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CODIFICATION OF PARLIAMENTARY PRIVILEGES – ISSUES AND CONCERNS

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Parliamentary privileges refer to the legal prerogative enjoyed by the members of the Parliament (Lok Sabha & Rajya Sabha) and the State Legislative Assembly, and their committees, which also includes the Attorney general of India and Union ministers. Our Constitution empowers each house to be the guardian of its own privileges by the virtue of Article 105[1] and 194.[2] The clause (3) of this article as originally enacted, provided that "the powers, privileges and immunities of each House of Parliament, and of the members and the committees of each House, shall be such as may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 the House of Commons of the Parliament of the United Kingdom, and of its members and committees, at the commencement of this Constitution", namely 26 January 1950.[3]

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The Speakers' Conference in 1938 stated that "the Conferences were unanimously and emphatically of opinion that the Government of India should be requested to take immediate steps to get sections 28 and 71 of the Government of India Act, 1935, amended so as to secure for the Central and Provincial Legislatures and the officers and members thereof all the powers and privileges which are held and enjoyed by the Speaker and members of the British House of Commons"

The parliamentary privileges conferred upon are innately interwoven in the Constitution with the intention of enabling the representatives to exercise their powers and fulfill their representatives in a manner that befits a the role of an elected official as well to preserve the dignity and

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[1] The Constitution of India, Art. 105

[2] The Constitution of India, Art. 194

[3] For observations of Alladi Krishnaswami Ayyar and Dr. B.R. Ambedkar, see C.A. Deb., 19-5-1949, pp. 148-49; 3-6-1949, pp. 582-83. See also C.A. Deb., 16-10-1949, pp. 374-75.

respectability of the office of Parliament that they form part of.[4] The Lok Sabha & Rajya Sabha, and as well as The State Legislative Assembly to be the sole authority to judge whether any matter that may arises, in any way infringes upon those privileges, also they can, if it deems it advisable, punish, either by imprisonment or reprimand, any person whom it considers to be guilty of contempt.[5]

The objective behind introducing parliamentary privileges was to safeguard the freedom, the authority and the dignity of the Parliament. It is necessary for the proper exercise of the functions entrusted to Parliament by the Constitution. They are enjoyed by individual members, because the House cannot perform its functions without unimpeded use of the services of its members, and by each House collectively for the protection of its members and the vindication of its own authority and dignity.[6]

In September, 1949, Post-Independence when the question of codifying these privileges and enacting a legislation for the same, was raised by the Conference. The Chairman, G. S. Mavalankar expressed contrary opinion, he was of the view that it is better not to define specific privileges at that moment but to rely upon the precedents of the British House of Commons. The disadvantage of codification at that moment was that whenever a new situation would arise, it will not be possible for Legislation to adjust themselves to it and give members additional privileges. In the set-up at that time any attempt at legislation will very probably curtail privileges.[7]

It seemed only logically to not enact any law regarding privilege and codify them at that time for two major reasons;

1. Any legislation at that point of time would have meant that the legislation only in regard to matters acceptable to the Executive Government. It was obvious that since they had control over the majority, the house would have only accepted that they would have deemed proper. It is important to bear in mind that the privileges of members are not to be conceived with reference to this or that party, but as privileges of every member of the

[4] C.V. H. Rao, ‘Privileges and Immunities of Parliament‘, in A.B. Lai, (ed.), The Indian Parliament (1956).
[5] https://articles.manupatra.com/article-details/The-Codification-Conundrum-of-Parliamentary-Privileges
[6] M.N. Kaul, ‘Codification of the Law on Privilege‘ accessed on12th January, 2021
[7] *P.O.C. Proceedings,* 18-7-1939, p 28-29

House, whether he belongs to Government or the Opposition party. Therefore, any attempt at legislation would have led to a substantial curtailment of the privileges as they exist today.

2. Any Legislation at that time would have crystallized the privilege and there would have been no scope left for the future authorities to widen or change the same by mere means of interpretation.

Even after presentation of the Fourth Report (Tenth Lok Sabha), various misconceptions did continue to exist and lamentably even among the educated classes. The Committee of Privileges (Fourteenth Lok Sabha) felt that there was a strong case for revisiting the very concept of parliamentary privileges. The Committee of Privileges accordingly, with the approval of the Speaker, Fourteenth Lok Sabha, took up for consideration the matter regarding "Parliamentary Privileges – Codification and related matters." The Eleventh Report of the Committee of Privileges was laid on the Table of the House on 30 April 2008. The Committee at the very threshold, addressed the basic reasons/primary factors from which emanated the oft felt need in certain quarters and demand from others for codification of parliamentary privileges. The Committee felt it appropriate to focus on these core areas/factors.[8] The Committee, therefore proceeded to clarify the extent and scope of privileges of the members and dispel certain misconceptions that prevail. Through a comprehensive questionnaire the Committee elicited opinion from the eminent persons/institutions belonging to Legislature, Legal Profession, Media and Academia. The Committee also obtained opinion from Foreign Parliaments. The Committee in their Report, after having considered the entire gamut of aspects relating to parliamentary privileges, the ground realities, responses to questionnaire on parliamentary privileges, established a position in the matter, and after an in-depth study of the case law summed up their observations/conclusions as under:

(i) Parliamentary privileges are made available to members of Parliament solely to enable them to perform their parliamentary duties unfettered. Members while not performing their parliamentary duties do not enjoy any privileges.

