
PARLIAMENTARY PRIVILEGE AND HATE SPEECH

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ABSTRACT

This paper explores the extent of Parliamentary Privileges granted under Article 105 (1) of the Indian Constitution and whether it grants a privilege against instances of Hate Speech inside the Parliament. The constitutional transplantation of Parliamentary Privileges from British Jurisprudence leaves the Jurisprudence in India unharmonized with its own Constitutional Scenario; we delve into how the Privileges in India need to be refined to suit the Indian Political and Constitutional Landscape. The analysis in this paper would mainly depend upon the implications drawn from the case of *Sita Soren vs Union of India*, especially the Necessity Test and the slew of cases that dealt with Freedom of Speech and Vote inside Parliament, to examine whether the current Parliamentary Rules and Procedure sufficiently address Hate Speech inside the Parliament and whether such speech is amenable to Judicial Review. The paper also theoretically explores the themes of Constitutional Supremacy and Parliamentary Sovereignty to provide context for the discussion on whether the veil of Privilege can be pierced in certain instances. Ultimately, this paper seeks to identify gaps in the current discourse on Parliamentary Privilege and provide a more constitutionally anchored understanding of Parliamentary Privileges.

INTRODUCTION

In 2023, an Elected Member of Parliament from South Delhi (Lok Sabha Constituency) used derogatory slurs on the floor of the Parliament against a fellow MP, an elected representative from Amroha in Uttar Pradesh.¹ Various Political Leaders have demanded the Expulsion of the MP and his Arrest.² The Members of Parliament have urged Speaker Om Birla to take serious action against the delinquent MP³. Since then, the Party's Deputy Leader has apologised to the House on behalf of the delinquent MP and ensured the smooth functioning of the proceedings. The Speaker of the House has reportedly taken “a serious view of the use of unparliamentary words by a member and has issued a warning that if there is any recurrence of such behaviour in future, strict action will be taken”⁴. A Parliamentary Privileges Committee inquiry was initiated against the miscreant MP, the results of which are still unknown⁵.

This incident brings forth the contested topic of this paper, Boundaries of Free Speech on the floor of the Parliament. Flowing from Article 105 of the Indian Constitution⁶. It is a privilege granted to conduct Parliamentary Business uninhibited. Whether such Privilege extends to protecting Hate Speech inside the Parliament is a critical Jurisprudential Question raised by this paper. This paper will thus endeavour to map the evolution of Indian Parliamentary Privileges, their scope, and their interaction with the Judicial Review in different cases, as well as identify the potential for reform within the existing framework governing parliamentary privileges.

EVOLUTION OF PARLIAMENTARY PRIVILEGES

Parliamentary Privileges are defined by Sir Erskine May as 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 cannot discharge their functions, and

¹ Opinion Piece: *MP Bidhuri's hateful speech stains historic session in new House. The speaker must speak*, THE INDIAN EXPRESS, September 22, 2023.

² Smriti Kak Ramachandran, *Outrage as BJP's South Delhi MP hurls religious slurs in Lok Sabha*, THE HINDUSTAN TIMES, September 23, 2023.

³ PTI, *Hate speech on LS floor, may consider quitting House if action not taken against Bidhuri: Danish Ali*, THE ECONOMIC TIMES, September 22, 2023.

⁴ NDTV News Desk, *BJP Leader Gets Notice From Party For Abusing Muslim MP In Parliament*, NDTV, September 22, 2023.

⁵ The Hindu Bureau's *Privileges Committee will hear complaints against BJP MP Ramesh Bidhuri*, THE HINDU, SEPTEMBER 29, 2023.

⁶ INDIA CONST. Art. 105, Cl. 1.

which exceed those possessed by other bodies and individuals”.⁷ They were first introduced in India through the Government of India Act of 1919, when Freedom of Speech was included in the list of Limited Privileges, with the words, “No member was to be made liable in any court because of his speech or vote in the House.”⁸ The provisions related to Parliamentary Privileges in the original Constitution of India, 1950, were directly borrowed from the practices of the House of Commons. The original text of Article 105(3)⁹ Read as:

*“(3) In other respects, the powers, privileges and immunities of each House of Parliament, and 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.”*

The reference to the House of Commons in this section provoked intense debate regarding the nation's sovereignty, but was quelled by the argument that, being a nascent nation, the early House of Parliament could not crystallise its procedures; thus, it was wise to follow those of Britain owing to its authority and familiarity.¹⁰ However, after 75 years of Independence, the Indian Parliament has done little to formulate its parliamentary procedures. So far, the only formulation done entirely by the Indian Parliament is “Rules of Procedure and Conduct of Business in Lok Sabha.”¹¹ Dealing mainly with the Procedure inside Parliament and the Privilege of Arrest and Detention of the Members of Parliament.

