

LEGISLATIVE PRIVILEGES UNDER INDIAN CONSTITUTION

Written by *Vishal Garg*

Ph.D Student Punjabi University Patiala

INTRODUCTION

The term parliamentary privilege is used in Constitutional writings to denote both rights and immunities. With the view to enable the Parliament to work effectively and efficiently and to discharge its functions without any kind of obstruction or interference, the privileges are provided to both the Houses of Parliament. The privileges are provided to each house collectively and to its members independently. An important and also a complicated question is, what do we understand by 'parliamentary privileges', "Nothing", said Dicey, "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"¹.

There are various definitions of the word privileges given in various dictionaries but as per Oxford dictionary², the term privilege refers to the "special right, advantage or immunity to the particular person. It is special benefit or honour". Hence it can be inferred that the term privileges referred to the special rights and advantages that are enjoyed by the members of Parliament over the citizen of India. Various authors throughout the world have interpreted the word privileges according to the norms and scenario exists in their respective country³.

The term parliamentary privilege is used in constitutional writings to denote both these types of rights and immunities. Sir Thomas Erskine has defined the expression parliamentary privileges as follows: "The sum of the peculiar rights enjoyed by each House collectively is a constituent part of the High Court of Parliament, and by members of each House of Parliament

¹ M.P. Jain, *Indian Constitutional Law*. 85 (2013).

² Available at <http://www.oxforddictionaries.com/definition/english/privilege> accessed on 03.08.2016.

³ Available at <http://www.legalservicesindia.com/article/article/privileges-of-parliament-919-1.html> accessed on 13.08.2016.

individually, without which they cannot discharge their functions, and which exceed those possessed by other bodies or individuals”⁴. Article 105 of the Constitution lays down the "Powers, Privileges and Immunities of Parliament and its members" and Article 194 lays down the State Legislatures and their members also contain certain enumerated privileges and powers while leaving room for a large number of uncodified and unremunerated privileges to continue. Reference to certain other provisions like Articles 118, 121, 122, 208, 211 and 361-A, which also have a bearing on the subject, are made at the appropriate places.

Freedom of Speech: Article 105(1)⁵ guarantees freedom of speech in Parliament subject of course to the rules and Standing Orders regulating the procedure of Parliament. What makes Article 105(1) effective and much more than the right of every citizen to free speech guaranteed by Article 19(1)(a), is the immunity from the process of the courts in respect of anything said in the House. The privilege is available not only to the Members of Parliament but also, under Article 105(4) of the Constitution, to persons like the Attorney General of India or Ministers who are not members but have a right to speak in the House. In order to claim the immunity, what needs to be shown is only that Parliament was sitting and that its business was being transacted⁶.

The limitations on the privileges regarding freedom of speech in Parliament are few. One limitation is that the freedom is subject to the constitutional provisions and the rules and procedures of Parliament. The rules are those framed under Article 118 of the Constitution. Under Article 121, Parliament cannot discuss the conduct of judges of the Supreme Court and of the Judges of the High Court. Even if there is any violation of these limits, it would still be a matter exclusively for Parliament to deal with and the courts would have no jurisdiction to look into the matter. In view of Article 122, the courts are also explicitly barred from enquiry into the validity of any proceeding in Parliament. Another exception is of course that Parliament must be sitting. The privilege cannot be stretched to cases of casual conversation in the House. A member cannot also claim immunity for any speech that he may make outside the House even if it is a verbatim reproduction of what he has said inside the House. Article 105(2), entertain a litigation even in a case of waiver of privilege. So, it is evident that subject

⁴ Sir Thomas Erskine May: Parliamentary Practice, 42 (2011)

⁵ *Supra* note 5.

⁶ *Tej Kiran Jain v. N. Sanjiva Reddy*, (1970) 2 SCC 272

to very minor limitations the privilege under Articles 105(1) and (2) with regard to speech in the House is complete, conclusive and outside the scope of scrutiny or enquiry by other organs of the State.

