

Parliamentary Privileges in India: A Comparative study with the United Kingdom, France, Australia, and South Africa

Dr. Raj Singh,
Vice-Chancellor,
JAIN (Deemed-to-be University), Bangalore, India
Email Id: rajsingh@jgi.ac.in

ABSTRACT: *Parliament in India has been granted some special privileges for its proper and smooth functioning. These privileges empowered the Member of Parliament to discharge their function more efficiently, confidently, and without any superfluous interference. In this review paper, the researcher will discuss the meaning and origin of the concept of parliamentary privilege. Further, the researcher will highlight how parliamentary privileges have been implemented in India and in selected jurisdictions. While discussing the concept of parliamentary privileges the researcher will adopt a comparative approach to determine how parliamentary privileges in India are different from the United Kingdom, France, Australia, and South Africa. Since the law of parliamentary privileges and immunities applies differently in different countries, the law of privilege in a continental system country such as France, and in Britain and Australia, is relevant in exploring the doctrine of parliamentary privilege. Moreover, India is one of the old democracies which, like South Africa, have a three-tiered system of government. In this paper the author has adopted, comparative research analysis which will help in interpreting and analyzing the extent of parliamentary privilege and immunities in India. The author will further discuss in detail about Parliamentary Privileges and its components in this paper.*

KEYWORDS: *Democracies, Functioning, Immunities, Parliament, Privileges.*

INTRODUCTION

Parliaments perform significant action as a democratic institution, which comprehensively fits into three fundamental regions;

- legislation,
- representation and
- The oversight of executive government.

For the purpose of accomplishing the objective defined under the above three regions, they are provided with undeniable assistance in their work. This assistance is in the form of power, immunities and privileges given to the House of Parliament and members of the parliament. The word parliament is derived from the Anglo-Latin word '*parliamentum*' which means a speaking conference. Thus, the parliament can be understood as a higher authority in a state dealing in public and national affairs. Similarly, the word privileges is derived from '*privilegium*' which means law affecting an individual meaning thereby exceptional right provided to the individual as an immunity. Thus, it can be said that parliamentary privileges mean exceptional rights provided to house of parliament or Member of Parliament or any committee thereof to accomplish their objective.¹

Parliamentary privileges are a special case to customary rule and are expected to permit parliament and Member of Parliament to play out their obligations unafraid of any threat fear or penance, and short of hindrance. The parliamentary privileges are provided not only to the individual but also to the House of Parliament. It was claimed that parliamentary privileges were result of civil and political scuffle (particularly between Commons and the Crown) in United Kingdom and Australia. While in India, France, and South Africa it is the Constitution that acts as a direct source for the privileges. English point of reference has fundamentally affected the selection of parliamentary privileges statutes and the application of privilege in India, Australia, and South Africa. Table 1 illustrate the list of countries and their origin.

¹ Rachel Macreadie & Greg Gardiner, 'An Introduction to Parliamentary Privilege' [2010] 10.13140/RG.2.1.2674.6723, available on

Table 1: Country and its Origin

S. No.	COUNTRY	ORIGIN
1.	United Kingdom	Political Struggle
2.	Australia	Political Struggle
3.	India	Constitution
4.	France	Constitution
5.	South Africa	Constitution

1. Definition of Parliamentary Privileges

The most normally used and acknowledged definition of parliamentary privilege is given by Erskine May, which characterizes parliamentary privilege as²:

- Immunities like- freedom from arrest and freedom of speech
- enjoyed by Houses collectively; and
- by members of House individually
- Other rights/immunities include- power to punish for contempt and to regulate its own proceedings.

2. Power and Privileges Available To Whom

As explained by Erskine May it can be drawn that the privileges are available to the following as follows:

- Jointly enjoyed by the Parliament
- Independently enjoyed by its members

The privileges are classified into two categories because rights such as freedom of speech and arrest belong primarily to the individual member whereas other rights like power to punish for contempt and to control its own proceedings belongs to House. Based on the same concept in India, the privileges are provided to the members, individual contributing to the functioning of the parliament. It is to be noted that President of India who is part of parliament is not entrusted with parliamentary privileges in India. In other jurisdictions everyone involved in the proceedings of parliament are provided freedom of speech like in Australia and U.K.³

However, in South Africa, the position is that the Constitution provides protection for Cabinet members, Deputy Ministers, and members of the National Assembly only.⁴ The scope of the constitutional provision on privilege is not exhaustive as the Constitution allows for the national legislature to prescribe other privileges and immunities for the National Assembly.⁵ In France, as enumerated in Article 26 of the Constitution of France these privileges are provided to any members who have participated in the parliamentary proceedings in any manner.

