

PARLIAMENTARY PRIVILEGES IN INDIA

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History of parliamentary privileges

The origin of the parliamentary privileges is connected to the history of the parliament in England. The Executive was separated from the parliament and the House of Commons were thereby struggling hard to seek a place for itself. This was necessary to protect them from the interference of power of the King as well as the House of the Lords. Thus parliamentary privileges were established by 16th century.

The origin of parliamentary privileges in India can be dated back to the Vedic age where there were two assemblies named Sabha and Samiti. The charter act of 1833 emphasised on legislative centralization. An expansion of the legislative council act of India was provided by 1853 charter act. The claim of privileges can be seen in demand of the legislative councillor under the charter act of 1853. Consequently, the power of legislative council was defined by Indian council act 1861. This act extended the privileges available to the members and to the members of the newly formed legislative council of state. In the Indian council Act 1892, the privileges were reiterated and extended which included debate, any motion passed by parliament etc. In the Government of India Act 1915, the entire position of parliament privileges were obtained and consolidated. In the Government of India act, 1919 they gave qualification to freedom of speech to members. Government of India act 1935 contained the provisions related to privileges of members of Indian legislature. The Indian Independence Act 1947 accorded sovereign legislative power on Indian domain. In the case of Raja Ram Patel v. Hon'ble speaker, Lok Sabha¹, the term privilege was defined as "a special right, advantage or benefit conferred on a particular person. It is a peculiar advantage or favour granted to one person as against another to do certain acts." This provides that the advantage or favour given is distinct from a common right which is enjoyed by all and thereby is a special

¹ Raja Ram Patel v. Hon'ble Speaker, Lok Sabha AIR 2007 SC (Supp) 1448

grant by the sovereign. Such privilege is given to members of the parliament only and by the higher authority.

Regarding freedom of speech

Freedom of speech in has been expressly safeguarded by Article 105(1) and (2). Article 105(1) secures freedom of speech in the parliament to its members. But such freedom is subject to provisions of the constitution which regulate the procedure of Parliament under articles 118 and 121. Article 105(2) provides immunity in relation to the proceedings in the court. No member shall be held liable to any proceeding in any court for anything said or any vote given or a committee as held in *A.K Subbiah's* case.² One of the restrictions imposed by article 121 is that no discussion can take place in the house with respect to the conduct of a Supreme Court or a High Court judge in the discharge of his duties except when a motion for his removal is under consideration.³ Two very significant points regarding parliamentary privileges have been discussed in the case of *P.V Narasimha Rao v. State*.⁴ With regard to the first point, the majority view is that the ordinary law does not apply in a way that the bribery by a Member of Parliament will be acceptable regarding the proceedings in the Parliament. A constitutional bench in a ratio of 3:2 has answered the first issue in affirmative. The majority has ruled that while the bribe makers can claim no immunity under Article 105(2), the bribe takers stand on a different footing. The alleged bribe takers are said to have received monies “as a motive or reward” for defeating the non confidence motion and thus, the nexus between the bribe and the non confidence motion is explicit. The majority judges have insisted that to enable members to participate fearlessly in Parliamentary debates, members need the wider protection of immunity against all the civil and criminal proceedings that “bear a nexus to their speech or vote”. The minority judges expressed view as per Justice S.C Agrawal, that the immunity which can be claimed is the liability that has arisen as a consequence of speech that has been made or given in the Parliament.⁵

Regarding publication

² A.K Subbiah v. Karnataka Legislative Council ., AIR 1979 Kant 24.

³ M.P Jain, Indian Constitutional Law, 88, Lexis Nexis, 7th edition, 2014pg 87, para 6

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

⁵ Supra note 3 at pg 149.

The freedom of publication is available to all persons who may publish reports, etc. of the House or papers under the authority of the House. For the purposes of Articles 105(1) and 105(2), it is quite immaterial if the publication was meant for circulation among the Members of Parliament or for a larger audience. In the case of *Stockdale v. Hansard*⁶, a book containing defamatory matter was published under the authority of the House of Commons leading to a suit for damages. The suit was decreed holding that no privilege is attached to the publication. This led to the framing of the Parliamentary Papers Act, 1840 granting complete privilege to the publications made under the authority of the House. In an English case of *Wason v. Walter*⁷, the House held that the advantage from publication of proceedings is so “great” that the little inconvenience caused to individuals due to the same can be ignored. Articles 105(1) and (2) reflect the march of the English law on the subject. In *Jatish Chandra Ghosh v. Hari Sadhan Mukherjee*⁸, the court held that immunity of a member of a House for speeches made by him in the House does not extend to publication by him outside the House. A member has an absolute privilege over what he says inside the House. Article 361A says that no person shall be liable to any proceeding civil or criminal, in any court in respect of the publication in a newspaper of a substantially true report of any proceeding of any House of the Parliament unless publication is proved to have been made with malice.⁹

Regarding privileges and fundamental rights

The advisory opinion rendered by the Supreme Court in the case of *Keshav Singh*¹⁰ arose out of the exercise of one of the most important privileges of a legislature i.e. to punish for contempt.

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 case*¹¹, the Supreme Court held that the right

⁶ *Stockdale v. Hansard* (1839) L.J (N.S) Q.B. 294

⁷ *Wason v. Walter* LR 4 QB 73 (1868)

⁸ *Jatish Chandra Ghosh v. Hari Sadhan Mukherjee* AIR 1970 SC 1574

⁹ *C.K Daphtary v. O.P Gupta* ., AIR 1971 SC 1132.