The court is often deferential when referring to matters of Parliamentary Privilege. The problem with such a reading is that the Parliament of India and the House of Commons in Britain enjoy different positions of power in their countries’ constitutional schemes. The British House of Commons enjoys sovereign powers based on its Unwritten Constitution. In contrast, with its Written Constitution, India enjoys Constitutional Supremacy¹² and a Parliament with limited powers. As such, the privileges enjoyed by the members are also limited to the extent required to protect constitutional supremacy, which includes all components of the basic

⁷ 1 Sir Thomas Erskine May, May, T. E. (1873). A Treatise on the Law, Privileges, Proceedings and Usage of Parliament. 7th ed., (1873).

⁸ Government of India Act 1935, 9 & 10 Geo. 5. c. 101, Section 72 (D) (U.K.).

⁹ INDIA CONST. Art. 105, cl. 3, [Original version].

¹⁰ M. V. Pylee, *Free Speech and Parliamentary Privileges in India*, Vol. 35, Pacific Affairs, No. 1 (Spring, 1962), pp. 11-23.

¹¹ Rules of Procedure and Conduct of Business in Lok Sabha, 15 e.d., 2014.

¹² *Kesavananda Bharati Sripadagalvaru v. State of Kerala and Anr*, AIR 1973 SC 1461.

structure of the Constitution.

This fundamental distinction emphasises the urgency of re-evaluating India's inherited notions of Parliamentary Privilege, which, in their uncritical transplantation from the Westminster model, risk undermining the very constitutional values they are meant to protect. The aforementioned episode and utterances of Hate Speech on the floor of Parliament, which went relatively unpunished, highlight the foundational vacuum in constitutional accountability mechanisms.

BORROWINGS FROM FOREIGN JURISDICTIONS

The scope and limits of Parliamentary Privilege vary across Jurisdictions. While India has borrowed from some of these Jurisdictions, some other jurisdictions have a mature understanding of the implications of Parliamentary Privileges. Thus, a comparative lens not only highlights best practices but also aids ongoing debates on whether certain forms of speech or conduct, like hate speech or bribery, can justifiably remain protected under the guise of Parliamentary Privilege.

United Kingdom:

Article 9 of the English Bill of Rights, 1689¹³ It provides freedom of speech, and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place outside Parliament. The primary effect of Article 9 was to protect legislators from legal consequences and enable free and fair discussion on legislative subjects. While it evolved from the United Kingdom, this Article is also frequently adopted into many Parliamentary Democracies and former colonies of Britain, like India and Australia¹⁴.

While discussing Parliamentary Privileges in India, Erskine May has identified three historical phases in the law governing privileges¹⁵. In the first phase, both houses had Absolute Privilege to define and enforce their privileges. This stance was backed by underlying principles of Parliamentary Superiority and the understanding that Lex Parliament (the law of Parliament) operated on a distinct set of principles different from common law principles. It was also crucial

¹³ English Bill of Rights, Art. 9, 1689 (U.K.).

¹⁴ Parliamentary Privilege and The Courts: Question of Justiciability, M. Groves and E. Campbell, Vol. 7 No. 2, Oxford University Commonwealth Law Journal, Winter 2007, pp-175-214.

¹⁵ Ibid.

during this period in English Jurisprudence to establish Parliamentary Sovereignty to protect it from the incursions of the King.

This soon changed in the 19th century with the pivotal case of *Stockdale v. Hansard*¹⁶, where the court began asserting its power to interpret the extent of Parliamentary Privileges. The court held that it could examine whether a claimed privilege existed, establishing the precedent that parliamentary Privilege is not immune from judicial scrutiny. This phase was followed by the third, where Parliament enjoys significant autonomy, flowing from Parliamentary Supremacy, but its privileges are not entirely beyond the reach of judicial review.

