

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 6 | Issue 4

2023

© 2023 *International Journal of Law Management & Humanities*

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com/>)

This article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in the International Journal of Law Management & Humanities after due review.

In case of **any suggestions or complaints**, kindly contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication in the **International Journal of Law Management & Humanities**, kindly email your Manuscript to submission@ijlmh.com.

Unleashing the Non-Justiciable Conundrum: The Garb of Parliamentary Privileges

SEZAL TYAGI¹

ABSTRACT

A member of Parliament, Mahua Moitra, in Parliament's budget session 2022 started off her scathing remarks on the current government and judiciary, courtesy of the frenzy "garb of parliamentary privileges" she asserted at the hand of parliamentary democracy. While setting a backdrop to Fundamental Rights, this article delves into the origin, meaning and extent of parliamentary privileges in India. Building on this, the objectives of the article are set forth. The author analyses the unresolved conflicts in such privileges through the lens of Constitutional law. By virtue of a comparative approach with the United Kingdom, these privileges are explored in light of freedom of speech and its scope. The article then incorporates a jurisprudential analysis of immunity from legal proceedings by examining case laws. Lastly, the article discusses whether codifying the privileges is essential since the doctrine of parliamentary privileges is inherently antithetical to the rule of law.

Keywords: Parliamentary Privileges, freedom of speech, Immunity, Fundamental Rights.

I. INTRODUCTION

The word 'privilege' is derived from the Latin "*privilegium*," meaning a law affecting an individual thereby, an individual's exceptional advantage 'over and above the ordinary law.' conferred to an individual. Thus, an essence of parliamentary democracy, 'Parliamentary privileges' as an inclusive and comprehensive term embodies **certain powers, immunities and, privileges enjoyed by the House of Parliament and its members to accomplish efficient functioning of the democracy without superfluous interference.** According to Erskine May, a unique characteristic of a privilege is its ancillary nature.

On delving into the origin of parliamentary privileges, it can be established that its emergence resulted from centuries of conflict in England between the King and the Parliament culminating in the **Bill of Rights of 1689**. **Article IX** of the Bill embodies the freedom of speech, the most essential privilege enjoyed by the members of the British Parliament. Historically, the British Parliament, a judiciary body, was regarded as the realm's highest court of royal justice. Thus,

¹ Author is a student at Symbiosis Law School, Pune, India.

an associated assertion was that lower courts could not entertain cases questioning the propriety of deliberations in higher courts. In addition to freedom of speech, it included freedom from civil arrest, the right to punish members and outsiders for contempt, and the rights derived from judicial precedents. Thus, these privileges evolved due to the Parliament's exigency to assert its authority, independence, and integrity against outside influence. In India, parliamentary privilege is one of scion; it is England's importation, a plant of an foreign stock that pursues to enrich its life and substance.

Article 105 of the Indian Constitution confers powers, immunities, and privileges to the Houses of Parliament and its members. **Article 105** incorporates two privileges of members of the Parliament, namely, **freedom of speech under clause(1)** and **freedom of publication of proceedings and immunity from legal proceedings under clause(2)**. Similarly, the powers, immunities and privileges of the State Legislatures are enshrined under **Article 194** of the Constitution. **Article 194** incorporates two privileges of members of the State legislatures, namely, **freedom of speech under clause(1)** and **freedom of publication of proceedings and immunity from legal proceedings under clause(2)**. The language of the Article 105 is mutatis mutandis to that of Article 194, except substituting the expression 'Parliament' in Article 105 with 'Legislature of a State.'

'Parliamentary privileges' is a topic of great controversy due to the unresolved legal conflicts arising out of numerous cases. Such privileges are a cornerstone of civil liberties and advancement of democracy, yet again, an oppressor of the subject's rights in the hands of corrupt, rapacious politicians desirous of prolonging their power. Moreover, following the U.K., laws governing parliamentary privileges in India are interspersed in the form of conventions and customs that have been frozen by articles 105(3) and 194(3) at the outset of the Indian Constitution. Thus, the spirit of the Indian constitution and the theory of 'Separation of Powers' it envisions are not in harmony with an automatic application of the English law that neglects the politico-legal conditions persistent in India.

