Jus Corpus Law Journal
Open Access Law Journal – Copyright © 2022 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

Codification of Parliamentary Privileges

Anmol Yadav[a]

[a]Banaras Hindu University, Varanasi, India

Received 22 February 2022; *Accepted* 13 March 2022; *Published* 16 March 2022

The Indian Constitution is the longest written constitution in the world, which entails detailed provisions about the governance of the country. Yet certain areas were left by the Constitution framers for the future generations to act and legislate upon. One such provision is the privileges enjoyed by the parliament and state legislatures in the course of their defined duties, i.e., legislating. But the subsequent generations haven't lived to the dreams and wishes of the Constitution makers. The uncodified privileges vest a wide power in the parliament and state legislatures of declaring anything and everything as their privilege. These uncodified privileges and immunities even clash with fundamental rights, particularly Article 19 granted by the constitution. In this article, I have discussed the views of various stakeholders on the codification of these privileges and why it hasn't been done yet. I have also discussed an alternate or rather hidden and unnoticed way to do it and if it is a desirable path to take in the world's largest democracy.

Keywords: *privileges, parliament, constitution, court.*

INTRODUCTION

This year in 2022 we celebrate 73 years of our Constitution, a phenomenon quite rare in the Indian subcontinent. We have stood up to the expectations of our forefathers by adhering to the ethos of the Constitution they provided us with. To much extent, we have functioned as a democracy rejecting the outdated provisions of our Constitution and adopting new ones in

place of them. But after all these years we are still stuck with a colonial heritage in the form of parliamentary privileges enshrined in our Constitution. Quite often we see privilege motions being introduced in the Parliament against editors of newspapers, anchors, scholars, and even lawmakers as well. It is also an obvious question of any layman why the Members of Parliament or State Legislature aren't held liable for defamation regardless of what they say about anyone in the parliament. The Constitution of India in Article 105(3)[1] and 194(3)[2] provides for legal immunity to legislators for their actions or statements made while discharging their legislative duties. These privileges are peculiar rights bestowed on the members of Parliament and State Legislature without which they could not perform their duties properly. Parliamentary privileges are important for parliamentarians to discharge their duties without any fear of repercussions of words and acts made in furtherance of their duties. The privileges are primarily divided into two heads, collective privilege, which belongs to each house of parliament collectively, and individual privileges, which can be availed by individuals or members of the house only. Out of many collective privileges include "no court has the right to investigate proceedings of the House or any of its committees". Individual privileges include "The members of Parliament can't be arrested during the session of the Parliament and 40 days before the beginning and 40 days after the end of the session". These provisions, on the face of it, look necessary for the proper functioning of the parliament. However, these privileges have many a time shown what happens when in a democracy, a person or a body is vested with unbridled power.

PRIVILEGES AND BRITISH PARLIAMENT

The source of the parliamentary privilege is certainly the constitution of India. Articles 105 and 194 of the Indian Constitution deal with the privileges and immunities enjoyed by the members of parliament and state legislatures respectively. However, there has been a substantive debate that why did our forefathers bind us with the privileges enjoyed by the British parliament when they could have come up with something which doesn't remind us of our colonial heritage. It is argued that British Parliament is a sovereign body whereas the

[1] Constitution of India, 1950, art. 105(3)
[2] Constitution of India, 1950, art. 194(3)

Indian parliament is not a sovereign body. The Indian parliament isn't sovereign but it is our Constitution that is. But this criticism is to some extent unfounded. The Constituent assembly was short of time and had to prepare the Constitution at the earliest. They didn't want to rush on codifying the privileges and hoped that the subsequent generations would come up with rules regarding it from time to time. However, this didn't happen.