This evolution of understanding Parliamentary Privileges is not entirely different from the recent developments in Indian Jurisprudence. The concept of Parliamentary Privileges not being absolute and amenable to Judicial Review is conclusively held in the case of *Keshav Singh v. Speaker, Legislative Assembly, Uttar Pradesh*¹⁷. Thus, British Law has considerable sway in developing Indian Law, owing to the countries' common law cultures and historical ties.

United States of America:

The Constitution of the United States provides for Parliamentary Privileges in its Speech and Debate Clause of Article 1, Section 6¹⁸ which reads, "For any Speech or Debate in either House, Members of Congress shall not be questioned in any other place." This clause provides lawmakers with Absolute Immunity for acts integral to discharging their legislative duties.

The U.S. Supreme Court has adopted a broad approach to interpreting the Privilege to protect any activity essential to the deliberative and communicative processes of Congress. This includes speeches in the House or Senate, voting, introducing legislation, committee work, and even reading classified materials into the record.¹⁹ In *Tenney v. Brandhove*²⁰, the court clarified that Parliamentary Immunity does not mean personal Immunity but extends to legislators' acts in discharging their legislative functions. The court emphasised granting legislators freedom of speech to speak and act without the fear of prosecution while exercising their law-making

¹⁶ [1839] 9 Ad & El.

¹⁷ AIR 1965, ALL 349.

¹⁸ U.S. CONST. Art 1, Section 6.

¹⁹ Yogendra. S, Dr. N. Sathish Gowda, Parliamentary Privileges in India and USA: An Assessment, Volume 3, Issue 1, Intl. Jour. of Legal Research and Studies, January - March 2018.

²⁰ (1951) 341 U.S. 367.

power.

The U.S. Supreme Court has interpreted this protection broadly. In *Kilbourn v. Thompson*²¹, the court held that voting, speech, reports, and all acts essential to legislative deliberation are immune from civil and criminal liability. In *Gravel v. United States*²², this immunity was extended to congressional aides, provided their conduct was “an integral part of the deliberative process.” However, it must be noted that Immunity does not cover acts outside core legislative functions. Press releases, public speeches, and interactions with federal agencies are not protected, and they cannot be used to shield actions that violate criminal laws.

Indian Jurisprudence also heavily borrows from its American counterpart. In the recent case of *Sita Soren v. Union of India*²³, the court borrowed from the *Gravel v. United States* decision in propounding the two-prong Necessity Test²⁴

Australia:

Parliamentary Privileges are codified under **the Parliamentary Privileges Act**,²⁵ clarifying their scope. The Act enshrines the provisions of the Bill of Rights 1688, particularly Article 9,²⁶ into Australian law. Section 16 of the Act²⁷ specifically defines “proceedings in Parliament” and holds that words and actions conducted in the course of parliamentary duties are protected by Absolute Privilege.

Parliamentary Privilege in Australia is divided into Two Components: Absolute and Qualified Privilege. Both ensure proportionality to the Immunity granted to acts performed by the Legislator. Absolute Privilege offers MPs Immunity from legal action for any statements made during parliamentary proceedings, even if those statements are defamatory or made with malicious intent. This Privilege extends to all actions or words spoken during parliamentary business or committee work. However, it does not apply to statements made outside of parliamentary proceedings. Qualified Privilege, in contrast, protects statements made in good faith and without malice. It is more limited than Absolute Privilege and applies when certain

²¹ (1880) 103 U.S. 168.

²² (1972) 408 U.S. 606.

²³ 2024 INSC 161.

²⁴ Sub-Section E, Part 3, Para 85 of the Judgement.

²⁵ Parliamentary Privileges Act 1891 (54 Vict. No. 4(AUS)).

²⁶ Art. 9, Parliamentary Privileges Act (1891).

²⁷ Sec. 9, Parliamentary Privileges Act (1891).

legal conditions are met, such as the relevance of the statement to parliamentary matters and the absence of malicious intent. It does not offer the same comprehensive protection as Absolute Privilege²⁸.

