
CODIFICATION OF PARLIAMENTARY PRIVILEGES

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I. Understanding Parliamentary Privilege

Parliamentary privilege, as a concept in democratic governance, refers to a set of immunities, rights, and powers that are granted to the Parliament as an institution and members of parliament to enable them to fulfil their legislative functions effectively and without fear of external interference¹. It provides certain protections to parliamentarians to ensure their independence and freedom of speech. These privileges include freedom of speech and debate, freedom from arrest in civil cases during the session, and the power to control their own proceedings.

Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament, which defines parliamentary privilege as "the sum of the 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 function... the privileges of Parliament are rights which are absolutely necessary for the due execution of its powers. They are enjoyed by individual Members, because the House cannot perform its functions without unimpeded use of the service of its Members, and by each House for the protection of its members and the vindication of its own authority and dignity."²

Parliamentary Privilege in Indian Context

In the Indian context, the definition of parliamentary privilege are derived from various sources, including the Indian Constitution, legislative rules, conventions, and judicial interpretations. Article 105 of the Indian Constitution³ grants certain privileges and immunities to members of parliament. However, the precise extent and limitations of these privileges have

¹ Enid Mona Campbell, *Parliamentary Privilege* (Federation Press, 2003)

² Thomas Erskine May, *Erskine May's treatise on the law, privileges, proceedings and usage of Parliament* (Butterworth, 1964)

³ INDIA CONST. art. 105.

been a subject of interpretation by the courts.

Article 105 of the Indian constitution reads,

105. Powers, privileges, etc., of the Houses of Parliament and of the members and committees thereof.—(1) 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.

(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 proceedings.

(3) In other respects, 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 that House and of its members and committees immediately before the coming into force of section 15 of the Constitution (Forty-fourth Amendment) Act, 1978.]

(4) The provisions of clauses (1), (2) and (3) shall apply in relation to persons who by virtue of this Constitution have the right to speak in, and otherwise to take part in the proceedings of, a House of Parliament or any committee thereof as they apply in relation to members of Parliament.

194. Powers, privileges, etc, of the House of Legislatures and of the members and committees thereof.—*(1) Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of the Legislature, there shall be freedom of speech in the Legislature of every State*

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

(3) In other respects, the powers, privileges and immunities of a House of the Legislature of a State, and of the members and the committees of a House of such Legislature, shall be such as may from time to time be defined by the Legislature by law, and, until so defined, shall be those of that House and of its members and committees immediately before the coming into force of Section 26 of the Constitution forty fourth Amendment Act, 1978

(4) The provisions of clauses (1), (2) and (3) shall apply in relation to persons who by virtue of this Constitution have the right to speak in, and otherwise to take part in the proceedings of a House of the Legislature of a State or any committee thereof as they apply in relation to members of that Legislature

Lok Sabha Rules⁴- Chapter 20. Rule 222 to 233B

1. Consent of Speaker.
2. Notice of the question of privilege.
3. Admissibility of questions of privilege.
4. Mode of raising questions of privilege.
5. Questions of privilege to be considered by the House or Committee.
6. Reference of questions of privilege to Committee by Speaker.
7. Power of Speaker to give directions.

II. Evolution of Parliamentary Privileges in India

The roots of parliamentary privileges in India can be traced back to ancient democratic assemblies/parliaments, such as the "sabhas" and "samitis," where members convened to discuss and decide on various matters. These assemblies provided an early foundation for the principle of freedom of speech and open debate in governance⁵.

⁴ 16 RULES OF PROCEDURE AND CONDUCT OF BUSINESS IN LOK SABHA, 2019 (India)

⁵Bhaskar Anand Saletore, *Ancient Indian Political Thought and Institutions*, (Asia Publishing House, 1963)

The advent of British rule brought forth Britain's form of Parliamentary traditions and concept of Parliamentary privileges to India.

During the British East India Company's era, the *East India Company Act 1772* established the Supreme Court of Calcutta, which upheld British legal traditions and principles⁶. This laid the groundwork for the import of British parliamentary practices.

