

ISSN: 2582-6433



INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed 6th Edition

VOLUME 2 ISSUE 7

www.ijlra.com

DISCLAIMER

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Managing Editor of IJLRA. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of IJLRA.

Though every effort has been made to ensure that the information in Volume 2 Issue 7 is accurate and appropriately cited/referenced, neither the Editorial Board nor IJLRA shall be held liable or responsible in any manner whatsoever for any consequences for any action taken by anyone on the basis of information in the Journal.

Copyright © International Journal for Legal Research & Analysis



IJLRA

EDITORIAL TEAM

EDITORS

Megha Middha



Megha Middha, Assistant Professor of Law in Mody University of Science and Technology, Lakshmanagarh, Sikar

Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmanagarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can bring a change to the society

Dr. Samrat Datta

Dr. Samrat Datta Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Samrat Datta is currently associated with Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Datta has completed his graduation i.e., B.A.LL.B. from Law College Dehradun, Hemvati Nandan Bahuguna Garhwal University, Srinagar, Uttarakhand. He is an alumnus of KIIT University, Bhubaneswar where he pursued his post-graduation (LL.M.) in Criminal Law and subsequently completed his Ph.D. in Police Law and Information Technology from the Pacific Academy of Higher Education and Research University, Udaipur in 2020. His area of interest and research is Criminal and Police Law. Dr. Datta has a teaching experience of 7 years in various law schools across North India and has held administrative positions like Academic Coordinator, Centre Superintendent for Examinations, Deputy Controller of Examinations, Member of the Proctorial Board



Dr. Namita Jain



Head & Associate Professor

School of Law, JECRC University, Jaipur Ph.D. (Commercial Law) LL.M., UGC -NET Post Graduation Diploma in Taxation law and Practice, Bachelor of Commerce.

Teaching Experience: 12 years, AWARDS AND RECOGNITION of Dr. Namita Jain are - ICF Global Excellence Award 2020 in the category of educationalist by I Can Foundation, India. India Women Empowerment Award in the category of "Emerging Excellence in Academics by Prime Time & Utkrisht Bharat Foundation, New Delhi.(2020). Conferred in FL Book of Top 21 Record Holders in the category of education by Fashion Lifestyle Magazine, New Delhi. (2020). Certificate of Appreciation for organizing and managing the Professional Development Training Program on IPR in Collaboration with Trade Innovations Services, Jaipur on March 14th, 2019

Mrs.S.Kalpna

Assistant professor of Law

Mrs.S.Kalpna, presently Assistant professor of Law, VelTech Rangarajan Dr. Sagunthala R & D Institute of Science and Technology, Avadi. Formerly Assistant professor of Law, Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr. Ambedkar Law College, Pudupakkam. Published one book. Published 8 Articles in various reputed Law Journals. Conducted 1 Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration. 10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.



Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC - NET examination and has been awarded ICSSR - Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

ABOUT US

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 is an Online Journal is Monthly, Peer Review, Academic Journal, Published online, that seeks to provide an interactive platform for the publication of Short Articles, Long Articles, Book Review, Case Comments, Research Papers, Essay in the field of Law & Multidisciplinary issue. Our aim is to upgrade the level of interaction and discourse about contemporary issues of law. We are eager to become a highly cited academic publication, through quality contributions from students, academics, professionals from the industry, the bar and the bench. INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

A CRITICAL ANALYSIS ON PARLIAMENTARY PRIVILEGES IN INDIA AND CANADA

Authored By-Dimple Nitin Rathod

P.E.S

Modern Law College

Department Of L.L.M

➤ Introduction

Privilege is that which sets honorary members apart from other citizens giving them rights which the public do not possess In my view, parliamentary privilege does not go much beyond the right of free speech in the House of Commons and the right of a member to discharge his duties in the House as a member of the House of Commons.

- Speaker Lucien Lamoureux

The term “parliamentary privilege” is used in constitutional writings to denote both rights as well as immunities. The pioneer analyst in law of parliamentary privileges Sir Thomas Erskine May has defined the expression „parliamentary privileges“ as follows:

“Parliamentary privilege is the sum of peculiar rights enjoyed by each House collectively as 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”.

‘Parliamentary Privileges’ is an all-embracing and comprehensive term which includes certain powers, privileges and immunities enjoyed by a legislature and its members. These privileges enable the legislature to discharge its functions effectively, fearlessly and without any outside interference. The British Parliament, which is regarded as the cradle of Parliamentary institutions all over the world, has certain powers and rights such as the ‘power to punish for breach of privilege or contempt’, ‘right to regulate its own composition’ and ‘right to prohibit the publication of its proceedings’. Individual members of each House of Parliament also have certain rights and immunities such as ‘freedom of speech and debate in the house’ and ‘Freedom from arrest in civil cases’ etc.