In India, the parliamentary privileges remain uncodified and unenumerated despite various demands throughout the years²⁹. Australian law offers a deeper perspective on dealing with Parliamentary Privileges. The broad and unchecked Immunity for all acts done by the elected representatives on the floor of the Parliament has often invited unnecessary prodding from the Courts. Although the courts usually respect parliamentary sovereignty, codifying privileges will help the Court and the Parliament's elected representatives better understand the nature and scope of the privileges.

UNDERSTANDING OF PARLIAMENTARY PRIVILEGES IN INDIA

Article 105 of the Indian Constitution³⁰ provides for Freedom of Speech in the Parliament. This Article is constructed as a Fundamental and Individual right of each Member of Parliament. The freedom of speech granted to members within the House serves as an essential safeguard that ensures that each member of Parliament can engage in the law-making process without fear of censure. The Article provides that:

“(2) No member of Parliament shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceeding”

This Immunity is accorded against any criminal or civil cases initiated against them for any words spoken or any vote given during the proceedings of the Parliament. This freedom of speech granted to legislators is distinct from the Fundamental Right to Free Speech and Expression in that it is absolute in nature, with the absence of Reasonable Restrictions.

The Right to Freedom of speech is absolute regarding proceedings outside Parliament. However, Parliament has the right to regulate its Internal Proceedings, as outlined in Article

²⁸ Ibid.

²⁹ P.O.C. Proceedings, 18-7-1939, p 28-29.

³⁰ Supra at 6.

118 of the Indian Constitution³¹. Article 122 of the Indian Constitution bars the courts from inquiring into the conduct of business inside the Parliament³². Given such Immunity, the Committee of Privileges³³ formed under the Mandate of Rules of Procedure has repeatedly observed that *"It is against the rules of parliamentary debate and decorum to make defamatory statements or allegations of incriminatory nature against any person... The Privilege of freedom of speech can only be secured if members do not abuse it."*³⁴

Throughout the times, the courts have decided on various cases that dealt with Parliamentary Privileges. The principal point in all such cases is the Extent of Parliamentary Privilege granted to the Members. One of the first such cases is **Tej Kiran Jain v. N. Sanjiva Reddy**³⁵, in which the court held that:

"The article confers immunity, inter alia, in respect of 'anything said... in Parliament'. The word 'anything' is of the widest import and is equivalent to 'everything'. The only limitation arises from the words 'in Parliament', which means during the sitting of Parliament and the course of the business of Parliament. Once it was proved that Parliament was sitting and its business was being transacted, anything said during that business would be immune from proceedings in any court. This Immunity is not only complete but is as it should be... The courts have no say in the matter and should have none."

This case, being one of the first in many, was deferential in its approach to Parliamentary Sovereignty. Following this approach came the case of **P.V. Narasimha vs Union of India**³⁶, wherein MPs from the Jharkhand Mukti Morcha were allegedly bribed to vote in favour of the Congress Government in the 1991 no-confidence motion. The case examined whether MPs could claim Immunity under Article 105³⁷ and whether they qualified as public servants under the Prevention of Corruption Act³⁸. The case concluded that the Legislators had Immunity against the criminality attached to the Act of taking Bribes flowing from Article 105. However, Justice Agarwal, in his dissent, held that while Members of Parliament enjoy Privilege in

³¹ INDIA CONST. Art 118.

³² INDIA CONST. Art 122.

³³ Rule 226, Rules of Procedure and Conduct of Business in Lok Sabha, 15 e.d., 2014.

³⁴ 33 Rpt., COP (adopted on 30.3.1993).

³⁵ AIR 1970 SC 1573.

³⁶ 1988 Cri LJ 2930.

³⁷ INDIA CONST. Art 105 cl. 2.

³⁸ Prevention of Corruption Act, 1988, No. 49 of 1988, India (1988).

respect of their speech and vote under Article 105(2), the critical question is whether acts such as bribery to vote can be construed as part of “legislative business” or internal parliamentary procedures. The phrase “in respect of anything said or any vote given” must be interpreted in *close and proximate connection* with the legitimate functioning of parliamentary proceedings. Conduct tangential or remote, such as a quid pro quo arrangement or bribery, cannot reasonably fall within the scope of internal parliamentary procedures. Such actions, being extraneous to the deliberative functions of Parliament, lie outside the protective ambit of Article 105.

