

ANALYSING ARTICLE 105 OF THE CONSTITUTION OF INDIA

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HISTORICAL DEVELOPMENT OF “PARLIAMENTARY PRIVILEGE”

Article 105 of the Indian Constitution defines the parliamentary privileges of both the Houses of Parliament and of their members and committees. The Constitution confers certain rights and immunities on each member of the House and every committee under it so that the Parliament can discharge its function properly. Also, the language of Article 105 is mutatis mutandis the same as that of Article 194 the only difference being that for the expression “Parliament” used in Article 105 the expression “legislature of a State” is used in Article 194.

In constitutional writings, the term “parliamentary privilege” is used to define the types of rights and immunities which are given by Article 105 of the Indian Constitution to the members of the Indian Parliament. To quote Sir Thomas Erskine, “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 individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals.”¹ According to Sir Thomas Erskine May, the distinctive mark of a privilege is its ancillary character. Privileges are enjoyed by the individual members of the House because the House cannot perform its functions without unobstructed use of the services of its members and by each House for the protection of its members and for its own authority and dignity.

In Article 105 of the Indian Constitution, two privileges, namely, freedom of speech and freedom of publication of proceedings are expressly mentioned in clause (1) and clause (2) of the Article. With respect to the other privileges, clause (3) before its amendment in 1978² laid down that the powers, privileges and immunities of the members of the Parliament of India

¹ Sir Thomas Erskine May, Parliamentary Practice (16th Edition) Chapter III.

² Constitution (44th Amendment) Act, 1978.

shall be those enjoyed by the House of Commons of the UK at the commencement of the Constitution until they were defined by an Act of Parliament. Though clause (3) was amended in 1978 and the amendment has changed the wordings in the clause, the current position is the same as before, which means that the powers, privileges and immunities are determined on the basis of what they were prior to the commencement of 1978 amendment are still the same as were enjoyed by the House of Commons in UK at the time of the commencement of the Constitution.

For the effective functioning of Parliamentary democracy, the freedom of speech in Parliament is guaranteed in India. The freedom of speech in Parliament is safeguarded by clause (1) and clause (2) of Article 105 in India.

Freedom of speech in the Parliament is subject to the Constitution and to the rules and standing orders. However, a restriction is imposed on this Article by Article 121 (similarly Article 211). The said restriction is that no discussion shall take place in any House with respect to the conduct of a Supreme Court Judge or a High Court Judge in discharge of his duties except when a motion for his removal is under consideration.

The privilege of the freedom of speech in the House of Commons is very well established and it owes this characteristic to a case famously known as the *Strode's case* which happened as early as 1512. In this case, a person named Richard Strode who was a member of the Parliament from Devon, England, had introduced a bill to improve the harsh working conditions of tin miners on Dartmoor. However, Strode was prosecuted and imprisoned by the order of the local Stannary Court before he could travel to Westminster to present his bill. Strode was released after three weeks and as a result of his imprisonment an Act was passed, famously known as the Strode's Act, officially known as the Privilege of Parliament Act 1512.

In 1629, in the case of Sir John Eliot it was held that the Strode's Act was a private act and applied to Strode only and not to any other member of parliament. However, in 1667, the decision was reversed and it was held by both the House of Commons and the House of Lords that the Strode's Act was a general law and that it would be applicable to any other member of parliament. This law was subsequently codified as Article 9 of the Bill of Rights 1689. It was enacted by the Bill of Rights that "the freedom of speech or debates in Parliament ought not to be impeached or questioned in any court or place out of Parliament."

Hence, no civil or criminal action lies against a member of parliament for defamation or the like in respect of things said in the Parliament or its committees.