These privileges and immunities by protecting its authority and self-esteem empower the legislature to execute its affairs effectually, valiantly and independently without any external interventions. “Power to punish for breach of privilege or contempt”, “right to regulate its own composition”, “right to prohibit the publication of its proceedings”, “freedom of speech and debate in the House” and “freedom from arrest in civil cases” etc. are some important privileges or immunities generally granted to a parliament in a parliamentary form of democratic polity. ¹As the concept of parliamentary privilege in India is an “importation from England” it has the same characteristic nature “not being codified” but “being in crystallized” form by modes of “resolutions, standing orders, conventions and practices of the Houses, and they are part of the Law and Custom of Parliament.

The practices and precedents of the House of Commons of Canada regarding parliamentary privilege stretch far back into colonial times. At an early stage, the young assemblies of the colonies, modelling themselves on Westminster, claimed the privileges of the British House, though without statutory authority. At Confederation, the privileges of the British House were transferred in the Constitution Act, 1867 to the Canadian Parliament, and for many years the Canadian House continued to look to the experience of the British House for guidance in matters of parliamentary privilege.

➤ **Parliamentary Privilege- Indian Perspective**

The law-making bodies and their Members, all over the world, enjoy certain constitutional powers, privileges and immunities collectively known as the “Parliamentary Privileges or Legislative Privileges”. Parliamentary privilege encompasses certain special rights and immunities deemed necessary to allow legislatures to protect themselves and their Members from undue interference so that they can effectively carry out their functions of inquiring, debating and legislating. Parliament is not only a Legislative Organ but also, in the words of Lord Denman, is a grand inquest of nation. Parliament functions through free discussions, open debate, exchange of arguments and criticism.

Privileges are, therefore, necessary to enable the Members to discharge their duties and responsibilities effectively and efficiently without any interruption, especially the opposition bench, who in a parliamentary polity has to build itself as an alternative government. The doctrine emerged over several hundred years of English history in response to genuine threats to the House of Commons from the

¹ <http://www.ourcommons.ca/marleaumontpetit/DocumentViewer.aspx?Sec=Ch03&Seq=2&Language=E>

Crown and the House of Lords, and continues to evolve both, in Britain and in its former colonies.

In parliamentary language, the term 'privilege' applies to certain rights and immunities enjoyed by each House of Parliament collectively and by Members of each House individually. The object of parliamentary privilege, as derived from its history, is to safeguard the freedom, the authority and dignity of the Parliament. It is nothing but the sum of the peculiar rights enjoyed by each House collectively and by Members of each House individually without which they could not discharge their functions and which apparently exceed those possessed by other²

bodies or individuals. This makes it an exemption from the ordinary law although being a part of the Law of the Land. It may, however, be pointed out that the Constitution does not give any concrete definition of the term 'privilege'. It was thought by the framers of the Constitution that in order to preserve the dignity and independence of the two Houses of Parliament, the term 'privilege' must remain as undefined. It is, therefore, submitted that it is not possible to give an exhaustive and precise definition of the term 'privilege'.

Privileges are now necessary to help the Members in effectively and fearlessly discharging of their duties and responsibilities and to keep the sanctity and dignity of the Parliament. The term privilege when used for Parliament as an institution, is nothing but the power of Parliament through which the sanctity and dignity of the Parliament can be maintained and when gets associated with the Members of Parliament, are basically the immunities of the Members, so that they can work effectively and fearlessly.

Article 105 and Article 194 of the Constitution of India deal with the privileges of the Parliament and the State Legislatures respectively. The framers of the Constitution, in order to avoid any confusion and conflict in future, made separate provisions for the Parliament and the State Legislature. Clause (1) and (2) of both these Articles guarantees freedom of speech in Parliament and immunity from civil and criminal proceedings to a Member in respect of anything said or done in Parliament and also immunity to any person in respect of the publication by or under the authority of either House of Parliament in respect of any report, vote, papers or proceedings. The framers of the Constitution, for other privileges of Parliament and State Legislature, left them free to define their privileges by law. However, until such privileges were codified by the institution themselves, the framers of the Constitution adopted a transitory mechanism by the virtue of which the privileges of the British Parliament were extended to the Indian Parliament and the State Legislature.