Freedom of Publication: The freedom of publication is available to all persons who may publish reports, of the House or papers under the authority of the House. For the purposes of Articles 105(1) and 105(2)⁷, it is quite immaterial if the publication was meant for circulation among the Members of Parliament or for a larger audience. A word must also be said about the rights of publication in respect of proceedings of the House, but not under its authority. Such publications obviously do not have the protection of Articles 105(1) and (2)⁸. But, an attempt has been made to protect the freedom of the press and thereby give the public access to the proceedings of the House. The Parliamentary Proceedings (Protection of Publication) Act, 1956 was repealed during the emergency but re-enacted in 1977 and it covers both publications and broadcasts. Article 361-A⁹ was added to the Constitution later and the protection has since then a much higher status. But, the protection is only of immunity from court proceedings and not from action from the House itself in case it initiates proceedings for breach of any of the privilege¹⁰.

In order to qualify for this immunity from civil and criminal proceedings all that is required is that the publication or broadcast must be a "substantially true report" of the proceedings in the House. The immunity is lost only if it is proved that the publication was made with malice or if it related to the proceedings of any secret meeting of the House. In some ways, the privilege is similar to the one conferred on persons reporting court proceedings by the fourth exception to Section 499 of the Indian Penal Code. The privilege could be successfully claimed even in respect of a part of the debate which alone the reporter finds newsworthy provided that it is a fair report, untainted with malice¹¹.

⁷ *Ibid*

⁸ *Ibid*

⁹ Narender Kumar, *Constitution Law of India* 699 (2016). The Constitution (44th Amendment) Act, 1978 has added Article 361 A to the Constitution.

¹⁰ *Supra* note 1.

¹¹ *Ibid*.

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*¹², 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. In *Jatish Chandra Ghosh (Dr.) v. Hari Sadhan Mukherjee*¹³ a member published questions that were disallowed by the Speaker. In both cases, the publications were found not entitled to any privilege.

Right to Vote: The other privilege expressly conferred by Article 105(2) of the Constitution is the one relating to the vote by a member in the House. The ramification of having a complete immunity from court proceedings in respect of the vote in Parliament was felt in *P.V. Narasimha Rao v. State*,¹⁴ The Supreme Court was called upon to decide if the constitutional immunity could be applied to the case of an alleged bribe given to members for exercising their vote in Parliament. The Court by majority held that the member, the alleged bribe-taker, could not be proceeded against. But, the bribe-giver and a member, who had not voted but had merely abstained, were found disentitled to any immunity. No court will take cognizance of any offence arising out of a member's action in the House without prior sanction of the Speaker or the Chairman, as the case may be. Article 194 (2) may also be similarly amended in relation to the Members of State Legislatures."

Perhaps, one limitation on the privilege to vote can be found in the Constitution (Fifty-second Amendment) Act, 1985¹⁵ and the anti-defection rules¹⁶ framed there under. The disobedience of the party whip could lead to disqualification of a member. It applies only to voting and not to any other right of a member like his privilege regarding speech¹⁷.

OTHER PRIVILEGES OF LEGISLATORS: There are, of course several other privileges of Parliament mention in some other enactments like those relating to the bar on arrest of a member during a session for 40 days before its commencement and 40 days after its conclusion¹⁸, right to exclude strangers from the House, rights of the Parliamentary

¹² AIR 1959 SC 395

¹³ AIR 1961 SC 613

¹⁴ (1998) 4 SCC 626

¹⁵ Came into force on March 1, 1985

¹⁶ 10th Schedule of the Constitution of India.

¹⁷ Report of the National Commission to Review the Working of the Constitution (Vol. I, March 2002) p. 168

¹⁸ Section 135A of Code of Civil Procedure, 1908.

Committees to call for records, right to prohibit publications, etc. Even an independent officer appointed by a Parliamentary Committee has been recognized to be an officer of the House and his actions beyond the pale of judicial review¹⁹ But, it is rarely that the exercise of these privileges has led to any inter-institutional issues. During the period from 1952 to 1984 a total of 87 reports, involving 100 issues of privileges were submitted by the Privileges Committees of the Lok Sabha and Rajya Sabha. A good number of these cases involved reflections on members, Speaker or Committees of the House²⁰.