CRITICISM OF THESE PRIVILEGES

The codification is necessary not only for its obvious clash with the fundamental rights particularly Article 19[3] but also for other aspects as well. Such as the jurisdiction of the judiciary and legislature and their possible confrontation with each other**.** An unprecedented event[4] took place in 1964 when the Uttar Pradesh legislative assembly passed a resolution for breach of privileges and ordered two Allahabad high court judges to be brought in custody before the assembly. The two judges were asked to appear before the assembly in Lucknow to explain why they breach the house's privilege by hearing a petition of Keshav Singh who was earlier imprisoned by the house. Even though the Supreme Court intervened and quashed the house's order which sought to summon the two high court judges, this incident proved to be an eye-awakening point in the context of the unlisted powers that were bestowed on the legislatures. Examining the circumstances and the way the Speaker of the Assembly reacted, it feels that the contention started off nowhere and that an undesirable situation could have been avoided if Keshav Singh had apologized to the Assembly. On similar lines in 1991, a motion was passed in the Lok Sabha for the removal of a sitting judge of the Supreme court of India, Justice V. Ramaswamy. The criticism of these privileges is very obvious and straightforward. According to the primary source of these immunities i.e., Article 105(3) and 194(3) of the Indian Constitution, these privileges were to be codified by parliament by law and *until then*, "privileges enjoyed by the House of Commons of the United Kingdom were to be extended to the Indian parliament and state legislatures". The constituent assembly did not list down these immunities because of their time constraint. Dr. Rajendra Prasad in the constituent assembly warned that 'Parliament may never legislate on these privileges'. His prophecy came true and

[3] Constitution of India, 1950, art. 19
[4] Chintan Chandrachud, *The cases that India forgot* (1st Edition, Juggernaut Books 2019) 4

parliament, having all the time unlike the constituent assembly, has never tried to codify these privileges, bringing in criticism from legal scholars and civil societies. A possible explanation for not codifying the privileges could be that the codification of privileges would bring them under the scrutiny of the Judiciary.

SUPREME COURT'S STAND

The issue has on several occasions found its way to the Apex court of India. The parliamentary privileges confront the fundamental rights provided in part III of the constitution, especially Articles 14, 19, and 21[5]. In one such instance, the editor of a newspaper named Searchlight was incarcerated because he published the debate of Bihar State Legislature. He then moved to the Supreme Court challenging this order of the Speaker of the Assembly. Thus, the Supreme court in the ***Searchlight case***[6]sat for the first time to interpret the immunities of the legislature. It held that the right to speech and expression (Article 19) would yield to parliamentary privileges. It noted that the House of Commons enjoyed the power to prevent the publication of even true events and so by the mandate of Article 194[7] it would apply to the Bihar legislature as well. The court applied the *harmonious construction* principle and observed that it did not have the power to examine the constitutional validity of the parliamentary privileges as it is already a part of the Constitution and hence do not qualify as 'law' under Article 13[8], which states that laws curtailing fundamental rights are void. Further giving the reason that ordinary 'law' would be open to scrutiny by the court, the court noted that once these immunities are codified by parliament by law, the Court could examine the constitutional validity of the immunities on the touchstone of fundamental rights as provided in Article 13. This was an important observation by the court which disincentivized the legislatures from codifying the parliamentary privileges and immunities as once they do it, it would be open to court's scrutiny. Nobody would ever want to delimit their power and that too by their actions. The privileges find their source in the Constitution, legislature's rules and laws enacted from time to time, and even from the judiciary's interpretation of the Constitution. Judicial

[5] Constitution of India, 1950, art. 14, 19, and 21
[6] *Keshav Singh v Speaker, Legislative Assembly* AIR 1965, All 349
[7] Constitution of India, 1950, art. 194
[8] Constitution of India, 1950, art. 13

interpretation has played a significant role in shaping these immunities of parliament. It has, on several occasions, enlarged the scope of the privileges enjoyed by the members of parliament as well as state legislatures.

In ***Tej Kiran Jain v Sanjeeva Reddy***[9] the Supreme Court held that "once it is proved that parliament was sitting and its business was being transacted, anything said during the course of that business was immune from proceeding in any court". The Apex Court stated in ***P.V. Narsimha Rao v State***[10] (1998) that MPs (Members of Parliament) are immune from taking bribes regardless of what they say or vote in the legislature. The Court backed up this decision by declaring that Article 105(2) of the Constitution requires such immunity.

In ***Raja Ram Pal v Hon'ble speaker***[11], it was held that the term privilege implies "A special right, advantage or benefit conferred on a particular person. It is a particular advantage or favor granted to one person as against another to do certain acts".