3. Components of Parliamentary Privileges

In the United Kingdom the authors Erskine May, on the law of parliamentary privilege recognized two components:

² Erskine May, 'Treatise on the Law, Privileges, Proceedings, and Usage of Parliament' (24th ed., p. 75)

³ Marc van der Hulst, 'The Parliamentary Mandate: A Global Comparative Study' <https://books.google.co.in/books?id=NG6hOvzActoC&lpg=PP3&pg=PP3#v=onepage&q&f=false>, 67

⁴ Constitution of the Republic of South Africa 1996, S 58(1)

⁵ Constitution of the Republic of South Africa 1996, S 58(2)

- Exclusive Cognizance⁶
- Freedom of speech and debate⁷

Exclusive cognizance generally means that the exercise by parliament authority over its own affairs. For example, freedom of speech and power to regulate its own proceedings protects individual from impeachment or questioning outside the houses of parliament. In light of the importance and fundamental segments of the privileges, power and immunities of Parliament, the end can be drawn that the principle 'exclusive cognizance' safeguards the veracity of parliament. It provides parliament to regulate its own proceedings and protect the member of the parliament from any obstacle in performing their function.

In India, Australia and South Africa, the Constitution being the supreme authority of country are accountable for rules and regulation established as parliamentary privileges. Thus these rights or privileges are subject to the Constitutional validity by the Judicial Review mechanism. On the contrary in France, The Constitutional Council is the highest constitutional authority to determine the validity of the law passed by the parliament.

4. *Kinds of Parliamentary Privileges: Non- Accountability and Inviolability*

There are two kinds of parliamentary immunity: -non-accountability and inviolability. The scope of these two kinds of privileges can be viewed from four different angles: *ratione personae* (protection for whom?), *ratione temporis* (when does protection begin and end?), *ratione loci* (protection only within the area of parliament or beyond?), and *ratione materiae* (what acts are covered by privileges?).

This research paper concern only with *ratione loci* and *ratione materiae*. In respect of *ratione loci*, non-accountability means freedom of the parliamentary vote and freedom of speech in parliament or in a parliamentary context. On the one hand, non-accountability shields individuals from prosecution, arrest, detention investigation, and trial for opinions convey or votes thrown by them in the activity of their parliamentary capacity. Inviolability, on the other hand, means exemption from legal action, arrest, or investigation falling outside of the immediate scope of a member's exercises in parliament.

4.1. *Non- accountability*

4.1.1. *Ratione Loci*

Non-accountability protects members from prosecution, investigation, arrest, detention, and trial for opinions expressed or votes cast by them in the exercise of their parliamentary function. Now the term 'parliamentary function' is to be understood to get the actual understanding of the Non-accountability principle. For that, we must have to refer the origin of parliamentary privileges in brief. The British parliament is made out of three bodies, the King, Lords, and Commons and mutually known as the King-in-Parliament. The parliament has supreme authority in making law and no one has right to overrule the law made by the parliament.

The Legislative Sovereignty of Parliament was not built up in a day. Over the span of history, the King, the Judges and the Houses of Parliament exclusively, each attempted to assert independent legislative authoritative separated from parliament. In any case, in the battle between the Crown and Parliament, the latter ultimately triumphed.

The aftereffects of this triumph are embodied in the Great Constitutional Charters viz., The petition of Rights, 1628; The Bill of Right 1688; Act of Settlement, 1701. The commons start clamming the special rights provided to the King for their own. Gradually, their claims based on the customs and with their constant effort has ended into "privilege" which is lawfully recognized by the Parliament.⁸ For instance, the fullest type of parliamentary privilege and immunity is set down in the Bill of Rights Act which gives freedom of speech.⁹

The wording of article 9 does not apparently clarify the extent of its operation. Given the uncertainty concerning the meaning and scope of the privilege, the British courts and the Joint Committee on Parliamentary Privilege have provided an interpretation of the privilege which sheds a light on the meaning and scope of the

⁶ Smyth, 'Privilege, exclusive cognizance and the law' in Horne, Drewry & Olivier (eds), Parliament and the law (2013) 35.

⁷ *ibid*

⁸ W. S. Holdsworth, 'History of English Law' Book II Pt. I.C. 6 (Sweet and Maxwell, 1966).

⁹ The Bill of Right Act 1689, Article 9

parliamentary privilege and immunity. As a result the acts performed by the member are restricted by the necessity that they should be connected to the business of parliament.