¹⁰ *Keshav Singh v. Speaker, Legislative Assembly* ., AIR 1965 All 349

¹¹ *M.S.M Sharma v. S.K Sinha* ., AIR 1960 SC 1186.

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 case opined that the violation of Article 21 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 askance 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 suffer.

A recent stand-off occurred in Tamil Nadu. The Speaker of the assembly issued a warrant for the arrest of an MLA, 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 second habeas corpus petition ordered his release. So the possibility of these kinds of conflicts between the courts and the legislature can occur.

In *Kihota Holohan v. Zachillhu & others*¹², 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 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 decision.

Regarding non-fundamental rights issues

There have been other instances of the Supreme Court and Parliament having doubts on the jurisdiction of the other even in cases where fundamental rights issues were not involved.

¹² *Kihota Holohan v. Zachillhu & others* 1992 SCR (1) 686

Commissions of Enquiry were appointed and reports were submitted on various offences committed by persons in high political and public offices during the period of the operation of the proclamation of emergency. The Special Courts Bill, 1978 to provide for the trial of these classes of cases was sought to be introduced.

Before the Supreme Court, a preliminary objection was raised by some States and several interveners that the reference was incompetent as the Court would be encroaching upon the functions and privileges of Parliament. The argument was that the Court would be "withdrawing" or "lifting" a Bill in session of the Lok Sabha to itself. The Supreme Court held¹³, that it has a constitutional obligation to consider and report on the reference and that the Court was justified in pronouncing on the constitutional validity of the Bill, a task that fell within its legitimate domain. It also held that rendering an opinion would not encroach upon any parliamentary privilege and the objection based on Article 105(3) of the Constitution is without merit.

In *Justice V. Ramaswami case*¹⁴, a motion for removal of a sitting Judge of the Supreme Court was made in the Lok Sabha. The motion was admitted by the Speaker. But, the House was dissolved thereafter. The matter reached the Supreme Court, where it disposed of the matter without issuing any specific direction or writ to any authority. Nonetheless, the Court proceeded to declare the legal and constitutional position and leave the organs of the State to consider matters falling within the orbit of their respective jurisdiction. It was held that the motion had not lapsed and that the courts retain the jurisdiction to make such a declaration. On an interpretation of the Constitution and the provisions of the Judges (Inquiry) Act, 1968, it was held that the Speaker is a statutory authority under the Act and the constitutional proceedings for removal of a judge up to a certain stage cannot be said to be outside the Court's jurisdiction.

Regarding other privileges

There are of course several other privileges of Parliament 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

¹³ Special Courts Bill, 1978, In re, (1979) 1 SCC 380

¹⁴ Sub-Committee on Judicial Accountability v. Union of India, (1991) 4 SCC 699

conclusion, right to exclude strangers from the House, rights of the Parliamentary Committees to call for records, right to prohibit publications, etc. Even an independent officer appointed by a Parliamentary Committee has been recognised to be an officer of the House and his actions beyond the pale of judicial review. 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 privilege 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 House.

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*¹⁵, 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*¹⁶, the Speaker of the Lok Sabha had directed five members of the House to ignore the notice of lodgement 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 case. The question does arise if any tangible benefit is obtained by ignoring notices and courting decisions without contest. It is doubtful if the privileges of the House are enhanced or protected in this manner.

CONCLUSION

The solution to avoid conflicts lies in understanding the relationship among the institutions. The doctrine of separation of powers coined by Aristotle and developed by Locke, Montesquieu and others has found expression in the Constitution of many countries. The categorisation of the powers of the State is to prevent concentration of power in any single

¹⁵ *Thankamma v. Speaker, T.C. Assembly*, AIR 1952 Tray Co 166

¹⁶ *Tej Kiran Jain v. Sanjiva Reddy* AIR 1970 SC 1573.

group of persons and to let the most competent organ perform the duties of the State without interference from the others. The balance of power in any Government is ensured by a system of checks and balances that effectively prevent any one organ from becoming supreme. The three branches are to share power and function without encroaching upon the powers confided to the others.

In practice, a complete separation of powers is never achieved. The organs of the State do not operate in watertight compartments. Even early thinkers like Montesquieu did not visualise a rigid separation of powers. What was visualised was only mutual restraint by the organs. In any modern Government, the overlapping of functions cannot be avoided. The problems of the State have increased manifold and are too complex for being decided by any one organ in isolation. But, if the organs act in the interest of the State and with mutual respect for the functions and powers of the other organs, the objective of the doctrine of separation of powers is substantially achieved.

The American Constitution expressly vests the legislative, executive and judicial powers in separate entities. The legislative power is granted to the Congress, the executive power to the President and the judicial power to the Supreme Court and other courts.

The Indian Constitution does not explicitly refer to any separation of powers. But, there is separation of powers by necessary implication. The separation of powers is accepted so as to preserve the freedom and independence of the organs of the State as are necessary for their proper functioning. The Supreme Court, in several cases, has recognised that a separation of powers is implicit in the Constitution. In fact parliamentarians appear to accept that a proper understanding of the doctrine of separation of powers can lead to justice being done.

Wherever, the theory of separation of powers is followed, there have been differences and conflicts between the wings by which powers are separately enjoyed. That has happened in many countries and in India also. The wisdom lies in understanding the essence of the principles and situations and acting in a manner that unnecessary controversies are not created, and justice is done. Whenever parliamentary privileges have been used as a shield the institutions have adopted a complementary role and protected it. But, wherever it has been used as a sword on the citizenry the complementary role has been played by the judiciary by testing

the constitutionality of the action with reference to the rights of the institution or individual and the privileges of the House.