(ii) Contrary to certain misconceptions in some quarters, privileges are not any special rights which are conferred upon members to the exclusion of common citizens.

[8] http://164.100.47.193/intranet/pract&proc/chapter-XI.pdf

Privileges do not compromise the fundamental precept that all citizens are equal in the eyes of law.

(iii) Privileges are enabling rights of members to put across the views and voice the concerns of their constituents fearlessly. These could, therefore, be termed as indirect rights of members' constituents. It is this essence of privileges which needs to be appreciated.

(iv) The penal powers of the House for breach of privilege or contempt of the House have been very sparingly used. During the past five and a half decades in Lok Sabha there has been only one case of admonition, two cases of reprimand and one case of expulsion for commission of breach of privilege and contempt of the House. In Rajya Sabha there have been only two cases of reprimand for commission of breach of privilege and contempt of the House.

(v) The above position bears testimony to the fact that there has not been any misuse of parliamentary privileges as erroneously believed in some quarters.

(vi) The majority view of those who responded to the Committee's questionnaire do not favour codification of parliamentary privileges.

The Committee finally opined that there does not arise any occasion for codification of parliamentary privileges and as a matter of fact an awareness needs to be created with regard to the true import of the term parliamentary privileges and the ground realities that exist. The Committee accordingly recommended against codification of parliamentary privileges.

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The main arguments that have been advanced in favour of codification are—

(i) Parliamentary privileges are intended to be enjoyed on behalf of the people, in their interests and not against the people opposed to their interests;

(ii) unless the parliamentary privileges, immunities and powers are clearly defined and precisely delimited through codification, they remain vague and inscrutable for the citizens and for the Press—nobody really knowing what precisely the privileges of Parliament, its members and its committees are, thereby causing many an unintended violations;

(iii) the concept of privileges for any class of people is anachronistic in a democratic society and, therefore, if any, these privileges should be the barest minimum—only

those necessary for functional purposes—and invariably defined in clear and precise terms;

(iv) sovereignty of Parliament has increasingly become a myth and a fallacy for, sovereignty, if any, vests only in the people of India who exercise it at the time of general elections to the Lok Sabha and to the State Assemblies;

(v) in a system wedded to freedom and democracy—rule of law, rights of the individual, independent Judiciary and constitutional government—it is only fair that the fundamental rights of the citizens enshrined in the Constitution should have primacy over any privileges or special rights of any class of people, including the elected legislators, and that all such claims should be subject to judicial scrutiny, for situations may arise where the rights of the people may have to be protected even against the Parliament or against captive or capricious parliamentary majorities of the moment;

(vi) the Constitution specifically envisaged privileges of the Houses of Parliament and State Legislatures and their members and committees being defined by law by the respective Legislatures and as such the Constitution-makers definitely intended these privileges being subject to the fundamental rights, provisions of the Constitution and the jurisdiction of the courts;

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(vii) it is best if matters which are amenable to judicial scrutiny are dealt with by courts and, in any case, there is hardly any reason why courts which have full power to enquire into the existence of privileges, powers and immunities claimed by the Houses of Parliament should not also look to their proper exercise, and to set aside any order made by the Houses or to give interim relief to a complainant pending final disposal of the complaint; and

(viii) in any case, there is no question of any fresh privileges being added inasmuch as (a) under the Constitution, even at present, parliamentary privileges in India continue in actual practice to be governed by the precedents of the House of Commons as they existed on the day our Constitution came into force; and (b) in the House of Commons itself, creation of new privileges is not allowed[9].

[9] Subhash C. Kashyap: Parliament of India, New Delhi, 1988, pp. 212-13

It would thus be seen that while the predominant view in the parliamentary forums has been against codification, the academic circles and the Press have been, by and large, in favour of codification. The main arguments against codification are as follows:

(i) The privileges of Parliament are part and parcel of the Constitution and, therefore, of what is known as the 'fundamental law'. As pointed out by the Supreme Court in the Searchlight Case, the provisions of article 105(3) and article 194(3) are constitutional laws and not ordinary laws made by Parliament or the State Legislatures and they are, therefore, as supreme as the provisions of Part III.