The freedom of speech which is guaranteed by clause (1) of Article 105 is very different from that which is given under Article 19 (1) (a) which is enjoyed by the citizens of India as a fundamental right. The freedom of speech given in Article 19 does not protect an individual absolutely from what he says. There are reasonable restrictions given in clause (2) of Article 19 regarding the same. In Article 105, the term “freedom of speech” means that no Member of Parliament will be liable to any proceedings in any court for the statements made by him in the debates in the Parliament or any committee of the Parliament whatsoever. Therefore, the freedom of speech given under Article 105 cannot be restricted under clause (2) of Article 19 as was held by the Supreme Court in the case of *Narasimha Rao*.³

Clause (2) of Article 105 has two parts. The first part says that no Member of Parliament shall be liable to any court proceedings for anything said by him or for any vote given by him in the Parliament or any committee thereof. The second part says that no person shall be liable in respect of the publication by order under the authority of a House of Parliament of any paper, report, vote or proceedings.

Though it has not been expressly stated but the Freedom of Speech given in Article 105 also extends to any other act which is done in connection with the proceedings of either House, for example, for notices of motions, questions or the resolutions as was held by the Supreme Court in the *Tej Kiran case*.⁴

Clause (2) of Article 105 confers immunity for anything that is said in the parliament by the members of the parliament. The word “anything” here is of the widest importance and is equivalent to “everything.” The only limitation in this Article arises from the words “in Parliament.” The words “in Parliament” means during the sitting of Parliament and during the course of business of the Parliament. Once it is proved that the Parliament was sitting and the business of the Parliament was being transacted, then anything said during the course of that business is immune from any court proceedings.

As was said by the Supreme Court in the *Tej Kiran case*, “This immunity is not only complete but is as it should be. It is of essence of the Parliamentary system of Government that people’s

³ P.V. Narasimha Rao v. State AIR 1998 SC 2120.

⁴ *Tej Kiran Jain v. M. Sanjiva Reddy* AIR 1970 SC 1573.

representatives should be free to express themselves without fear of the legal consequences. What they say is only subject to the discipline of the rules of Parliament, the good sense of the members and the control of proceedings by the Speaker. The courts have no say in the matter and should really have none.”

This view came to be reiterated in the *P.V. Narasimha Rao* case. Here, it was held that the privilege of immunity from court proceedings given by Article 105(2) to each Member of Parliament extended even to bribes taken by the members of the Parliament for voting in a particular manner. The Supreme Court said that by reason of Article 105(2), no Member of Parliament is answerable to any Court of law for anything said or done by him in the Parliament and that such a wide freedom of speech and vote is sine qua non for the effective functioning of a parliamentary system of Government. However, rejecting the view that the bribe givers and bribe takers had not committed any offence by reason of Article 105 (2), the Supreme Court said that the bribe givers and bribe takers had committed breach of privilege and contempt of the House (Lok Sabha) hence the Parliament could proceed against them for the same.

This decision however has been heavily criticized and has invoked so much controversy and dissatisfaction that its review was sought in the court. This review petition however was dismissed on the ground of delay. A much appreciated critique of this case can also be found in Balwant Singh Malik’s work.⁵

However, clause (1) and clause (2) of Article 105 protect only what is said within the House. If a Member of Parliament publishes his speech outside the Parliament then the concerned immunity would not be available to him.⁶ Also, this Freedom of Speech as given by Article 105 is only available to a Member of Parliament when he attends the session of Parliament.⁷

It can be said here that common law gives the defence of “qualified privilege” to fair and accurate unofficial reports of Parliamentary proceedings published in a newspaper or the like, as was held in the case of *Wason*⁸, wherein it was observed that it was of paramount public and national importance that Parliamentary proceeding be communicated to the public who have a genuine interest in knowing about the status of their country’s Parliament. However, a fake

⁵ Balwant Singh Malik, “P.V. Narasimha Rao v. State: A Critique” (1998) 8 SCC J-1.

⁶ Jatish Chandra Ghose v. Harisadhan Mukherjee AIR 1956 Cal 433.

⁷ K. Ananda Nambiar & R. Umanath v. Govt. of Madras AIR 1966 SC 657.