² <https://blog.ipleaders.in/parliamentary-privileges-india/amp/>

➤ Parliamentary Privileges- Canadian Perspective

Privilege is that which sets hon. members apart from other citizens giving them rights which the public do not possess... In my view, parliamentary privilege does not go much beyond the right of free speech in the House of Commons and the right of a member to discharge his duties in the House as a member of the House of Commons.³

Speaker Lucien Lamoureux (Debates, April 29, 1971, p.5338)

The classic definition of parliamentary privilege is found in **Erskine May's**

Treatise On The Law, Privileges, Proceedings And Usage Of Parliament:

Parliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively... 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. Thus privilege, though part of the law of the land, is to a certain extent an exemption from the general law. These "peculiar rights" can be divided into two categories: those extended to Members individually, and those extended to the House collectively. Each grouping can be broken down into specific categories. For example, the rights and immunities accorded to Members individually are generally categorized under the following headings:

- freedom of speech; f
- freedom from arrest in civil actions; f
- exemption from jury duty; e
- exemption from attendance as a witness. E

The rights and powers of the House as a collectively may be categorized as follows:

³ *House of Commons-Procedure and Practice*", Edited by Robert Marleau and Camille Montpetit- 2000 Edn

the power to discipline, that is, the right to punish (by incarceration) persons guilty of breaches of privilege or contempt's, and the power to expel Members guilty of disgraceful conduct;

- t
the regulation of its own internal affairs;
- t
the authority to maintain the attendance and service of its Members;
- t
the right to institute inquiries and to call witnesses and demand papers;
- t
the right to administer oaths to witnesses;
- t
the right to publish papers containing defamatory material.

These two groupings represent all the privileges extended to Members of Parliament and the House of Commons collectively. Each of these privileges will be examined in greater detail and illustrated with relevant cases later in the chapters.⁴

The House has the authority to invoke privilege where its ability has been obstructed in the execution of its functions or where Members have been obstructed in the performance of their duties. It is only within this context that privilege can be considered an exemption from the general law. Members are not outside or above the law which governs all citizens of Canada. The privileges of the Commons are designed to safeguard the rights of each and every elector. For example, the privilege of freedom of speech is secured to Members not for their

personal benefit, but to enable them to discharge their functions of representing their constituents without fear of civil or criminal prosecution for what might be said in the House and committees. When a constituency has returned a candidate, it is the electors' right that this chosen representative should be protected from any kind of improper pressure, and particularly from crude violence.

Privilege essentially belongs to the House as a whole; individual Members can only claim privilege insofar as any denial of their rights, or threat made to them, would impede the functioning of the House. In addition, individual Members cannot claim privilege or immunity on matters that are unrelated to their functions in the House.

⁴ Constitution of India, 1950, Article 105 & Article 194
Government of India Act, 1919, § 27(2).²⁹ Government
of India Act, 1919, § 44.

Any conduct which offends the authority or dignity of the House, even though no breach of any specific privilege may have been committed, is referred to as a contempt of the House. Contempt may be an act or an omission; it does not have to actually obstruct or impede the House or a Member, it merely has to have the tendency to produce such results.

What Parliament has considered as “absolutely necessary” privileges has varied over the centuries. Nevertheless, certain basic principles relating to privilege have become established. Neither House individually can extend its privileges, though either House can, formally by resolution, decide not to claim or apply privileges it has hitherto claimed. No one House of Parliament has a right to claim for itself new privileges; new privileges can only be created or old privileges extended by Act of Parliament. Either House can apply its rights to new circumstances, thereby in some cases creating new instances of contempt. And finally, each House can individually adjudicate and punish breaches of its privileges.

➤ **Pre And Post Parliamentary Constitution Privileges In India**

The Government of India Act, 1919 and the Government of India Act, 1935, as already said, had some limited provisions that laid the foundation of Parliamentary Privileges in India. Hence, it cannot be said that prior to coming into force of the Constitution, the concept of privileges was unknown to India. However, a short Code of Parliamentary Privileges, for the first time, came into existence with the Constitution of India.

Prior to the Government of India Act, 1919, there was no statutory recognition of the privileges. It was surprising that being the first legislature in India under direct control of the British, the Indian Council Act, 1861 did not confer any privilege, power or immunity on the Houses of Indian Legislatures. After the coming of the

Government of India Act, 1919, for the first time, freedom of speech, although as qualified privilege, was conferred to the Indian Legislatures. The Act made it clear that there shall be freedom of speech in both the Chambers of Indian Legislatures. These rules were made by the Governor General with the sanction of the Secretary of State and the Indian Legislatures had no power to repeal or alter them. Thus, it is evident that the privilege of freedom of speech, as granted by the Government of India Act, 1919 was ultimately subject to the pleasure of the Governor General and Secretary of the State.

Apart from granting the privilege of freedom of speech, the Government of India Act, 1919 also conferred immunity to the Members of the Indian Legislature. The immunity, as conferred by the Act of 1919, did not protect such persons who published under the authority of House of Legislature, any report, paper, vote or proceedings.

The Government of India Act, 1935 undoubtedly made substantial improvements upon State of Affairs that existed before, in respect of the privilege, power and immunity by making certain provisions in the Act. The relevant provisions, in respect of privileges of the Federal and Provincial Legislatures, were contained in Section 28 and Section 71 respectively. Moreover, it also specified that no person shall be so liable in respect of publication by or under the authority of either House of Legislature of any report, paper, vote or proceedings.