After the Indian Rebellion of 1857, the British Crown took direct control of India. The *Government of India Act of 1858* granted legislative councils the authority to regulate their procedures and internal matters, reflecting the beginnings of parliamentary autonomy⁷. This act recognised the importance of protecting members' freedom of speech and expression. However, there was still a very restricted approach to granting authority to members of legislative councils. The official aversion to the legislature's privileges was diluted after the indirect election to the legislature was provided by the *Indian Councils Act, 1909*. This was followed by the Montagu-Chelmsford Reforms of 1919 which introduced the *Government of India Act of 1919*. This marked a significant step in representation by expanded legislative councils and explicitly recognising parliamentary privileges. This act granted immunities and privileges to council members, ensuring that they could participate in debates without fear of legal repercussions⁸. The *Government of India Act of 1935* further entrenched the concept of parliamentary privileges. It introduced a federal structure with separate powers for central and provincial legislatures⁹. This act extended privileges to these bodies, including freedom of speech and immunity from legal actions related to statements made during legislative proceedings.

Following India's independence in 1947, the *Constitution of India* was adopted in 1950, establishing the Parliament of India. The Constitution enshrined parliamentary privileges to safeguard the functioning of the legislative process and ensure members' independence.

The primary articles of the Indian Constitution that speak on the privileges of Parliament are Articles 105 and 122, and the corresponding articles for the states are Articles 194 and 212.

⁶East India Company Act, 1772, No. , Acts of Parliament, 1772()

⁷ Chandra, U., 2013. Liberalism and its other: The politics of primitivism in colonial and postcolonial Indian law. *Law & Society Review*, 47(1), pp.135-168.

⁸ Woods, P., 1994. The Montagu-Chelmsford reforms (1919): A re-assessment. *South Asia: Journal of South Asian Studies*, 17(1), .25, 42

⁹ Chandra, U, *supra* note 7

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

The enactment of the *Right to Information Act, 2005* introduced new dynamics to the landscape of parliamentary privileges¹⁰. Balancing the right to information of the citizens with the need to protect sensitive legislative discussions and privacy (with the advent of Right to Privacy in the *K.S.Puttaswamy vs Union Of India, 2017*¹¹) of members has presented legal challenges.

Currently, some of the privileges of Parliament, and its members and committees, are specified in the Constitution, and there are certain statutes and the rules of procedure of the House, others continue to be based on the precedents of the House of Commons.

Rule Nos. 222-228 in Chapter 20 of the Lok Sabha Rule Book and correspondingly Rule 187-203 in Chapter 16 of the Rajya Sabha¹² rulebook governs privilege.

Judicial Precedents in India

Over the years, the courts in India have played a significant role in interpreting and evolving the concept of parliamentary privilege. Judiciary, while a different branch of government has been given the power and authority to intervene even in matters of Parliamentary Privilege if it is against the constitution. This is unlike in United Kingdom and has given a long precedence in this topic to note at length. In the landmark case of *Keshav Singh v. Speaker, Legislative Assembly, Bihar (1965)*¹³, the Supreme Court recognized parliamentary privilege as an essential feature of the Indian parliamentary system. The court held that the power to punish for contempt of the House and the protection of freedom of speech and debate are inherent in the legislative function.

In a much publicised matter involving former Prime Minister, several ministers, Members of Parliament and others a divided Court, in *P.V.Narsimha Rao v. State*¹⁴ has held that the

¹⁰ Chatterjee, A. and Patel, S., 2022. Parliamentary Privileges and the Indian Inhibition: Untangling the Controversy Surrounding their Status Quo as Unactionable Immunities. *International Journal of Parliamentary Studies*, 2(1), 72, 85

¹¹ *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1

¹² Rules of Procedure and Conduct of Business in the Council of States (Rajya Sabha), 2016

¹³ *Keshav Singh v. Speaker, Legislative Assembly, Bihar 1965 AIR 745*

¹⁴ *P.V.Narsimha Rao v. State (1998) 8 SCC (Jour) 1*

privilege of immunity from court proceedings in Article 105 (2) extends even to bribes taken by the Members of Parliament for the purpose of voting in a particular manner in Parliament. The majority (3 judges) did not agree with the minority (2 judges) that the words in respect of in Article 105 (2) mean, arising out of and therefore would not cover conduct antecedent to speech or voting in Parliament. The court was however unanimous that the members of Parliament who gave bribes, or who took bribes but did not participate in the voting could not claim immunity from court proceedings under Article 105 (2). The decision has invoked so much controversy and dissatisfaction that a review petition is pending in the court.

