



Judicial review of parliamentary privileges and immunities in India

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Abstract

This article analysis the privileges and immunities enjoyed by the members of the Parliament especially with that of protection from civil and criminal acts. The Constitution of India have provided with these immunities to be enjoyed by certain members of the legislative houses. In this regard, this article underlines the significance of the Constitutional provisions in granting the privileges and immunities to the members of the Parliament. The Constitution does not confront the supremacy of any of the three organs viz., the legislature, the executive and the judiciary of the State, on the contrary, it controls the functioning of all the three organs; thereupon, the article more or less focuses on the doctrine of separation of powers. Further, the judiciary exerts its power to examine the actions of the members of the Parliament to ensure that such actions conform to the provisions of the Constitution. Accordingly, this article highlights whether these privileges endowed by the Constitution are subject to judicial review. In this context, the article aims towards the scope of the judiciary to interpret the Constitution and moreover, this article emphasizes on the immunities of the sovereignty of the Parliament as to whether it is untouched from judicial review.

Keywords: the constitution, separation of powers, rule of law, parliamentary privileges and immunities, members of Parliament, judicial review, etc

Introduction

The Parliament in India is an essential foundation that aims to accomplish the aspiration of national reform and fostering the values of secularism, democracy and freedom. The three organs of nation viz., legislative, executive and judiciary must exercise proper functions of their part so as to enable them to carry out their obligations. These three wings of the State are bound by the doctrine of constitutional sovereignty and all are governed by the framework of the Constitution. The Constitution of India guarantees certain special powers to the members of the Parliament for effective discharge of their functions. Parliamentary privilege is an elemental episode to the high and multifarious functions which the legislature is called to act upon. The Parliament is delegated with the function of law making. Besides this, the parliament also exercises motions for adjournment; discussions and questions addressed by members to ministers, control over the administration of the country and uphold people's liberties. To perform the task of such a great importance, it is necessary that its members must be free. Accordingly, the Constitution of India has afforded certain parliamentary privileges and immunities. The term "parliamentary privilege" is essentially used to describe the law relating to the privileges or immunities of Parliament and includes its powers to punish for "contempt" or breach of privilege. The privileges, whether of Parliament itself as a collective body or of the individual members, are intended to enable them to carry out their constitutional functions of legislating, debate and enquiry effectively, independently and without interference or obstruction from any quarter. The expression "Privilege and Immunity" signifies certain unique and exceptional rights of Lok Sabha and Rajya Sabha members. C.K. Thakker, J. in *Raja Ram Pal v. The Hon'ble Speaker Lok Sabha* [2007] Insc 24 (10 January 2007) observed that: 'Privilege' is 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. Inherent in the term is the idea of something, apart and distinct from a common right which is enjoyed by all persons and connotes some sort of special grant by the sovereign.

'Immunity' is an exemption or freedom from general obligation, duty, burden or penalty. Exemption from appearance before a court of law or other authority, freedom from prosecution, protection from punishment, etc. are immunities granted to certain persons or office bearers (Utkarshini Rai, & Vijay Rohan Krishna, *The Scope And Extent of Parliamentary Privileges In India: A Critical Analysis*)

Doctrine of separation of powers

It is a well-known fact that, India being a Parliamentary democracy does not follow an absolute separation of powers. There is a system of balances and counter balances exists among the three organs of the government to ensure a strong nurtured democratic system. The Legislature, the Executive and the Judiciary are the pillars of democracy. The Constitution assigns the function of authoritatively and finally interpreting the Constitution and of expounding its meaning to the Judiciary. No democracy indeed contemplates conferment of absolute power in any single authority. The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another (*Rai Saheb Ram Jawaya Kapur v. State of Punjab*, AIR 1955 SC 549).

The functionaries of the three wings, namely, the legislature, the executive and the judiciary, as has been stated in *His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and another* (AIR 1973 SC 1461), derive their authority and jurisdiction from the Constitution. The Parliament has the exclusive authority to make laws and that is how the supremacy of the Parliament in the field of legislation is understood. There is a distinction between parliamentary supremacy in the field of legislation and constitutional supremacy. The Constitution is the fundamental document that provides for constitutionalism, constitutional governance and also sets out morality, norms and values which are inhere in various articles and sometimes are decipherable from the constitutional silence. Elaborating the said concept, Sabharwal, C.J. in *I.R. Coelho (Dead) by LRs. v. State of T.N.* (2007 2 SCC 1), speaking for the nine-Judge Bench, held that the supremacy of the Constitution embodies that constitutional bodies are required to comply with the provisions of the Constitution. It also mandates a mechanism for testing the validity of legislative acts through an independent organ, viz., the judiciary. In *Bhim Singh v. Union of India* (2010) 5 SCC 538, the Court, observed that two aspects must be borne in mind. One, that separation of powers is an essential feature of the Constitution and secondly, that in modern governance, a strict separation is neither possible nor desirable.