Government of India Act, 1935 clearly mentioned that the Legislature, as an institution, has the power to remove or exclude persons who infringed the rules or⁵ standing orders or behaved in a disorderly manner. Apart from this, as it was clearly intended by the Government of India Act, 1935, the Indian Legislature does not have any punitive or disciplinary power or the status of a Court. Section 28(3) and Section 71(3) of the Government of India Act, 1935 expressly denied to those legislatures the penal jurisdiction of the House of Commons and Section 28(4) and Section 71(4) of the Government of India Act, 1935 obliged the said legislature to approach a Court for punishing persons who refused to give evidence or to produce documents before its Committee. The rules, thus, made by the Governor General were to prevail over rules made by the House.

But, the position was still very unsatisfactory and it was almost universally acknowledged that rights and privileges of the Members and Legislatures were very limited. A memorandum was submitted by the President of Central Legislative Assembly, Sir Abdul Rahim, to the Reform Commission of Government of India in 1938 for necessary amendment of Section 28 and Section

71 of the Government of India Act, 1935 pointing out that the Central and Provincial Legislatures in India be given the same privileges, powers and immunities as were enjoyed by the Legislature in the Dominion and Colonies. It was considered that unless effective measures were provided by which Member

⁵ Government of India Act, 1919, § 24(7)

⁵ Government of India Act, 1935, § 28(1)

⁵ *Id*

⁵ Government of India Act, 1935, § 28(3).

⁵ P.S. PACHAURI, LAW OF PARLIAMENTARY PRIVILEGES IN U.K AND INDIA 308

could be assured of being able to carry on their deliberations in the Chamber without interference and molestation and by which dignity of the legislature was duly protected from outside attacks, it would not be expected to function to the best advantage.

The ineffectiveness and inadequacy to uphold the dignity and the right and privileges of the legislatures in India made the policy makers to rethink on the provisions of the Government of India Act, 1935. The Government of India Act, 1935 failed to safeguard rights and privileges of Members and officers, who felt entirely helpless against unfair and malicious attacks of unscrupulous outsiders and newspapers. This chaotic position was altered by the Independence Act, 1947 which made some significant changes in provisions and powers of the Government of India Act, 1935. The Governor General of India, in exercise of powers conferred on him by clause (i)(c) of Section 9 of the Independence Act of 1947 passed orders to amend the Government of India Act, 1935.

The Governor General, by virtue of one of his orders, deleted clause (3) and (4) of the Section 28 of Government of India Act, 1935 which had placed fetters on the law making powers of the Central Legislature on the subject of its privileges. The intention of the Governor General was to equate the immunities of the Members of the House of the Indian Legislature with those of Members of House of Commons. However, Section 71 remained un-amended and its status quo, as it existed under Government of India Act, 1935 was maintained.

The Draft Constitution also took care of the fact that the Members of the Parliament need to work effectively and fearlessly. However, it adopted a transitory mechanism which suggested that until such privileges are not defined by the Parliament, the privileges and immunities of Members of House of Commons of United Kingdom at the commencement of the Constitution shall be enjoyed by the Members of Indian Parliament. The best part of the Draft Constitution was that it had separate similar provisions of State Legislature and its Members under Article 169.

The most important of the privileges, namely, freedom of speech in Parliament and immunity to Members from any proceeding in any Court in respect of anything said or any note given by them are specially propounded in Article 105 of the

Constitution of India. This article provides immunity to a person from any proceeding in any Court in respect of the publication by or under the authority of either house of Parliament of any report, paper, votes or proceeding. The Courts are

further prohibited to inquire into the proceeding of Parliament by virtue of Article 122 of the Constitution of India.

As far as other privileges were concerned, a transitory mechanism was adopted by the framers of the Constitution. Article 105(3) of the Constitution, as originally enacted, provided that in other respect, the powers, privileges and communities of Parliament, its committees and Members, until defined by Parliament by law, shall be the same as those of House of Commons of the United Kingdom as on coming into force of the Constitution on 26th January, 1950. The expectation of the Constitution makers was that the Indian Legislatures, in near future, will codify their privileges, which did not happen. This clause was however amended in 1978 to provide that in respect of privileges other than those specified in the

Constitution, the powers, privileges and immunities of each House of Parliament and its Members 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, its Members and committees immediately before the coming into force of Section 15 of the Constitution (44th Amendment) Act, 1978 (with effect from 20th June, 1978). This amendment in fact has made only verbal changes by omitting all references to the British House of Commons, but the substance remains the same.