⁸ *Wason v. Walter* (1868) LR 4 QB 73.

report published with the intent to injure the reputation of an individual will not be permitted to take the protection of qualified privilege. The position of the law is the same in India as well. The Parliamentary Proceedings (Protection of Publication) Act, 1956 enacts that no person shall be liable to any proceedings in any court in respect of the publication of a true report of the proceedings of either House of Parliament, unless it is proved that the publication has been made out of malice or if the publication was expressly ordered to be expunged by the Speaker⁹. This position has become much stronger as a result of the insertion of Article 361-A by the Constitution (44th Amendment) Act, 1978.

With respect to the other privileges conferred by Article 105 (3) as amended, declares that the privileges of each House shall be such as determined from time to time by the Parliament. Since the Parliament has not done so the current position is that of what clause (3) provided before its amendment on 20 June 1979, i.e. it is the same as that enjoyed by the House of Commons in England. However, there are also certain privileges which the Parliament of India cannot enjoy but which are enjoyed by the House of Commons. For example, the privilege of access to the Sovereign which is exercised by the House of Commons through its speaker has no application in India. Unlike the House of Commons, the Parliament of India cannot discharge any judicial function whatsoever and cannot claim to be regarded as a court of record.¹⁰

CODIFICATION OF PRIVILEGES

The term “privileges” is used in constitutional writings to mean both rights and immunities. Power to punish for breach of privilege or contempt, freedom of speech, debates in House and right to prohibit the publication of its proceedings are just a few examples from the many privileges or immunities granted to a Parliament in a democratic setup. These privileges and immunities, by protecting its authority and self-esteem allow the legislature to carry on its functions more effectively and independently without any interference from anyone.

In India, as the idea of Parliamentary privilege was derived from England, it has the same nature of not being codified but being in a crystallized form as a result of resolutions, standing

⁹ This act was repealed by the Congress Government during the Emergency in 1976. However, the Parliamentary Proceedings (Protection of Publication) Act, 1977 was passed by the Parliament and it received the assent of the President on 18.04.1977.

¹⁰ Powers, Privileges and Immunities of State Legislatures, re AIR 1965 SC 745.

orders, conventions and practices of the Houses and they are a part of the Law and the custom of Parliament (Lex et consuetude Parliamenti).¹¹

The way in which the said immunities given in Article 105 of The Constitution are to be exercised can be decided only by the respective Houses and the judiciary has no say in it whatsoever. The judiciary is confined to the borders of deciding whether a particular privilege or immunity exists or not. If and when any warrants are issued or any resolutions are passed in the Parliament in its contempt proceedings then the authority to decide such a case vests completely in the Parliament only and it cannot be challenged in any court of law throughout the whole country. It is also very clear the exercise of a legislative privilege cannot be struck down on the ground of alleged irregularity in procedure as laid down expressly in Article 122 (1). The courts will only interfere regarding the exercise of a legislative privilege when it is clear to them that the exercise of such a legislative privilege is unconstitutional or is vitiated by fundamental illegality.

However, in India, the Parliament cannot claim to have its own powers independent of the constitution itself because ultimately the Constitution alone is the source of all powers, privileges and immunities granted to the Union Parliament and the State Legislatures.

Therefore, all the rules relating to the Parliamentary Privilege are decided by the Parliament only. These rules which are decided by the Parliament are then laid down in the manuals of Parliamentary Procedure, Rules of Procedure and Conduct of Business both in the Upper House and the Lower House of India. These rules, a majority of times, are based on British models. The 'other privileges' laid down in clause (3) of Article 105 are not explicitly mentioned in the Constitution and hence have to be searched from the above mentioned resources. This makes these 'other privileges' not comprehensive. As there is no codification of these 'other privileges' even today, as a result of this, both the Houses of Parliament of India can today also claim the rights and the immunities which were being enjoyed by the British Parliament before the commencement of the Constitution of India. This character of 'other privileges' of being non-codified many a times results in ambiguity and vagueness of the nature and scope of the 'other privileges'.

¹¹ Shashikant Hajare, The Law of Parliamentary Privileges in India: Problems and Prospects.