II. FREEDOM OF SPEECH

In a parliamentary democracy, freedom of speech of Members of the Parliament is indispensable for effectively discharging their parliamentary duties and for preserving the independence of such a deliberative body. In light of the above, the notion of freedom of speech is expressed as the protection enjoyed by the members of Parliament against legal actions arising from views stated democratically. A judicial intervention into the internal affairs of the legislative body would violate the universally recognised constitutional principle of "**Separation of Powers**".

Moreover, the principle of “responsible government” cannot be effectively sustained due to the absence of ‘absolute’ freedom bestowed upon the legislators to analyse government policies. Thus, any violation of the freedom of speech of Parliament members is deemed as a “**breach of privilege**” and is accordingly penalized.

(A) India

Article 105(1) and **Article 194(1)** of the Indian Constitution bestows the ‘**freedom of speech**’ upon members of the Parliament and State Legislatures, respectively. However, the Constitution has not conferred ‘absolute’ freedom of speech to the legislators but only limited freedom subject to “other provisions of the Constitution and the rules and standing orders regulating the procedure of the House.” The expression above includes **Article 121** and **Article 211**, which prohibit any discussion in the Parliament and the State Legislatures, respectively, in regard to the conduct of High Court and Supreme Court judges. A question arose in *Keshav Singh case*² that whether there is any legal sanction if a speech delivered by a member contravenes Article 211. The Supreme Court held that there is no legal sanction for the said prohibition since as per Articles 105(2) and 194(2), no legal proceedings can be instituted against the members in any court ‘in respect of anything said in the Houses of Parliament and State Legislatures, respectively. Moreover, the freedom of speech in the House would only fall within the exclusive jurisdiction of the Presiding Officer, i.e., the supervisory powers of the Speaker, and was also subject to the good sense of the members. In *Sub-Committee of Judicial Accountability v. Union of India*³, it was held that the constitutional bar under Article 121 is waived when any member of the Parliament files a notice of motion to remove a judge under Article 124(5) read with the Judges (Inquiry) Act, 1968. The sheer allegations made by him are subject to debate in the House itself.

Furthermore, freedom of speech conferred to the members of the legislatures is much wider than the freedom guaranteed to the other citizens/press under **Article 19(1) (a)** of the Constitution. The Apex Court in *P.V. Narasimha Rao v. State*⁴, observed that the reasonable restrictions enshrined under Article 19(2) cannot be applied to the freedom of speech guaranteed under Article 105. By virtue of **Article 105(2)** and **Article 194(2)**, the members of Parliament and State Legislatures are immune from any legal proceedings with respect to speeches delivered by them in the house. Since these provisions are not subject to “other provisions of the Constitution,” they prevail over all other provisions, including Fundamental Rights. It was ruled

² The President’s Reference No.1 of 1965, AIR 1965 SC 1186

³ Sub-Committee of Judicial Accountability v. Union of India (1991) 4 SCC 699, Para 34

⁴ P.V. Narasimha Rao v. State, AIR 1998 SC 2120

that the **alleged bribe-taking by the members of the Parliament is protected by Article 105(2)**; thus, the accused in such cases are not answerable to any Court.

With due respect to the Supreme Court, it is humbly contended that in the aforesaid case, the Court neglected to expound the Constitution's philosophy in general and the 'real intention' along with the 'original meaning' behind Article 105 (2) specifically as laid down in *Supreme Court Advocates-on-Record Association v. Union of India*⁵. The culpability of the accused persons cannot be condoned under the "garb of parliamentary privileges" as the said act was not performed within the holy precincts of the House. If the members solicit bribe to fulfill their parliamentary duties, they would instead hinder the Parliament from accomplishing its functions efficiently and effectively, as the interpretation of immunity runs counter to the principles of fairness, justness, and moral conduct pledged by the members.⁶

In *Tej Kiran Jain v. N. Sanjiva Reddy*⁷, the judicial enforceability of the scope of freedom of speech was assessed, wherein the Court held that the expression "anything" in clause (2) of Article 105 was of greatest significance and was analogous to "everything." Additionally, the Court opined that immunity is of essence to the Parliamentary democracy. According to the High Court, the phrase "proceedings in any court" should be interpreted broadly, and it encompasses writ proceedings under Article 226 of the Constitution within its ambit. The aforesaid position was affirmed in *A.K. Subbiah v. The Chairman, Karnataka Legislative Council, Bangalore*⁸, wherein the High Court ruled that in light of the prohibition under Article 212(1), according to which the validity of any proceedings in the Legislature of a State shall not be questioned in any court on the ground of any irregularity of procedure, the Court would not be permitted to call for the House's records.