➤ **Historical Perspective Of Privileges In Canada**

PRIVILEGE IN THE PRE-CONFEDERATION BRITISH NORTH AMERICAN COLONIES

From the establishment in 1758 of the first legislative assembly in Nova Scotia, the common law accorded the necessary powers to the legislature and its Members to perform their legislative work. "Members had freedom of speech in debate and the right of regulating and ordering their proceedings, and were protected from being arrested in connection with civil cases, because the legislature had first call on their services and attendance." As to the power of an Assembly in the colonies to punish and more especially imprison for contempt, the situation was not at all clear. In effect, the rights enjoyed by the Assemblies in the pre-Confederation period were quite limited. However, as early as 1758, the House of Assembly of Nova Scotia had an individual arrested and briefly confined because of threats made against a Member of the Assembly.

In Upper and Lower Canada, the Constitutional Act, 1791, adopted by the British Parliament, was silent on the privileges of the Legislatures, although by 1801 the

Speaker of the Legislative Assembly in Upper Canada claimed “by the name of the Assembly, the freedom of speech and generally all the like privileges and liberties as are enjoyed by the Commons of Great Britain our Mother Country”. Although it had no statutory authority, the Assembly of Upper Canada proceeded to fight for and assert many of the same privileges, such as freedom from arrest while sitting and freedom from jury duty, claimed by the British Commons. The Assembly also claimed the power to send for and question witnesses and to punish any individual who refused to appear or answer questions, using its power of imprisonment to ensure obedience of its orders. Although challenged on occasion, the Assembly was successful in enforcing its privileges, “which though not recognized de jure, were at least recognized de facto”. In the period prior to responsible government,⁶

the Assembly in Upper Canada guarded its reputation by punishing libels against it in the newspapers and also fought for the right to initiate money bills, that is, bills for appropriations and taxation. In general, the Assembly of Upper Canada was satisfied that it could discharge its functions with the privileges it had.

In the same period, the Assembly of Lower Canada also asserted both individual and corporate privileges freedom from arrest and freedom from the obligation to appear in court with respect to civil suits brought against Members, and the right of the Assembly to punish for contempt, no matter the offender. The Assembly was not afraid to put forward its claims of privilege against the Crown. In 1820, it blocked the conduct of business at the opening of a new Parliament because of a dispute over the return of election writs and again in 1835 over comments made by the Governor about the privileges of the Assembly.

With the Union Act, 1840 which created the Province of Canada out of Upper and Lower Canada, and especially following the achievement of responsible government, issues of privilege were less frequent or serious.

As had been the case in the old colonial assemblies, the power to commit or imprison for contempt claimed by the Assembly of the Province of Canada remained an issue. In 1842, it was held “that colonial legislatures had no power to

⁶The British legislation followed the famous *Stockdale v. Hansard case of 1837*. The Act of 1840 provided that the publication of reports, papers, votes or proceedings of either House of Parliament by order was essential to the functions and duties of Parliament and thus privileged. The same provisions were adopted in Canada in 1868 as *An Act to define the privileges, immunities and powers of the Senate and House of Commons, and to give summary protection to persons employed in the publication of Parliamentary Papers (S.C. 1868, c. 23)*. This Act is now sections 7, 8 and 9 of the Parliament of Canada Act (R.S.C., 1985, c. P-1) and corresponds exactly to sections 1, 2 and 3 of the Parliamentary Papers Act, 1840.

⁶ Maingot, 2nd ed., p. 3. See also p. 198.

⁶ O'Brien, p.109.

commit for contempt outside the assembly, and in 1866 it was held that they had no power to commit for contempt even when committed in the assembly.”

➤ **Role Of Canadian Judiciary With Respect To Privilege Challenged In The Court**

An examination of privilege in the Canadian context shows that the constitutionally guaranteed privileges of the House have rarely, if ever, been seriously challenged. Indeed, there have been only two significant court actions; one relating to freedom of speech in the House of Commons and the other concerned with the right of a provincial legislature to control its proceedings.

The first matter, dealing with freedom of speech, arose in a judicial setting, rather than in the House of Commons itself. In the case of the Roman Corporation Limited versus Hudson's Bay Oil and Gas in 1971, an action was brought against the Prime Minister and the Minister of Energy, Mines and Resources for announcements made in the House of Commons. In its ruling, the Ontario Supreme Court disavowed any jurisdiction over statements made in Parliament based on Article 9 of the English Bill of Rights of 1689. However, Speakers have always urged Members not to abuse their privilege in light of the damage that can result through the wide dissemination of their remarks through the official printed reports of the House and the television broadcasts of House proceedings.