Constitutional Provision

The Constitution of India has provided under Article 105 with the privileges and immunities of the parliament.

Article 105: Powers, privileges, etc. of the Houses of Parliament and of the members and committees thereof.

1. Subject to the provisions of this Constitution and the rules and standing orders regulating the procedure of Parliament, there shall be freedom of speech in Parliament.
2. No Member of Parliament shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings.
3. In other respects, the powers, privileges and immunities of each House of Parliament, and of the members and the committees of each House, shall be such as may from time to time be defined by Parliament by law, and, until so defined, shall be those of that House and of its members and committees immediately before the coming into force of section 15 of the Constitution (Forty-fourth Amendment) Act 1978.
4. The provisions of clauses (1), (2) and (3) shall apply in relation to persons who by virtue of this Constitution have the right to speak in, and otherwise to take part in the proceedings of, a House of Parliament or any committee thereof as they apply in relation to members of Parliament."

Judicial Review and Parliamentary Sovereignty

The Parliament asserts absolute sovereignty in parliamentary matters; however, the parliamentary sovereignty is not immune from judicial review. Parliamentary privileges are provided to the Members to

ensure smooth functioning of the parliament. If these privileges are violated or not accord with the fundamental rights enshrined in the Constitution then the judiciary will interfere in the matter of privilege. The Court has the adjudicating authority to scrutinize the limits of the power and transgression of such limits. The nature and scope of judicial review has been succinctly stated in *Union of India and another v. Raghubir Singh (Dead) by LRs. etc.* (1989 2 SCC 754) by R.S. Pathak, C.J. thus:

'...The range of judicial review recognised in the superior judiciary of India is perhaps the widest and the most extensive known to the world of law....'

It is quite common for Members of Parliament to take the shelter of parliamentary privileges. It is important for the judiciary to take a stand against the wrongs committed by these members. The privileges conferred on these members are subject to fundamental rights. The Supreme Court has observed in various judgments that any conflict that may arise between the privileges and the fundamental rights must be resolved through harmonious construction. Though the judiciary does not have any jurisdiction over parliamentary issues, still it is essential that any violation of the fundamental rights of the society should be dealt with by the Court as it deems fit (Parliamentary Privileges, Freedom of Speech and Judicial Review, Agam Bansal, International Journal of Law Management & Humanities) Articles 14, 19 and 21 represent the foundational values which form the bedrock of the rule of law. These are the principles of constitutionality which form the basis of judicial review apart from the rule of law and separation of powers.

Privileges and Immunities of the Parliamentarians

a. Freedom of Speech

Freedom of Speech is the most important privilege vested with a parliamentarian as it gives him the right to express his views and opinions freely. It exempts him from any liability and thus, express themselves freely in Parliament without fear of any impediment of inviting any civil or criminal proceedings. This right provides the Members of Parliament the chance to have a free and fearless discussion. No member can be taken to task anywhere outside the four walls of the House (e.g. court of law) or cannot be discriminated against for expressing his/her views in the House and its Committees.

b. Right to Prohibit the Publication of Proceedings

The first part of Article 105(2) provides that no Member of Parliament shall be liable to any proceedings in any court "in respect of" anything said or any vote given by him in Parliament or any committee thereof. The *immunity of parliamentary proceedings* is in essence a safeguard of the separation of powers. It prevents the other two branches of government, the Executive and the Judiciary from calling into question or inquiring into the proceedings of the Legislature. The Parliament does not prohibit the press to publish its proceedings, but however, has a right to forbid such publication. Again, while a member has the privilege of freedom of speech in Parliament, he has no right to publish it outside Parliament. Anyone violating this rule can be held responsible for any libelous matter it may contain under the common law rules.