(B) Immunity from legal proceedings

A question arose in *Surendra Mohanty v. Nabakrishna Chaudhary*⁹, whether a state legislator who makes derogatory remarks in a speech delivered to the House can be held liable for contempt of the High Court. The court held the respondent's impugned speech as objectionable, which comprised of an allegation that the Court had abused its powers, significantly undermining the High Court's authority and holding the Judges in contempt. Further, the power of the State Legislature to file a legal action against a member who transgresses the limits under Article 194 (2) does not impact the limited immunity from any action in a Court of law under

⁵ Supreme Court Advocates-on-Record Association v. Union of India, (1993) 4 SCC 441.

⁶ Malik, Balwant Singh, "*P.V.Narsmha Rao v. State: A Critique*" (1998) 8 SCC (Jour) 1.

⁷ Tej Kiran Jain v. N. Sanjiva Reddy, AIR 1970 SC 1573.

⁸ A.K. Subbiah v. The Chairman, Karnataka Legislative Council, Bangalore, AIR 1979 Kant. 24.

⁹ Surendra Mohanty v. Nabakrishna Chaudhary, AIR 1958 Orissa 168.

Article 194 (2). Thus, the language of Article 194(2) is explicit and unambiguous, stating that no Legislature member may be subject to legal action for any speech delivered to the House, and the immunity is sought to be absolute. The aforesaid decision is inconsistent with the established principles for constitutional interpretation.

The doctrine of “harmonious construction” portrays that if there is any direct conflict between the two provisions of the Constitution, then the special provision prevails over the general provision. Article 215, being a special provision, is not subject to “other provisions of the constitution,” as a result of which no member of the Legislature possesses absolute immunity from contempt action in respect of anything said by him in the House.¹⁰ Thus, in such cases, Article 215 shall prevail over Article 194 (2), a general provision. Lastly, the Supreme Court in *Indira Nehru Gandhi v. Raj Narain*¹¹ determined that the immunity enshrined under Article 105(2) must not extend to any criminal acts committed by the members to deliver a speech or cast a vote in the Parliament, as the framers would not have intended for such immunity for legitimizing the criminal acts of the members. Moreover, immunity cannot be claimed for an act committed by a member “outside the Parliament” regarding “anything said or any vote given” in the Parliament.

(C) United kingdom

The history of freedom of speech has been inextricably linked with the UK’s Constitutional history. In accordance with **Article IX of the Bill of Rights, 1688**, the British Parliament guarantees the freedom of speech. As it is regarded as a fundamental component of parliamentary privileges in the UK, freedom of speech is inclusive of defamatory or offensive statements which ought not to subject the members to be held liable to any court. Moreover, the aforesaid Act is the genesis of Article 105(2) and 194(2) incorporated in the Indian Constitution. Erskine May has recognised two components of parliamentary privileges in UK, namely, **(a) Exclusive Cognizance** and **(b) Freedom of speech and debate**.¹² The guardian of the Parliament’s integrity, the principle of ‘Exclusive cognizance’ refers to the exercise of parliamentary jurisdiction over its own affairs. For instance, freedom of speech to regulate its own proceedings protects the members from impeachment or questioning outside the Parliament. Any violation of the said principle may result in legal action for a ‘breach of privilege,’ similar to India.

¹⁰ Dam, Shubhankar, “Parliamentary Privileges as Façade: Political Reforms and the Indian Supreme Court *Raja Ram Pal v Hon’ble Speaker, Lok Sabha and Others*”, Sing. J. Legal Stud. 162 (2007)

¹¹ *Indira Nehru Gandhi v. Raj Narain*, 1975 (Supp) SCC 1

¹² Smyth, ‘Privilege, exclusive cognizance and the law’ in Horne, Drewry & Olivier (eds), *Parliament and the law* 35, (2013).