AN ALTERNATE ROUTE

Even though the Constituent assembly was hopeful of the codification of the parliamentary privileges our lawmakers haven't taken a single step towards it. The Parliament or State legislatures don't want to limit their immunities by codifying them. However, if their privileges are not codified, it might lead to gross violation of freedom of speech and expression. How viable is an alternate route in a democracy? Taking an alternative route to achieve something which is the outcry of many, is not ideal in a democracy. It is not something to boast of. But given the fact that our legislators have kept this topic on the backburner for over seven decades now, it is imperative to find a way to list and limit the privileges of the parliament. It was during the Emergency when through the 42nd Constitutional Amendment Act[12] in 1976, the Parliament sought to substitute (delete and replace) Article 105(3) and 194(3). This was done to add a clause to the original text, that 'the privileges would be evolved by the

[9] *Tej Kiran Jain and Others v N. Sanjiva Reddy and Others* (1970), AIR 1573
[10] *P.V. Narsimha Rao v State* [1998] 4 SCC 626
[11] *Raja Ram Pal v The Hon'ble Speaker, Lok Sabha & Ors* (2007) 3 SCC 184
[12] Constitution (42nd Amendment) Act, 1976, art. 105(3) and 194(3)

parliament and state legislatures from time to time. Even though through this amendment the Parliament sought to strengthen its grip on deciding what would constitute a privilege, it opened a backdoor for this provision to be struck down[13]. Since the Parliament deleted and replaced Article 105(3) and 194(3) with new text (where it could have changed only a certain part of the provision without replacing the whole text) it meant that these provisions are now constitutional amendments and not an original part of the constitution. According to the Kesavananda Bharati judgment, "a constitutional amendment violating the basic structure of the constitution is null and void". A constitutional amendment is not law. Now if we prove that Article 19 is a part of the basic structure of the Constitution, the provisions relating to parliamentary privileges in the Constitution could be struck down as they violate fundamental rights, particularly Article 19(1)(a)[14]. The Supreme Court in the ***Minerva Mills***[15]judgment has held that "Articles 14, 19, and 21 forms part of the basic structure of the Constitution, and they can't be abridged through any law". Since it is held that Article 19 is part of the basic structure by the Supreme Court itself, the Court now has the power to check the constitutional validity of the amendments to Article 105(3) and 194(3) on the touchstone of Article 13 as decided in the ***Kesavananda Bharati case***[16]**.** Article 19(1)[17] prevails over any Constitutional amendment but not against law enacted by the Parliament and so it would prevail over the said amendments and not against any law codifying the parliamentary privileges.

Even talking about this route feels like an insult to our Constitution. We take pride in upholding the values of our Constitution for all these years. How can we possibly try to get rid of some provision of our constitution that our forefathers wanted our legislators to develop? It does not seem right.

---

[13] Shivprasad Swaminathan, 'The Conflict Between Freedom of the Press and Parliamentary Privileges: An Unfamiliar Twist in a Familiar Tale' (2010) 22 (1) National Law School of India Review, 123
[14] Constitution of India, 1950, art 19(1)(a)
[15] *Minerva Mills Ltd. & Ors v Union of India & Ors* (1980) AIR 1789, SCR (1) 206
[16] *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225
[17] Constitution of India, 1976, art. 19(1)

CONCLUSION

Achieving the demand of the majority by exploiting loopholes is not a feature of a democracy. But if it strengthens the democracy itself, there is only gain and no harm. The Indian constitution envisions democracy for both men and institutions. It provides for unbridled powers and sovereignty for none. The parliamentary privileges being a grey area is something sort of an unwanted exception that needs to be corrected and brought in line with constitutionalism which the constitution provides for. It is thus for obvious reasons that it is corrected by our elected representatives and not the judiciary. Legislators voice their opinion that the codification of their privileges will hamper their sovereignty by bringing them under the scrutiny of the judiciary. The legislators should remember Lord Denning's words *"Be you ever so high, the law is above you"*, and realize that all the organs of the government derive their power from the constitution and not from the legislatures.