(ii) (ii) As further pointed out by the Supreme Court in M.S.M. Sharma v. Sri Krishna Sinha Case (A.I.R. 1959 S.C. 395), article 19(l)(a) and article 194(3) have to be reconciled and the only way of reconciling the same is to read article 1 9(l)(a) as subject to the latter part of article 194(3). The principle of harmonious construction must be adopted and so constructed that the provisions of article 19(l)(a), which are general, must yield to article 194(1) and the latter part of clause (3) thereof which are special.

(iii) (iii) A law made by Parliament in pursuance of the earlier part of article 105(3) or by the State Legislature in pursuance of the earlier part of article 194(3) will not be a law made in exercise of constituent power... but will be one made in exercise of its ordinary legislative powers under article 246, and that consequently if such a law takes away or abridges any of the fundamental rights, it will contravene the pre-emptory provisions of article 13(2) and will be void to the extent of such contravention[10].

(iv) To say that parliamentary privileges are intended to be enjoyed on behalf of the people and not against the people, pre-supposes a conflict of interest. This is a fallacious argument. In fact, there is or should be no dichotomy between the two. It is to be stressed that these privileges do not belong to any feudal body or feudal lords; they belong to the representatives of the people elected to the Houses of Parliament and as such should not be seen as something antagonistic to the rights and interests of the people. The people of India, through the Constitution, have conferred these rights

[10] M.S.M. Sharma v. Sri Krishna Sinha, A.I.R. 1959, S.C. 395

on members to be exercised by them collectively and individually in their capacity as representatives of the people in the wider interest of the people.

(v) The only purpose and justification for these privileges is that the representatives of the people should be enabled to discharge their responsibilities and duties to the people effectively and efficiently without any fear or favour and without any obstruction or hindrance.

(vi) The scope of parliamentary privileges is very well-defined and restricted. The litmus test is that no privilege of Parliament or a member of Parliament will be attracted if any obstruction, libel or reflection upon a member of Parliament does not concern his character or conduct in his capacity as a member of the House and is not based on matters arising in the actual transaction of the business of the House. The volume of case law built up in India over the last fifty years has clearly established this principle. It is, therefore, not correct to say that parliamentary privileges are vague and inscrutable.

(vii) The basic law that all citizens should be treated equally before the law holds good in the case of members of Parliament as well. They have the same rights and liberties as ordinary citizens except when they perform their duties in the Parliament. The privileges, therefore, do not, in any way, exempt members from their normal obligation to society which apply to them as much and perhaps, more closely in that capacity as they apply to others.

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(viii) To take for granted that the codification of privileges will ipso facto put an end to confrontation between makers of law and dispensers of justice is perhaps a naive notion; instead of solving any problems, may be, it will create other unforeseen problems in the matter of relations between the Legislature and the Judiciary.

(ix) The Legislature’s power to punish for contempt is more or less akin and analogous to the power given to the courts to punish for their contempt. What constitutes a breach of privilege or contempt of the House can be best decided according to the facts and circumstances of each case rather than by specifying them in so many words.

(x) If there is mutual trust and respect between Parliament and courts, there is hardly any need to codify the law on the subject of privileges. With a codified law more advantage will flow to persons bent on vilifying Parliament, its members and

committees and the courts will be called upon more and more to intervene... A written law will make it difficult for Parliament as well as courts to maintain that dignity which rightly belongs to Parliament and which the courts will always uphold as zealously as they uphold their own[11]; and

(xi) If the privileges are codified, all matters would come before the courts and the Legislatures would lose their exclusive right to determine matters relating to their privilege and precision will be gained at the sacrifice of substance.

Legislature's reasoning behind not enacting any law regarding privileges has been that a law made by Parliament in pursuance of the earlier part of article 105(3) or by the State Legislature in pursuance of the earlier part of article 194(3) will not be a law made in exercise of constituent power, but will be one made in exercise of its ordinary legislative powers under article 246 and that consequently if such a law takes away or abridges any of the fundamental rights, it will contravene the pre-emptory provisions of article 13(2) and will be void to the extent of such contravention.[12] It is to be stressed that these privileges do not belong to any feudal body or feudal lords; they belong to the representatives of the people elected to the Houses of Parliament and as such should not be seen as something antagonistic to the rights and interests of the people. The people of India, through the Constitution, have conferred these rights on members to be exercised by them collectively and individually in their capacity as representatives of the people in the wider interest of the people. So giving this argument that the reason of not codifying the privilege is that the ambit of privileges will come in conflict with individual's fundamental right, this prima facie seems that there is malice in intension rather than any genuine good cause for not restricting and properly defining the scope and ambit of the parliamentary privileges.

[11] Hidayatullah, M. A Judge's Miscellany, Bombay, 1972, pp. 210-11

[12] *M.S.M. Sharma* v. *Srikrishna Sinha*, MANU/SC/0021/1958