A question has arisen, with some regularity, as to whether a Court of law can issue a notice to the Speaker of a House or to its members in connection with their activities relating to the House. Is the issuance of a notice and its non-acceptance by the Speaker a matter of parliamentary privilege? In *Thankamma v. Speaker, T.C. Assembly*²¹ notice was issued by the Court and accepted by the Speaker. A counter-affidavit was filed by the Secretary to the legislature and all arguments, including the jurisdiction of the Court to go into the question of the validity of an oath taken in the assembly were raised. A decision was rendered. But, in *Tej Kiran Jain v. Sanjiva Reddy*²² the Speaker of the Lok Sabha had directed five members of the House to ignore the notice of lodgment of petition of appeal issued by the Court. The case was dismissed and consequently the apprehended conflict was averted. In another case relating to the taking of oath in the assembly, the Kerala High Court issued notice which the Speaker refused to accept or acknowledge. The result was that the Court proceeded to hear and decide the case²³ the question does arise if any tangible benefit is obtained by ignoring notices and quoting decisions without contest. It is doubtful whether the privileges of the House are enhanced or protected in this manner.

PRIVILEGES OF LEGISLATORS AND FUNDAMENTAL RIGHTS

The advisory opinion rendered by the Supreme Court in the case of *Keshav Singh v. Speaker legislative Assembly*²⁴ arose out of the exercise of one of the most important privileges of a legislature i.e. to punish for contempt. Such cases have arisen out of the zealotry of the

¹⁹ *R. v. Parliamentary Commr. for Standards*, (1998) 1 All ER 93

²⁰ Ranjana Arora, *Parliamentary Privileges in India*, 159 (2010)

²¹ AIR 1952 Trav Co 166

²² (1970) 2 SCC 10

²³ Haridasan Palayil v. Speaker, Kerala Legislative Assembly, (2003) 3 KLT 119

²⁴ Special Reference No. 1 of 1964, (1965) 1 SCR 413

courts to protect the fundamental rights of the citizen and the legislative bodies to protect their privileges. In this situation, the interest of the nation is twofold i.e. of free and frank discussion in the House and also to safeguard the dignity of its citizens. The Supreme Court was called upon to decide on the jurisdiction of the High Court to entertain and deal with the petition filed by Keshav Singh complaining of the violation of his fundamental rights on account of the action of the assembly. The question arose whether the fundamental rights of the citizen itself could be subject to the parliamentary power of privilege. It must also be remembered that in *M.S.M. Sharma*²⁵, the Supreme Court had already held that the right to free speech of every citizen under Article 19(1)(a) is subject to the privilege of the House. The Supreme Court in *Keshav Singh*²⁶ opined that the violation of Article 21²⁷ on account of exercise of powers under Article 194(3) could be examined by the Court. The Court proceeded on the basis that it cannot look as a mock spectator if an allegation of violation of the fundamental rights of a citizen is brought before it on account of the action of a legislative body. The Committee of Privileges of Parliament has, however, opined that the majority opinion is wrong. If the organs of the Government are unsure on what is right, then the citizen and the nation will suffer²⁸.

In *A. Kamaraj v. The Secretary Assembly Secretariat, Tamil Nadu Legislative Assembly*²⁹, Madras High Court held that proceeding for breach of privilege cannot be taken to be a legal proceeding within the meaning of Section 7 of the Press and Registration of Books Act, 1867. Further also held that High Court can certainly examine whether the impugned proceeding are tainted on account of substantive or gross irregularity or unconstitutionality. However, power of judicial review cannot be exercised on a mere procedural irregularity.

A recent stand-off occurred in Tamil Nadu. The Speaker of the assembly issued a warrant for the arrest of an M.L.A, R. Tamraikani, for violating the privileges of the House by hitting and causing grievous injuries to the Agriculture Minister in the assembly, when the session was going on. The High Court on a Habeas Corpus petition ordered his release. He was released, but within a few minutes he was rearrested on the order of the Speaker. The High Court on a

²⁵ *Supra* note 29.