The immunity of parliamentary proceedings from impeachment and question comes down to respect and promotion of the doctrine of separation of powers between

the Executive and the Judiciary. The operation of the doctrine of separation of powers was in the case of *State of Kerala vs. R Sudarsan Courts Bahu and Others* (AIR 1984 Ker 1), explained by the Supreme Court of India in the following terms: "... The Indian Constitution conceives the Judiciary and the Legislature as different organs of the State having independent specified functions. Just as it is within the power of the Legislature to exercise all functions conferred on it, there are functions conferred on the Judiciary by the Constitution which it is expected to perform in accordance with the Constitution. Immunity from action would be desirable if proper functioning is to be secured and such immunity has been conferred in the Legislature by Article 194 read with Article 212 of the Constitution, while immunity from discussion by the Legislature has been conferred by Article 211. True democratic spirit calls for mutual respect by these institutions, and avoidance of trespass." Similar observations are echoed by the learned authors of *M.N. Kaul and S.L. Shaktidher* (M.N. Kaul and S.L. Shaktidher, *Practice and Procedure of Parliament*, 2009, page 239) as follows: "Parliament is sovereign within the limits assigned to it by the Constitution. There is inherent right in the House to conduct its affairs without any interference from an outside body ... In the matter of judging the validity of its proceedings, the House has also collective privilege to declare what it will discuss and in what order, without any interference from a court of law ... The House is not responsible to any external authority for following the procedure it lays down itself, and it may depart from that procedure at its own discretion. The validity of any proceedings in Parliament cannot be questioned in any court on the ground of any alleged irregularity of procedure. No officer or Member of Parliament, in whom powers are vested for regulating the procedure on the conduct of business or for maintaining order in Parliament, is subject to the jurisdiction of any court in respect of the exercise of those powers." If the Parliament defied mandatory provisions of constitution and the fundamental rights of the people, the judiciary has every authority to consider the question of constitutionality of its action. Procedural regularity or propriety will not help an unconstitutional act to survive under Article 122, at the same time the action which is not violative of constitutional rights of the people cannot be vitiated by the technical doubts of procedural irregularity. The right to regulate its own internal proceedings as a privilege under Article 105 and Article 122 together offers unquestionable internal autonomy to the legislature (Prof. G. Manohar Rao, *Constitutional Development through Judicial Process*, 2012, pg. 151-152. The scope of this immunity was examined by the Supreme Court in *Tej Kiran Jain v. N. Sanjiva Reddy* (AIR 1970 SC 1573). The Court held: "Article 105 confers immunity inter alia in respect of 'anything said... in Parliament'. The word 'anything' is of the widest import and is equivalent to 'everything'. The only limitation arises from the words 'in Parliament' which means during the sitting of Parliament and in the course of the business of Parliament. We are concerned only with speeches in Lok Sabha. Once it was proved that Parliament was sitting and its business was being transacted, anything said during the course of that business was immune from proceedings in any court. This immunity is not only complete but is as it should be." This view came to be reiterated in *P.V. Narasimha Rao v. State* (CBI/SPE (1998) 4 SCC 626). One of the main issues

involved in this case was whether Article 105 of the Constitution confers any immunity on a Member of Parliament from being prosecuted in a criminal court for an offence involving offer or acceptance of bribe. The Supreme Court observed that the liability for which the immunity can be claimed under Article 105(2) is the liability that has arisen as a consequence of the speech that has been made or the vote that has been given in Parliament. However, the immunity granted under this Article would not be available in a case where a Member agrees not to speak or vote in Parliament, and he would be liable to be prosecuted on the charge of bribery in a criminal court (Dr. Yogendra Narain, "Relations between Parliament and the Judiciary").

c. Freedom from Arrest

According to this privilege, no member shall be arrested 40 days before and after the adjournment of the House (Lok Sabha or Rajya Sabha) in a civil case and also when the House is in session. It also means that no member can be arrested within the precincts of the Parliament without the permission of the House to which he/she belongs. However, the privilege does not extend to arrests or imprisonment on a criminal charge or contempt of court or to preventive detention. It has been held in *K. Anandan Nambiar v. Chief Secretary, Governor of Madras* (AIR 1966 SC 657), that matters of Parliament do not enjoy any special status as compared to an ordinary citizen in respect of valid orders of detention.

d. Right to exclude strangers

Each house of Parliament enjoys the right to exclude strangers (non-members or visitors) from the galleries at any time and to resolve to debate with closed doors. *Rule 248 of Lok Sabha* give the Chair the power, whenever it thinks fit, of ordering the withdrawal of strangers from any part of the House and when the House sits in a secret session no stranger is permitted to be present in the chamber, lobby or galleries. The only exceptions are the members of the Council of States and the persons authorized by the Speaker.

e. Right to regulate the internal affairs of the House

The House has the right to regulate its internal affairs. A member of the House is free to say whatever he likes subject only to the internal discipline of the House or the Committee concerned. But he does not have any Constitutional authority to direct the Speaker of an Assembly about the manner in which the proceedings of the House should be conducted.

f. Right to punish members and outsiders for breach of its privileges

The Parliament has been given penal powers to punish those who are adjudged guilty of contempt of the House. Such contempt can be committed by the members of any House or any outsider. When a member of the House is involved for parliamentary misbehavior or commits contempt he can be expelled from the House. The authority on Parliamentary privileges, *Sir Thyomas Erskine May* explains the contempt power of Parliament. He says: "Any act or omission which obstructs or impedes either House of Parliament in the performance of its function or which obstructs or impedes any member or officer of such House in the discharge of his duty or which has a tendency, directly or indirectly, to produce such results, may be treated as a contempt even

though there is no precedent of the offence” (Prof. G. Manohar Rao, *Constitutional Development through Judicial Process*, 2012, pg. 152).

