruled that Article 105 and Article 194 are special provisions that precede Article 19 (1) (a) of the Indian Constitution.

In the *Hardwari Lal and A.R. Antulay* case¹¹, the Hon'ble court accepted the argument and ruled that MLAs are not "public servants."

In the *P.V. Narasimha Rao* case, despite being classified as public servants, the Supreme Court of India ruled in a contentious decision that they could legally accept bribes and vote as per the wishes of the bribe-giver. Therefore, under the legislation, they are not liable for corruption.

These instances increase the misuse of legislative immunity that leads to the punishment of non-members for breach of privilege, as well as the arbitrary restriction of citizens' rights to free speech and expression in the guise of contempt of the Houses.

IV. THE INSTANCES OF PARLIAMENTARY PRIVILEGES BEING ABUSED TO SUPPRESS DEMOCRATIC VOICES IN INDIA

The following examples demonstrate how individuals elected to represent citizens' concerns abuse their power to suppress the country's democratic voices.

1. In the case of *Tej Kiran Jain v. N. Sanjeeva Reddy*¹², supporters of a religious leader filed a defamation lawsuit against various Members of Parliament (MPs). The accused were a former Lok Sabha Speaker and the then Union Home Minister. On April 2, 1969, the MPs were notified about the religious leader's behaviour during a religious conference. The seer had purportedly remarked that untouchability was acceptable within Hinduism and had left the gathering as the national anthem was performed
2. The Tamil Nadu Assembly Speaker issued an arrest warrant against the Hindu journalists in 2003. The publication of an article in which the words "incensed," "fume," and "high-pitched tone" was used to describe Smt. Jayalalitha's behaviour in the House was deemed a violation of privilege. The journalists were denied the right to be heard. The arrest warrant was issued when the speaker accepted the idea and issued the warrant, but the Supreme Court of India later delayed it.

¹⁰ A.I.R. 1969 S.C. 395 (India).

¹¹ A.I.R. 1988 S.C. 1531 (India).

¹² A.I.R. 1970 S.C. 1573 (India).

3. In Maharashtra, Mr. Manjit Singh Sethi was convicted for 90 days in prison for violating privilege for uttering the phrase, "We would not let the minister's wife roam around if dance bars were banned." The Maharashtra High Court declined to intervene in the legislative process.
4. In 2017, a Karnataka tabloid published derogatory articles about MLA Mr. K.B. Koliwad. The Legislative Assembly sentenced the journalists to one year in prison based on the recommendations of the Privilege Committee. The ultimate judgement was made by the Speaker, Koliwad, who had filed the complaint against the journalists. The Karnataka High Court intervened and suspended the prison sentence. Amnesty International India also raised this issue. It affirmed that journalists have the freedom to write critical pieces, and governments must be tolerant of such criticism. Furthermore, if an individual believes that his reputation has been seriously harmed, he should be able to seek redress via civil defamation. Finally, the Hon'ble Supreme Court granted a stay on the proceedings order.
5. Similarly, a spoof film of Mr. Devendra Fadnavis making a speech in the House in 2019 was interpreted as an insult to the House and a violation of parliamentary privilege.

Hence, there are a few examples of legislators condemning individuals for remarks that did not hinder the Legislature's work or sometimes were positive and constructive criticism¹³.

V. CONCLUSION

There must be a balance between legislative privileges and autonomy, constitutional rights and freedoms of the citizens of our country. The aforementioned are instances of misusing legislative privileges and powers to stifle the democratic voices of the country who wrote something critical that did not disrupt the functioning of the Legislature.

These critiques have reignited the debate over the urgent need for codifying privileges and prioritising citizens' rights to free speech and expression over legislative privileges¹⁴.

Unlike in England, Indian parliaments are not courts, and a conviction impacting people's rights should only be obtained through a judicial decision. Codifying legislative privileges can prevent these abuses as we neither have a clear-cut definition nor punishment for violating the privileges. This prevents Legislature from punishing anyone according to their whims and

¹³ Kavya Arora, *Legislative Privileges: The Exercise of Indefinite Powers to Curtail the Voice of Democracy*, BAR AND BENCH (Oct. 27, 2020, 9:00 AM), <https://www.barandbench.com/apprentice-lawyer/legislative-privileges-the-exercise-of-indefinite-powers-to-curtaill-the-voice-of-democracy>.

¹⁴ Faizan Mustafa, *Bring the House up to date*, THE HINDU (July 11, 2017, 12:31 AM), <https://www.thehindu.com/opinion/op-ed/bring-the-house-up-to-date/article19253239.ece>.

fancies.

Parliament has not sought to codify its privileges yet. One of the reasons might be that Parliament is afraid of losing its ultimate power if the codified law is subjected to judicial scrutiny. This infringes on citizens' fundamental rights, which is not how a representative democracy should work. Acknowledging the intention of the parliamentarian, the Supreme Court should set a timeframe for the codification of privileges so that further abuse of the privileges is curbed.

The constitutional expert and Chairman of Constitutional and Parliamentary Studies, Dr L.M. Singhvi, has also favoured the codification of privileges. The Press Commission of India has stressed the need to define legislative privileges. Moreover, in 2002, the National Commission for Review of the Working Constitution noted that privileges are designed to help parliamentarians accomplish their job of representing citizens' opinions, not to limit their freedom of speech and expression. Therefore, it is also recommended that the privileges should be defined and delimited.

Thus, the current situation should be addressed and improved until privileges are codified and the relationship between privileges and fundamental rights is balanced.

One possible approach is to make the Privilege Committee as unbiased as possible. This committee's responsibility is to determine if a violation occurred and what penalty should be imposed on the individual. Also, the committee must adhere to all the procedures of natural justice. In addition, the monopoly of a single party in the committee should be avoided, and the Privilege Committee should not be allowed to be the judge in its case.

As a result, the methods above might be used to make an urgent endeavour to maintain a balance between safeguarding parliamentary privileges and defending citizens' fundamental rights to speech and expression.