The second matter involved the right of the House of Assembly in the province of Nova Scotia, in light of the Canadian Charter of Rights and Freedoms, to exclude strangers from its proceedings. The case involved a claim by the Canadian Broadcasting Corporation (CBC) that its reporters had a constitutional right to film the proceedings of the Nova Scotia House of Assembly with their own cameras. CBC applied to the Nova Scotia Supreme Court for an order allowing it to film the proceedings based on Section 2(b) of the Charter which guarantees freedom of expression, including freedom of the press. The Trial Division and the Court of Appeal both ruled in favour of the CBC and the Speaker of the House of Assembly appealed to the Supreme Court of Canada. The Supreme Court allowed the appeal and overturned the decisions of the lower courts, upholding the absolute authority of the Houses of Parliament and of the legislative assemblies to control their proceedings and reasserting the independence of the different branches of government.

➤ Codification Of Parliamentary Privileges In Indian Constitution

The powers, privileges and immunities of either House of the Indian Parliament and of its Members and committees are laid down in Article 105 of the Constitution. Article 194 deals with the powers, privileges and immunities of the State Legislatures, their Members and their committees. The language of Article 105 is "mutatis mutandis" the same as that of Article 194 except that for the ⁷

expression "Parliament" in Article 105 the expression "legislature of a State" is used in Article 194. Hence, a discussion on Article 105 would be relevant to Article 194 also.

Article 105(1) provides that subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of Parliament, there shall be freedom of speech in Parliament.

Article 105(2) contains two parts. Part one says 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. Part two provides that no person shall be liable in respect of the publication by or under the authority of either House of Parliament or any report, paper, vote or proceedings.

Article 105(3) again contains two parts. Part one says that in other respects the powers, privileges and immunities of each House of Parliament, and of the Members and the committees shall be such as may from time to time be defined by Parliament by law. Part two says that until so defined, the powers and privileges 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 the Constitution. Accordingly whenever a question arises with regard to the availability of a privilege, it becomes necessary to ascertain the powers, privileges and immunities of the House of Commons as on the 26-1-1950.

In India, some legislative privileges are expressly mentioned in the Constitution while the others are recognized in the Rules of Procedure and Conduct of Business in Lok Sabha framed under its rule-making power.

⁷ The case was known as *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)* (it is also referred to as *Donahoe v. Canadian Broadcasting Corporation*) and the Speakers of the House of Commons, the Senate and the provincial legislatures were interveners.

➤ Freedom Of Speech

For the effective functioning of parliamentary democracy, the freedom of speech in Parliament is guaranteed. This is to enable the Members to express themselves freely in the House without any fear or favour. In England, this freedom was established in the 17th century itself. This was fortified by the Bill of Rights in 1688.4 In India, the freedom of speech in Parliament is safeguarded by Article 105(1) and (2).

In *Raja Ram Pal v/s Hon'ble Speaker, Lok Sabha*

The Apex Court explained that the right to vote and be represented, though integral to our democratic process, was not absolute and was subject to certain limitations.

A five-Judge Bench of Guwahati High Court in *Yitachu v/s Union of India* observed that:-

there is nothing like an unfettered right to participate in the legislative process. Such a right is subject to the regulations made under Art 208 or the Tenth Schedule by the Legislature, as a collective body. We do not see logically any objection for the Legislature to stipulate that the freedom of speech/right to vote of a member should be kept in abeyance in a particular situation without terminating the membership of such a member.

Also in *P.V.Narshima Rao v/s State (JMM Bribery case)*,

The majority of the Apex Court explained that the expression "in respect of" in Article 105(2) must be given a wider meaning so as to comprehend an act having a nexus or connection with the speech made or a vote given by a member in Parliament or any Committee thereof. So interpreted it would include within its ambit, acceptance of bribe by a Member in order to make a speech or to cast his vote in Parliament or any Committee thereof in a particular manner. Therefore, the bribe taker MPs, who had voted in Parliament against no-confidence motion were held entitled to the protection of Article 105(2) and were held not answerable in a court of law for alleged conspiracy and agreement.

• DISCIPLINARY POWERS OVER MEMBERS

A House of Parliament has power to enforce discipline, to punish its members for their offending conduct in the House, or to expel a member who conducts himself in a manner unfit for membership or for unbecoming behaviour whether inside or outside the House.

- **FREEDOM FROM JURY SERVICE**

Members of Parliament are exempted from jury service. Members may decline to give evidence and appear as a witness in a court of law when Parliament is 'in session. These privileges are founded on the paramount right of the House to the⁸ attendance and service of its members.

- **PARLIAMENTARY PRIVILEGES IN CANADA**

The privileges of the House can be examined from two vantage points: the rights and immunities of its individual Members and the rights of the House in its collective capacity. Within this framework, the individual Member's rights are subordinate to those of the House as a whole in order to protect the collectivist against any abuses by individual Members. For instance, a Member's individual privileges may be considered suspended if the House orders that Member to attend in his or her place and answer questions demanded by the House. It is extremely rare, however, that the rights of the House collectively will be used to override those of an individual. Some of these immunities are applicable to officials of the House and to individuals summoned by the House on official business.