The three aspects of the Parliamentary autonomy

- Deciding on disqualifying the members on the charge of defection under Tenth Schedule
- Punishing the others for contempt of House,

Taking disciplinary action against the erring members. (Prof. G. Manohar Rao, *Constitutional Development through Judicial Process*, 2012, pg. 154). In *Keshava Singh's Case or U.P. Assembly Case* (AIR 1965 SC 745), one Keshava Singh, a non-member, of the U.P. Assembly printed and published a pamphlet. The Speaker of the U.P. Legislative Assembly reprimanded him for contempt and breach of the privilege of the member Mr. Narsingh Naraina Pandey. On the same day, Mr. Keshava Singh, who was present in the house, by his conduct, committed contempt in the house. The Speaker, thereupon, directed Mr. Keshava Singh to be admitted to prison. A warrant was issued for his detention in the jail for 7 days and he was so detained. Further, the petition was filed by the advocate, Mr. Solomon under Section 491 Cr. PC read with Article 226, a *Habeas Corpus* petition alleging that his detention in jail was illegal and mala fide because he was not given an opportunity to defend himself. The petition was heard by 2 Judges of Allahabad High Court which granted interim bail to Keshava Singh and he was released, pending the decision of the case on merit. On this, the Assembly, by a resolution took the view that the 2 Judges, Mr. Keshava Singh, and Mr. Solomon had committed Contempt of the Assembly and ordered that the Keshava Singh be immediately taken into custody and the 2 Judges and the Advocate be brought in custody before the House. At this, the 2 Judges and the Advocate, by separate petitions moved under 226 the High Court, contended that the resolution amounted to contempt of court and that it be set aside and its implementation be stayed by the interim order. Further, the petition was heard by the Full Bench of the Allahabad High Court and the court ordered the stay of implementation of the resolution. The assembly modified its order and the warrant against the 2 Judges was withdrawn, but they were asked to appear before the House and explain their conduct.

The Judges moved an application before the Court against the modified order and the Court granted the stay against the implementation of the later order. At this stage, the President referred the matter to the Supreme Court, invoking the provisions of Article 143 (1), for obtaining its advisory opinion. The main questions referred to were-

1. Whether the legislature is the sole and exclusive Judge of its privileges and whether it is competent to punish a person for its contempt taking place outside the Legislature?
2. Whether the High Court who entertained a petition of *habeas corpus* challenging the validity of the detention of a person sentenced by the assembly under a general or unspeaking warrant has committed contempt of the Legislature?

The Supreme Court by a majority of 6:1 held that the 2 Judges did not commit the contempt of the house by issuing an interim bail order. The Court explained that the Court under Article 226 had jurisdiction to order the release of a

person from illegal detention. The Court said that the courts in India could examine the validity of detention of a person, sentenced by the Assembly, under a general or unspeaking warrant (Preeti Singh, *Parliamentary Privileges*, Academike).

Conclusion

Ultimately, the supremacy of the Constitution and the principles of constitutional limitation, separation of powers and the spheres of judicial review, it is clear that all actions of Members of Parliament in the course of parliamentary proceedings are protected by parliamentary privilege. Governance is through parliamentary privilege made more transparent, and accountable. Further, representative democracy is also enhanced by parliamentary privilege, because it is through Members of Parliament, that citizens are able to participate effectively in the affairs of the country. In a word, parliamentary privilege is an effective and essential tool that allows Members of Parliament to discharge their duties without let and hindrance (Dr. Patrick Matibini, J., “Parliamentary Privilege-Protecting: The Effective Functioning of Democracies”). Nonetheless, the powers of various organs of the Government are limited by the Constitution. To keep the various organs within the bounds, the Constitution vested powers in the judiciary. The courts apply the "rule of law" values in preventing the Government from abusing the powers conferred on it by various laws. As a result of this, the traditional executive privileges have also been diluted to an extent. The expanding horizon of judicial review has taken in its fold the concept of social and economic justice.

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