Similarly, in India, as pointed by Article 105(1) that freedom of speech will also be applicable in the parliament. Further, it protects Member of Parliament from any court proceedings for exercising parliamentary function.¹⁰ South Africa also enshrined non-accountability principles under Section 58 of the South Africa Constitution, similar to the provision given under Indian Constitution.

4.1.2. *Ratione Materiae*

In some countries, particularly India, U.K. and Australia, non-accountability provides protection against civil but not against criminal proceedings.¹¹

4.2. *Inviolability*

4.2.1. *Ratione Loci*

Inviolability means exemption from legal action, arrest, or investigation falling outside of the immediate scope of a member's exercises in parliament. The acts covered by inviolability are that which is not related to the parliamentary business. In France, the privilege of freedom of speech in parliament enjoyed by the members differs from the British, Indian and South African models. Parliamentary immunities set down in the Constitution of France¹² covers both non-accountability and inviolability protection. French non-accountability protection is also absolute in that it prohibits any form of a legal proceeding, civil or criminal, against a member for acts performed, a vote cast, or an opinion uttered by him or her in the exercise of his or her parliamentary functions.¹³

Furthermore, it was observed in France that members of parliament enjoy both the non-accountability and inviolability immunities, whereas persons other than members of parliament enjoy only the non-accountability immunity. In modern times inviolability protection is heavily contested in France. It is contested that the inviolability protection clashes directly with equality before the law, as it is an unjustified procedure that enables parliamentarians to escape justice and to block the investigation of criminal matters for the act done outside of the parliament.

A Parliamentary privilege in Australia as provided in Section 49¹⁴ is based on the law enacted by the parliament or followed by the Commons House of Parliament of the United Kingdom. As a result, parliament in Australia enacted the Parliamentary Privileges Act 1987. From the manner in which Section 16 of the Parliamentary Privileges is expressed it can be observed that in Australia also both the kinds of privileges were followed in respect of *ratione loci*.

4.2.2. *Ratione Materiae*

In general, the inviolability application is limited to the criminal proceedings but in rare cases, it was observed that the principle is also applicable to civil proceedings.

Like in France and South Africa, parliamentary privilege and immunity are sourced directly from the Constitution which provides the absolute privilege to members of Parliament. It does so by exempting them from criminal and civil liability for exercising freedom of speech in parliament.

5. *Issues and Tensions*

Individual being the members of the Parliament enjoys privileges provided to them either by Constitution or by customary law.¹⁵ Further, they themselves regulate their proceedings. In that case, while exercising the

¹⁰ The Indian Constitution Act 1950, Article 105(2)

¹¹ Hulst (n 4)

¹² The Constitution of France 1958, Article 26

¹³ The Constitution of France 1958, Article 26

¹⁴ Commonwealth of Australia Consolidated Acts

¹⁵ Asthana (n 3)

power there is always a fear that the privileges given to members or house will be misappropriated for personal or official gains/interest. The obvious reason for such a doubt is that there is no mechanism which can monitor the rights or privileges exercised by the members or Parliament. Thus it can be said that there is need for establishing a mechanism which is primarily responsible for check and balances.¹⁶

Secondly, it is argued against the parliamentary privileges that rights and immunities provided to the members and parliament are too wide that they have chances of getting encountered with general public or other pillar of the government. One such a case is of *M.S.M. Sharma vs. Sri Krishna Sinha*¹⁷ where it was pronounced that any parliamentary privileges enacted by law will be subject to the Article 13 of the Indian Constitution. Further, it was also held that if the enacting law violets any fundamental right it will be regarded as void insofar as it violates fundamental rights. Keeping in mind these issues, concerns were raised against the scope and extent of parliamentary privileges. More recently, in Australia and India, the involvement of judiciary in the matter of parliamentary privileges has been raised as a monitoring mechanism.

Thirdly, it is argued that with regard to “other privileges” used under Article 105(3) of the Indian Constitution there is more uncertainty and ambiguity. The problems of uncertainty in law are also due to the interpretation by the Supreme Court.

6. *Codification of Parliamentary Privileges: Need of Hour?*

The phrases like ‘other privileges’, customary rules and lack of monitoring power have made the parliament and its member supreme authority. There was no provision which explicitly provides or put a bar on parliamentary privileges. Whenever, the concern was raised to codify the law, the members of parliament counter the enactment. This is because any enactment of statute makes the customary parliamentary privileges subjects to the Constitution (particularly fundamental rights) and Judicial Body. Constitution Review Commission 2000 headed by the Justice M.N. Venkatachalia proposed that there is need to define and confine the privileges so that legislature can perform his function unrestricted and freely. The person enjoying the benefit of the parliamentary privileges were in dilemma that codification will bring court interference and thus they will be monitored by the court of law. As of now, these customary privileges have given full freedom and opportunity to the members of the house.