In addition, both the House in its collective capacity and Members individually have the responsibility to protect from abuse their rights and immunities, particularly freedom of speech. Members should avoid any arrangement which might limit their independence as Members: they should not raise trivial matters as matters of privilege or contempt; and they should not use the privilege of freedom of speech to be unfairly critical of others in debate. The House should exercise its powers with regard to privilege and contempt sparingly and ensure that when exercising its power to punish for contempt, the action it orders is appropriate to the offence.

The rights, privileges and immunities of individual Members of the House are finite, that is to say, they can be enumerated but not extended except by statute or, in some cases, by constitutional amendment, and can be examined by the courts. Moreover, privilege does not exist "at large" but applies only in context, which usually means within the confines of the parliamentary precinct and a "proceeding in Parliament". With the role of the courts to uphold the Canadian Charter of Rights and Freedoms as well as the Canadian Bill of Rights, Members must avoid creating unnecessary conflicts with private rights and thereby having issues of parliamentary privilege brought before the courts.

⁸ Hardwari lal v/s Election Commission of India, ILR (1977) 2 P & H 269
The Sinha Case, Lok Sabha (1952)

➤ **POWER TO PUNISH FOR CONTEMPT IN INDIA**

A House has power to punish a person, whether its member or outsider, for its 'contempt or 'breach of privilege'. A House can impose the punishment of admonition, reprimand, suspension from the service of the House for the session, fine for contempt is truly described as the 'keystone of parliamentary privilege' for it is used by the House to protect its privileges, punish their violation, and vindicate its authority and dignity

The grounds on which a person can be held guilty of contempt of the House are vague, uncertain and indefinite as these have not been defined anywhere. The scope of the phrases 'contempt of the House' and 'breach of privilege' is very broad and covers a variety of situations when the House can take action. Generally speaking, a case of contempt of House arises when any act or omission obstructs or impedes it in the performance of its functions, or which obstructs or impedes any member or officer of the House in the discharge of his duties, or which has a tendency, directly or indirectly, to produce such results.

➤ **PRIVILEGE V/S CONTEMPT IN CANADA**

Any disregard of or attack on the rights, powers and immunities of the House and its Members, either by an outside person or body, or by a Member of the House, is referred to as a "breach of privilege" and is punishable by the House. There are, however, other affronts against the dignity and authority of Parliament which may not fall within one of the specifically defined privileges. Thus, the House also claims the right to punish, as a contempt, any action which, though not a breach of a specific privilege, tends to obstruct or impede the House in the performance of its functions; obstructs or impedes any Member or Officer of the House in the discharge of their duties; or is an offence against the authority or dignity of the House, such as disobedience of its legitimate commands or libels upon itself, its members or its officers. "The rationale of the power to punish contempt whether contempt of court or contempt of the Houses, is that the courts and the two Houses should be able to protect themselves from acts which directly or indirectly impede them in the performance of their functions." In that sense, all breaches of privilege are contempt's of the House, but not all contempt's are necessarily breaches of privilege.

Contempt's, as opposed to "privileges", cannot be enumerated or categorized. As speaker Sauvé explained in a 1980 ruling, "while our privileges are defined, contempt of the House has no limits. When new ways are found to interfere with our proceedings, so too will the House, in appropriate cases, be able to find that a contempt of the House has occurred."

Just as it is not possible to categorize or to delineate what may fall under the definition of contempt, it is not even possible to categorize the “severity” of contempt. Contempt may vary greatly in their gravity; matters ranging from minor breaches of decorum to grave attacks against the authority of Parliament may be considered as contempt.

By far, most of the cases of privilege in the Canadian House relate to matters of contempt challenging the perceived authority and dignity of Parliament and its Members. Other cases have involved charges made between Members or media allegations concerning Members. The premature disclosure of committee reports and proceedings has frequently been raised as a matter of privilege. However, in those instances where no specific individual has been identified, the matter has not been pursued even though it might appear to involve contempt.

The reluctance to invoke the House’s authority to reprimand, admonish or imprison anyone found to have trampled its dignity or authority and that of its Members appears to have become a near constant feature of the Canadian approach to privilege. Though the power of the House to imprison remains, it is difficult to foresee circumstances arising that would oblige the House to invoke it. Members have proven themselves to be fairly thick-skinned when it comes to criticism, even when it appears hard and unfair. They seem willing to endure such treatment from the press and other media rather than raise a potential conflict between the authority of the House and the freedom of the press. There is, however, no doubt that the Canadian House of Commons remains capable of protecting itself from senseless abuse should the occasion ever arise.