This was affirmed in *Sita Soren vs Union of India*³⁹. In the 2012 Rajya Sabha elections, an MLA was accused of accepting a bribe but was found to have voted according to her party's guidelines. The High Court refused to quash proceedings, citing *P.V. Narasimha Rao* (1998). A five-judge bench referred the case to a seven-judge bench to reconsider the precedent.⁴⁰ The Constitution Bench held that MPs and MLAs are not immune from prosecution under Articles 105(2) and 194(2) of the Constitution for acts of bribery. Overruling the *P.V. Narasimha Rao* decision, the court clarified that parliamentary Privilege is not absolute and is limited to actions that are functionally connected to the collective duties of the legislature. Immunity fosters free deliberation within the House but cannot shield criminal acts like bribery, undermining democratic integrity.

The Court laid down a two-fold test for Immunity: (1) the Act must be related to the collective functions of the House, and (2) there must be a functional relationship between the Act and the duties of the individual Legislator. Receiving a bribe to vote or speak fails this test. Finally, the Court affirmed its jurisdiction to try criminal offences against legislators, independent of Parliament's internal disciplinary powers.

This landmark judgment in *Sita Soren* underscores a crucial constitutional principle: that parliamentary Privilege cannot be a shield for criminal acts unrelated to a legislator's functional duties. It draws a clear line between protected legislative activity and personal misconduct cloaked in legislative Privilege. This principle becomes especially relevant when considering the question of whether the statements made by Bidhuri on the floor of Parliament claim Parliamentary Privilege? Applying the precedent laid down in the *Sita Soren* Case, the statements made by Bidhuri, on the account of Hate Speech that seeks to target not only a

³⁹ Supra at 23.

⁴⁰ The Hindu Bureau, *SC to pronounce judgment in JMM bribery case review*, THE HINDU, March 04, 2024.

particular individual but a minority religion in the same vein, do not satisfy the Necessity test laid down by the Court. The same can also be amenable to the Jurisdiction of the Courts regardless of Internal Proceedings, as Hate Speech is also a criminal offence in India⁴¹.

CONCLUSION

This research has tried to answer the question of whether Parliamentary Privileges cover Hate Speech on the floor of the Parliament under Article 105, which protects Speech and Vote in the Parliament from Prosecution outside the Parliament. In doing so, it has analysed the objective, scope, and limits of parliamentary privileges across different jurisdictions, which, when compared to India, highlight the drawbacks and gaps in Indian lawmakers' understanding of Parliamentary Privilege. While Article 105 provides Absolute Immunity, this cannot be interpreted to mean that there is *carte blanche* to protect against crimes like hate speech, bribery, and property destruction that happen frequently inside Parliament.

This paper has demonstrated that with the judgment of *Sita Soren* and the application of the Necessity Test, the absolute nature of Parliamentary Privileges is eroded significantly. The Parliament must answer this new jurisprudential shift by understanding that the Parliamentary Privileges are qualified in nature and protecting those acts essential to protecting legislative autonomy. Codifying privileges is a step towards safeguarding essential parliamentary functions. Incorporating explicit exceptions for hate speech and other criminal conduct and empowering internal mechanisms of accountability, such as the Privileges Committee, are crucial steps toward aligning parliamentary practice with constitutional ideals and would reduce, if not exclude, unnecessary Judicial Intervention into Internal Parliamentary matters.

We must understand that while privileges are provided to protect parliamentarians from unnecessary litigation, they are not trump cards against impunity. Lawmakers, by being elected representatives of the people, carry with them much more responsibility than an ordinary citizen not to commit a Crime. The present episode inside Parliament highlights that while it is essential to protect the freedom of speech afforded to the legislators, Hate Speech inside the Parliament is intolerable. As such, this paper is a minuscule attempt at finding a comfortable middle ground for Constitutional Supremacy and Parliamentary Sovereignty in India.

⁴¹ Sec. (196). *Bharatiya Nyaya Sanhita*, 2023, No. 45, Acts of Parliament, 2023 (India).