In U.K. Parliamentary privilege is not immutable, some privileges once asserted by Parliament have lapsed or been modified, some have been codified in statute law. The Joint Committee on Parliamentary Privilege 1999, recommended legislation which would clarify a number of uncertain aspects. The main gist of the report is for the comprehensive codification of the Parliamentary Privileges. However, no legislation followed in subsequent sessions and there was no official Government response. At the same time, it cannot be denied that there was some act passed by the legislature which is somehow related to Parliamentary privileges like Parliamentary Privilege Act 1770, Parliamentary Papers Act 1840, Parliamentary Standards Act 2009, Bribery Act 2010, and The Green Paper April 2012. However, all these scattered provisions do not serve the very purpose of The Joint Committee on Parliamentary Privilege 1999. Recently, the report of the Joint Committee July 2013 recommends that there is no need for comprehensive codification of parliamentary privilege at this point.

In Australia as provided by the Section 49¹⁸ the law applicable to the members of house and houses concerning the parliamentary privileges will be those as declared by the parliament. Further, if no law was passed by the parliament, the law applicable will be those as applicable in Commons in U.K. As a response to this, parliamentary privileges are codified to the fullest extent by the Parliamentary Privileges Act 1987. It can also be drawn from Section 49 of the Commonwealth of Australia Constitution Act, 1900 that in case Parliamentary Privileges Act 1987, is silent over certain matters the law prevailing in the United Kingdom shall be applicable.

In India also Article 105(3) which is related to other privileges than the Freedom of Speech and Freedom of Publication, provides that other privileges include as those determined by the parliament. Thus the phrase “defined by parliament” make it clear that Constitution itself suggest to enact the law and practices followed

¹⁶ ibid

¹⁷ AIR 1959 SC 395

¹⁸ The Commonwealth of Australia Constitution Act, 1900

in Commons is just a temporary measure. However, even today we follow the same practice as adhered by Commons and has not been codified so far. The voice has been raised many times for codifying the parliamentary privileges.

However, Committee on Privileges of Lok Sabha 2008, concluded that there was no need for Codification. It further, concludes that lack of mechanism to have proper check and balance is responsible for misuse of the powers. Further, it highlighted that since the first Lok Sabha is established in 1952s only 5 cases have been recorded till today. In France, there is no such provision to codify the law has been given in the Constitution. However, Constitution of South Africa under Section 58 (2) provides that other privileges can be prescribed by the national legislation.

CONCLUSION

From the discussion made above it is clear that, parliamentary privileges are a special case to customary rule and are expected to permit parliament and Member of Parliament to play out their obligations unafraid of any threat fear or penance, and short of hindrance. Further, we have discussed in brief two components of parliamentary privileges i.e. Exclusive Cognizance and Freedom of speech and debate. It has been also regarded as requisite in allowing parliament to perform their function smoothly.

. As per discussion made above, UK, India, and South Africa practice non-accountability protection only with regard to *ratione loci* whereas France and Australia practices both types of privilege. Further, with regard to *ratione materiae* India, UK, and Australia follow non-accountability protection against civil but not against criminal proceedings whereas France and South Africa provides protection to both civil and criminal. Further, we have observed that rights and immunities provided to the members and parliament are too wide that they have chances of getting encountered with general public or other pillar of the government.

In last we have observed that the Constitution of India and South Africa provides that other privileges, then the Freedom of Speech and Freedom of Publication will be prescribed by the National Legislation but it has not yet been done. On the other hand, Australia enacted their National Legislation acts which are Parliamentary Privileges Act 1987. The United Kingdom even having an unwritten constitution tries to codify the law related to parliamentary privileges but failed to do so and at last, the Joint Committee on Parliamentary Privilege 1999 suggest, that there is no need to codify the law. Interestingly, the United Kingdom which is a source for parliamentary privileges and was followed by many countries including India has not comprehensive but randomly tries to codify the law related to parliamentary privilege under different statutes.

Hence, it can be said that there is need to codify the parliamentary privileges in India since the practices we follow today in India might not have any relevance in U.K. Since it is clear that to keep a pace with the development of society it is necessary to implement the law which is need of the hour. Similarly, codification of parliamentary privileges is need of hour.