A question arose in *A v. United Kingdom*¹³ whether Article IX of the Bill of Rights is subject to **Article 6 of the European Charter on Human Rights** conferring the right of access to court and fair trial. The European Court of Human Rights held that Article IX was not violative of **Article 6 (1)** of the Charter. However, the Court stated that the said immunity cannot be claimed for statements, inclusive of repetition of the statements delivered during the course of Parliamentary debates and the press statements published prior to Parliamentary debate by the members outside the Parliament, analogous to India. Furthermore, the acceptance of bribes by members of Parliament is regarded as contempt of the House and punishable as such in the United Kingdom. Thus, the offense of bribery in juxtaposition with parliamentary duties extends to a member of Parliament. In 1999, the joint committee of the House of Lords and of the House of Commons, in its First Report suggested that members of both Houses should be subject to criminal proceedings for bribery by legislation on corruption, notwithstanding Article 9 of the Bill of Rights.

III. CODIFICATION OF PARLIAMENTARY PRIVILEGES

By virtue of **Articles 105(3) and 194(3)**, the Parliament and State Legislatures had the authority to codify the “other privileges,” and until they were so defined by law, the privileges enjoyed by the British House of Commons and its members at the time of commencement of the Indian Constitution shall be applicable in India. As the Constituent Assembly of India intended the said provisions to be **transitional in nature** which would be explicitly codified. However, the law relating to the parliamentary Privileges in the U.K. has undergone a tremendous evolution since 1950, whereas, contrary to the constitutional mandate, no law has been made either by the Parliament or State Legislatures to codify the parliamentary privileges (frozen to the year 1950). The legislators perceive codification as a threat to Parliament’s sovereignty as codified laws would be subject to Fundamental rights under Article 13 hence, subject to the Court’s jurisdiction.¹⁴ The non-codification led to ambiguity in determining the following:

- i. Whether the Indian legislative bodies, which are subject to the Supreme and Written Constitution (Suprema Lex) can legitimately claim all the privileges enjoyed by the British House of Commons.
- ii. Whether these bodies are subject to any judicial review in matters of privilege.
- iii. Whether the parliamentary privileges of the legislature are within the purview of

¹³ *A v. United Kingdom*, (2003) 36 E.H.R.R. 51

¹⁴ Rao, K. Madhusudhana, “*Codification of Parliamentary Privileges in India-Some Suggestions*”, 7 SCC (Jour), (2001).

fundamental rights.

The **pressing need for codification** of parliamentary privileges:

- i. The codification would serve as a guardian against the arbitrary exercise of parliamentary privileges and minimize the abuse of power by the members. Moreover, codified privileges would promulgate greater lucidity and certainty.
- ii. It would enable the members to be aware of their privileges and regulate the public's behaviour towards them. Thus, it would preclude unjustified privilege motions and misinformed public criticism of the House or its members.
- iii. It would unburden the Parliament by reducing its workload; thus, the wastage of Parliament's precious time can be prevented.
- iv. It would abridge the disputes arising out of the hazy nature or vagueness of the law relating to parliamentary privileges.

IV. CONCLUSION

India lacks comprehensive legislation on parliamentary privileges distinctly inclusive of the definitions, nature, and extent of the privileges, procedure to exercise privileges in the Houses, restriction of certain privileges in the interest of freedom of media, and lastly, the scope of judicial review to question the acts of the Houses. Thus, aforesaid lacunae necessitate an analytical inquiry into the working of Constitutional provisions and the judicial antecedents on parliamentary privileges through comparative analysis of law prevailing in other jurisdictions.

(A) Recommendations:

- i. The National Commission for Review of the Working of the Constitution's suggestion to amend Articles 105(2) and 194 (2) to specify that the immunity enjoyed by the members of Parliament does not encompass their corrupt acts in the course of their duties must be implemented.
- ii. No court shall take cognizance of any offense arising out of members' actions in the House without prior authorization from the Presiding Officer.
- iii. The aforesaid provisions should be inclusive of the expression "Subject to the other provisions of the Constitution" at the outset.
- iv. After taking the oath of office, each member of Parliament and State Legislatures shall be handed an "Advisory Guide" consisting of limitations on freedom of speech.
- v. The codification of laws to promulgate the aforesaid consequences. Moreover, a

codified law must incorporate essential elements constituting specific instances amounting to “contempt of House” and the period of punishment for the contemnor.