PARLIAMENTARY PRIVILEGES IN RELATION TO FUNDAMENTAL RIGHTS: A BRIEF HISTORY ABOUT THE CONFLICT BETWEEN THE TWO AND THE CURRENT POSITION OF THE RELATIONSHIP BETWEEN THE TWO

There has been a long history of conflicts between the governed and the government not only in the Indian history but in the human history. It is evident in the historical facts that the governed slowly asserted their right to freedom and liberty against the government. For example, in the English history, the Magna Carta in 1215 was the first triumph of the people over the King.

The Preamble of the Constitution of India contains the Fundamentals of the Indian Constitution which secures to its citizens justice, social, economic and political; liberty of thought expression and belief, equality of status and opportunity; and to promote among them all fraternity assuring the dignity of the individual and unity of the nation. The essence and the theme of these objectives when read can be found throughout the whole Constitution of India. The reason that the Fundamental Rights were incorporated in Part III of the Constitution was to give effect to these very objectives. However, the idea of the Fundamental Rights can be found in the Indian polity in a very tenuous manner even before the present Constitution came into force. Reference may chiefly be made in this connection to Section 298 and Section 299 of the Government of India Act, 1935.

These so called 'Fundamental Rights' are regarded as fundamental because these rights are the most essential for an individual in order to live freely and with dignity. These Fundamental Rights enshrined in Part III of the Indian Constitution are unchallengeable in the sense that no law, ordinance or custom can abridge or take away a 'Fundamental Right'. However, this characteristic of the Fundamental Rights is subject to the qualifications defined in the Constitution itself.

In India, the importance of Fundamental Rights has been observed in the historical case of *Maneka Gandhi v. Union of India*.¹² It was observed in this case by Bhagwati J. that, "These fundamental rights represent the basic values cherished by the people of this country (India) since the vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent".

¹² Maneka Gandhi v. Union of India 1978 AIR 597.

Any member of the public who has an interest can represent some other person in the court if that person's legal right is violated if the concerned person cannot approach the court due to poverty or some other valid reason, however the position is different when it comes to privileges. These privileges even though they are a part of the law of the land are to a certain extent an exception from the ordinary law.

Now, after the arrival of the Constitution of India there have been numerous conflicts between the Fundamental Rights and the Parliamentary Privileges throughout the years. The questions which arose were whether the fundamental rights control the parliamentary privileges in any way, which would prevail in case of a conflict between the two, the fundamental rights or the parliamentary rights and immunities.

In an attempt to solve this question, I shall in this report refer to some of the cases which have come up in the past and have served as a major factor regarding the issue of conflict between the fundamental rights and the parliamentary privileges. The key question in each case has been whether a parliamentary privilege can be struck down if it violates a fundamental right or would fundamental rights override the privileges. To sum up all these questions and to put it in a different wording the main issue is does the power of Judicial Review extend to Parliamentary Privileges?

The power of Judicial Review is contained in clause (2) of Article 13. According to this clause, the Supreme Court can strike down any law which violates any fundamental right. With respect to the power of judicial review, the Supreme Court had held that it would not extend to clause (1) and clause (2) because the language of these clauses itself prohibited judicial review.¹³ However, with respect to clause (3), the Supreme Court held that the uncodified privileges were not 'law' within the meaning of Article 13 (2) and hence were not capable of being struck down. As a result of this decision of the Supreme Court, the Parliament has, till this date, resolved to keep the privileges coming under clause (3) uncodified in the fear that if these privileges are codified then they can and will be struck down by the Supreme Court when there is a conflict with any fundamental right. This fear also stems from the fact that many privileges which are still enjoyed by the Indian Parliament today have been removed from the British Parliament and do not exist anymore. There are many privileges which are likely to cause a conflict with the fundamental rights and hence if codified into a statute, there will be many

¹³ Pandit MSM Sharma v. S.K. Sinha AIR 1954 SC 636

privileges which the Parliament will not be able to enjoy anymore. As a result of this, every Member of Parliament in India enjoys a large number of privileges, some of which are in direct conflict with rights in actual practice and which have ceased to enjoy the status of privileges in England and other countries.