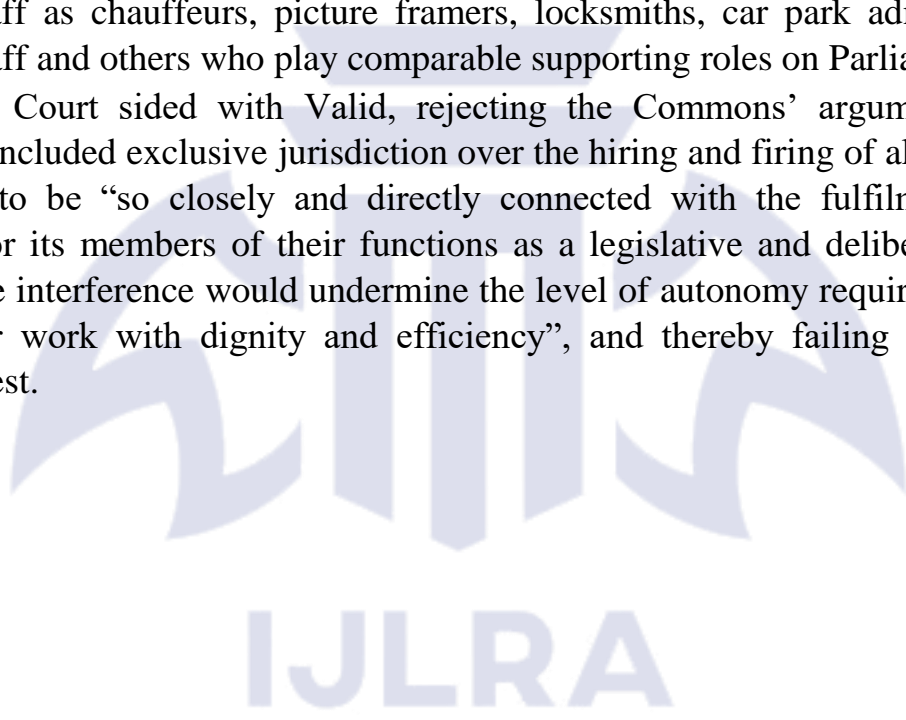
In only a very few cases in Canadian practice has the House, or a procedure committee report, recommended a punishment. In the 1987 Parry case, the Committee also did not recommend punishment and the Member’s apology to the House put an end to the matter.

The two Canadian decisions, *NB Broadcasting and Void* were, at least in retrospect, relatively easy fact situations. Although, as outlined above, the Court in *NB Broadcasting* found in favour of the parliamentary privilege argument, the infringement of the right to freedom of expression did not seriously prejudice any⁹

⁹ *Journals*, October 22, 1975, pp. 791-2; *Debates*, December 9, 1997, p. 2945; November 26, 1998, p. 10467

individuals, and concerned one of the most sacrosanct privileges: the right to control over the Chamber during proceedings.

Valid concerned the jurisdiction of the Canadian Human Rights Commission to investigate allegations of discrimination and wrongful dismissal brought by the former chauffeur of the Speaker of the House of Commons. Valid argued that the Speaker's invocation of privilege with respect to his dismissal amounted to an overreach, if not a trivialization of the true role and function of "such lofty doctrine", and that even if privilege covered some employees whose duties were closely tied to the legislative process, the Speaker went too far "in attempting to throw the mantle of this ancient doctrine over the dealings of the House with such support staff as chauffeurs, picture framers, locksmiths, car park administrators, catering staff and others who play comparable supporting roles on Parliament Hill." The Court sided with Valid, rejecting the Commons' argument that its privileges included exclusive jurisdiction over the hiring and firing of all employees as failing to be "so closely and directly connected with the fulfilment by the assembly or its members of their functions as a legislative and deliberative body that outside interference would undermine the level of autonomy required to enable to do their work with dignity and efficiency", and thereby failing to meet the necessity test.



Conclusion

Parliament perform important functions as democratic Institution which broadly fit into three main areas; representation, legislation and overseeing of executive government. To achieve this objective and keep the executive accountable and transparent, parliament possesses certain privileges, power and immunities. Indian parliament is the Gangotri of our democracy. It represents the will and the aspirations of one billion plus people and is the link between the people and the government. If Gangotri gets polluted, neither Ganga nor any of its tributaries can stay unpolluted. Parliament, like other organs of the government is not sovereign and owes its origin and authority to the Constitution. Parliamentarians must maintain highest standards of democracy. Parliament functions through debate, discussion and not through disruption. There are certain privileges which are enjoyed by each house of the legislature collectively and by the members thereof individually. These privileges have been given to the legislature and its members with the object to enable them to discharge their duties as representative of the people independently without obstruction with dignity.