²⁶ *Supra* note 43.

²⁷ **Article 21.** Protection of life and personal liberty.-

No person shall be deprived of his life or personal liberty except according to procedure established by law.

²⁸ "Fundamental Rights and Parliamentary Privileges", Calcutta Weekly Notes, Vol. 96, Editorial Notes, 29

²⁹ 2013(4) R.C.R(Civil) 452

second Habeas Corpus petition ordered his release. So the possibility of these kinds of conflicts between the courts and the legislature can occur. The question would arise as to the law that should govern a criminal act done within the House. Is it a matter of mere privilege or a matter to be dealt with by a court of law? If a murder is committed in the House then the ordinary law of the land would obviously apply. A question would also arise as to the fundamental right of a citizen who could end up being imprisoned twice over for the same infraction. His fundamental right under Article 20(2) of the Constitution, which bars a person being prosecuted and punished for the same offence more than once, would be jeopardized since the privilege action would not be a trial by a court. It can only be hoped that when the law of privileges is codified adequate thought would be bestowed on these aspects³⁰.

The landmark judgment of the Supreme Court *Raja Ram Pal v. The Hon'ble Speaker, Lok Sabha and Ors*³¹ has also reshaped the law on parliamentary privileges in India. The observations recorded by the Apex Court in first Presidential reference were emphatically approved again by the Court and even made some improvements with regard to the protection of Fundamental Rights. In a country like India, which is governed by the principles of the written Constitution; non-specified and ambiguous character of the powers, privileges and immunities of Parliament (In the absence of clear provisions and Statute) was a big handicap. It is the Judiciary who has removed this handicap to some extent. The solution of the conflict between the Parliament and the judiciary on the issue of parliamentary privileges lies in harmonizing the relationship between the two highest organs of the democracy. The strength of the democracy too lies in the existence of harmonious relations among different organs of the State, in particular, Legislature and Judiciary.

In *Kihoto Hollohan v. Zachillhu*³² the Court was called upon to decide intricate questions of constitutional law touching upon the nature and limits of the powers of the Speaker of the House and the scope for judicial intervention in respect of exercise of power by the Speaker. The Supreme Court by majority held that the Speaker while adjudicating on disputed disqualification under the Tenth Schedule to the Constitution exercises judicial power and that decisions rendered are subject to judicial review. The Court did, however, hold that the Speaker

³⁰ *Ibid*

³¹ 2007 (3) SCC 184

³² 1992 Supp (2) SCC 651

of the House holds an exalted and pivotal position in a parliamentary democracy and is the guardian of the rights and privileges of the House. The vesting of adjudicatory powers on such an authority was upheld. It was held that the Court could at best consider the correctness of the ultimate decision but could not pass orders at the interlocutory stage, except in grave circumstances, or at any stage prior to the making of the decision³³.

This once again brings the essential issue of whether the existence, limits and exercise of the privileges of the House vis a vis the Fundamental Rights of a citizen is ultimately determined by the House itself or by judicial pronouncements. The judicial view in *State of Kerala v. Sudarsan Babu*³⁴ is clearly that the "officers and members of a legislature cannot claim immunity when they exercise their powers in a manner opposed to the Constitution" (KLT p. 341, para 6) and that the power under Article 226 or Article 32 of the Constitution can be invoked against the legislature.

CONCLUSION

We can conclude as there is a clear demarcation as to what all rights and privileges are absolute and what are not. For example, in India Legislative Assemblies and Parliament never discharge any judicial function and their historical and constitutional background does not support their claim to be regarded as courts of record in any sense. No immunity from scrutiny by courts of general warrants issued by House in India can therefore be claimed. It is also a duty of the members to properly use these privileges and not misuse them for alternate purposes that is not in the favour of general interest of nation and public at large. Thus what we must keep in mind is the fact that, "power corrupts and absolute power corrupts absolutely". For this not to happen under the privileges granted, the public and the other governing body should always be on vigil.

³³ *Ibid*

³⁴ 1983 KLT 764 (FB)