There is also some controversy regarding the procedure which is followed in the Parliament of India with respect to cases of where there is a breach of privilege. The Parliament is yet to lay down a set of procedure for dealing with instances of breach of privilege. Some examples of such controversy coming were whether a hearing must be given to the accused or whether he must be given a right of legal representation and the like. The Parliament of India till this date follows a policy of different procedure for each case. All the cases regarding the breach of privilege which come before the Parliament are guided solely by the exigencies of the hour the popular public opinion in a particular case.

Until now the Supreme Court had not interfered with such a procedure because of its restrictive interpretation of Article 122. Any kind of review of the procedure of the Parliament was avoided by the court even if it was one which would affect the life and liberty of a person under Article 21.¹⁴

A case was famously decided in 2007 which dealt with parliamentary privilege in relation to Article 21. The name of the case was *Raja Ram Pal v. The Hon'ble Speaker, Lok Sabha*.¹⁵ In this case, 11 members of the Parliament were caught taking bribes in the camera of a news channel. They had taken the bribes to ask certain questions in the Parliament thereby misusing their powers for illegal gratification and monetary gain. After the event of such an act becoming public, the Parliament suspended these members who in turn approached the Supreme Court for seeking remedy. The Speaker and the Chairman of the Lower and the Upper House refused to come before the Supreme Court. They gave the reason that since the jurisdiction regarding the exercise of privileges was completely vested in the Parliament, the Supreme Court had no say in it. However, the Supreme Court still decided to proceed with the case inspite of the Parliament's stand.

The first ever binding change in the law of privileges in India was brought about in this case. The Court held that the power of judicial review under Article 13 (2) would extend to privileges

¹⁴ Constitution of India, Article 21 states; Right to Life and Personal Liberty- No person shall be deprived of his life or personal liberty without a procedure established by law.

¹⁵ JT 2007 (2) SC 1.

on a case to case basis overruling its earlier decisions. The restrictive interpretation of Article 122 as mentioned above was done away with after this decision and a very wide interpretation was given to Article 122 in the judgment of this case. It was held that although Article 122 did not allow an inquiry into the procedure of Parliament by the judiciary or anyone on grounds of procedural irregularity, however, it did not exclude instances of review of a procedure if it was found to be illegal or unconstitutional.

In arriving in its decision, the Supreme Court relied on various foreign decisions¹⁶ as well as its own decision in the Presidential Reference of 1964.¹⁷ The change in law brought about by this judgment has crucial implications on the accountability of our Parliamentarians who until now were not liable to be questioned by any court in respect of their functions as parliamentarians.

COMPARATIVE ANALYSIS OF THE PARLIAMENTARY PRIVILEGES IN INDIA WITH THAT OF UK AND SOME OTHER COUNTRIES

Still to this day, the Constitution of our country India, finds its foundations in the unwritten Constitution of England. The reason behind India finding the foundation of its Constitution in England is the British rule which was prevalent in the country for decades. Considering the fact that the British ruled India for so long, it is only obvious that when India became independent it referred to the laws of England in order to make its own. However, the major difference today is the way the parliamentary privilege has changed in both the countries with the passage of time.

The doctrine of the parliamentary sovereignty is a very dominant feature of the British Constitution. It means that the British Parliament can make or unmake any law, can legislate on any topic and the Courts are under a compulsion to apply these laws and they cannot in any way, shape or form say that a law made by the Parliament is invalid. However, in India the Parliament has to work with the limitations prescribed by the Constitution. Both the legislatures

¹⁶ House of Commons v. Vaid (2005) 1 SCR 667, Harvey v. New Brunswick 1996 (2) SCR 876, Prebble v. Television New Zealand Ltd. 1994 (S) WLR 970, Speaker of the House of Assembly v. Canadian Broadcasting Corp. (1993) 1 SCR 319.

¹⁷ (1965) 1 S.C.R. 413.

of the Upper House and the Lower House cannot make any law which violates the fundamental rights given in Part III of the Constitution.

The parliamentary privileges of the House is defined in the Constitution itself in the United States of America. They have not made any reference to the House of Commons, however, as a result of them making their own privileges, those privileges are limited to a certain extent. In Australia, with respect to the parliamentary privileges, a specific statute has been made just for that purpose. On the other hand, a direct reference has been made to the privileges of the House of Commons by Canada, however, their privileges can never exceed that of the House of Commons.

Thus, in all of the above mentioned countries, parliamentary privileges are recognized. These rights enjoyed by the House collectively and the members individually are an integral part of the Parliament which is necessary for them to exist in order to for them to do their job effectively. If anyone goes against these rights in any of the above mentioned countries, then they are subject to contempt. Also, these rights are not unlimited. If any member were to commit a criminal offence, then they cannot take the defence of parliamentary privilege and they will be subject to the regular criminal jurisdiction of the courts and will be in the same footing as any other citizen of the country. This position is the same in all the above mentioned countries.

LITERATURE REVIEW

1) *Treatise on the Law, Privileges, Proceedings and Usage of Parliament*¹⁸

This book is the really the principle source for deriving the ideas about parliamentary privilege and almost every other thing related to the parliament like the procedure followed and the like in the United Kingdom. As it is very clear that India took its parliamentary privileges from the House of Commons, this book undoubtedly plays an important role in the parliamentary privileges enjoyed in India as well. The Supreme Court has also in the past given a reference to the principles of Thomas Erskine May in many of its judgments.

¹⁸ Thomas Erskine May, *Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (United Kingdom: Lexis Nexis 23rd ed. 2004).

2) *Myth and Law of Parliamentary Privileges*¹⁹

As far as the parliamentary privilege in India is concerned this is a very good resource material. The author himself was a member of the Haryana Assemble who was expelled in the year 1975 following which he argued his case personally before the court. The court decided in his favour and held that the legislature had no power to expel a duly elected member.

3) *Parliamentary Privileges: An Indian Odyssey*²⁰

This volume which is written by Justice V.R. Krishna Iyer and Dr. Vinod Sethi studies the issues which arise due to the non-codification of privileges.

4) *Parliamentary Privileges: Law and Practices*²¹

Written by the very famous and eminent lawyer of India Ram Jethmalani and D.S. Chopra, this book deals with the parliamentary privileges and the conflict it causes with the freedom of speech and expression.

CONCLUSION

The Parliament of India represents the people of India and it mirrors the minds and aspirations of these very people. Many a times, legislators from the opposing benches while analyzing the work of the working government tend to make some serious attacks and this happens often in today's time. It is therefore of prime importance that the parliamentarians are given all the privilege which they need in order to perform their job effectively.

Clause (3) of Article 105 is the main reason why there is a demand for the codification of privileges because as a result of this clause the said privileges can be very unclear and vague at times. The reason for the silence of the Parliament in this issue is that they fear that if the privileges are codified then they will lose many of the privileges enjoyed by them.

¹⁹ Hardwari Lal, *Myth and Law of Parliamentary Privileges* (New Delhi: Allied Publishers Private Limited 1979).

²⁰ V.R. Krishna Iyer & Vinod Sethi, *Parliamentary Privileges: An Indian Odyssey* (Capital Foundation Society 1995).

²¹ Ram Jethmalani & D.S. Chopra, *Parliamentary Privileges: Law and Practices* (New Delhi: Thomson Reuters 1st ed. 2015).

Our suggestion on the issue would be that a detailed survey should be conducted to find out which privileges are necessary and which violate the fundamental rights and are unnecessary in nature. However, the said survey should not be conducted by any law man but a committee of experts who would study and analyse the whole matter in depth and then go on to decided whether the privileges given in clause (3) should be codified and not and also strike a harmonious balance between the fundamental rights of the people and the parliamentary privileges.