In the case of *Rajendra Singh Rana v. Swami Prasad Maurya (2007)*¹⁵, the Supreme Court of India held that parliamentary privilege is an essential attribute of the Indian parliamentary system, protecting the freedom of speech and debate of members of parliament. The court emphasised that these privileges should be interpreted broadly to ensure the effective functioning of the legislature.

The Supreme court case of *Tej Kiran Jain V. Sanjeeva Reddy*¹⁶ held that “once it is recognised that the parliament was in session and its business being transacted, anything said during the clause of that transaction was completely immune from any proceeding in any court of law”.

In subsequent cases, such as the *Amarinder Singh v. Special Committee (2010)*¹⁷ and *Raja Ram Pal v. Hon'ble Speaker, Lok Sabha (2007)*¹⁸, the courts reaffirmed the importance of parliamentary privilege in upholding the integrity and independence of the legislature. The judiciary emphasised that while parliamentary privilege is crucial, it must be exercised responsibly and within the bounds of the law.

Searchlight case, also *MSM Sharma v Shri Krishna Sinha*¹⁹, is an important landmark case that clarified the legal status of parliamentary privilege in India and established the following:

* The privileges of Parliament are derived from the Constitution, and they are not absolute.

¹⁵ *Rajendra Singh Rana v. Swami Prasad Maurya*, (2007) 4 SCC 270

¹⁶ *Tej Kiran Jain v. N. Sanjiva Reddy*, (1970) 2 SCC 272

¹⁷ *Amarinder Singh v. Special Committee* (2010) 6 SCC 113

¹⁸ *Raja Ram Pal v. Hon'ble Speaker, Lok Sabha*, (2007) 3 SCC 184

¹⁹ *Pandit M.S.M. Sharma vs Shri Sri Krishna Sinha and Ors* 1959 AIR 395

* The privileges of Parliament must be balanced against the fundamental rights of citizens, such as the right to freedom of speech and expression.

* The courts have the power to interpret and enforce the privileges of Parliament, but they cannot create new privileges.

The case arose from an incident in which the editor of a newspaper, Pandit M.S.M. Sharma was charged with contempt of the Bihar Legislative Assembly for publishing a report of a speech delivered by a member of the Assembly. The speaker of the Assembly had asked that the speech be excluded from the published proceedings, but Sharma had published it anyway.

Sharma challenged the charge of contempt, arguing that the right to freedom of speech and expression guaranteed by Article 19(1)(a) of the Constitution protected his right to publish the speech. The Assembly argued that its privileges were superior to the fundamental rights of citizens, and that Sharma had therefore committed contempt.

The Supreme Court upheld Sharma's conviction. The Court held that the privileges of Parliament are derived from the Constitution, but they are not absolute. The Court also held that the privileges of Parliament must be balanced against the fundamental rights of citizens, such as the right to freedom of speech and expression.

The case has also been criticised for giving too much power to Parliament. Some argue that the case allows Parliament to suppress dissent and criticism. Others argue that the case does not go far enough in protecting the fundamental rights of citizens. Despite the criticisms, the Searchlight case remains an important precedent in Indian law.

The Supreme Court of India has also expressed its support for the codification of parliamentary privileges. In the *Keshavananda Bharati* case, the Court held that the privileges of Parliament are not fundamental rights, and that they can be modified or abolished by Parliament. The Court also held that the codification of parliamentary privileges would be desirable. Despite the support of the Supreme Court, the codification of parliamentary privileges has not yet been achieved.

Challenges Faced in the Absence of Codification

Absence of Codification of Parliamentary Privileges has created a very inefficient and anti-

people system which is often abused to the advantage of the members of Parliament.

Lack of clarity and ambiguity:

One of the primary challenges arising from the absence of a codified framework for parliamentary privilege in India is the lack of clarity and ambiguity surrounding the privileges enjoyed by members of parliament²⁰. The privileges have been derived from conventions, precedents, and court judgments, leading to inconsistencies in their interpretation and application.

Without a clear and well-defined codification of privileges, there is a risk of varying interpretations by different courts, which can result in confusion and legal uncertainties. It becomes challenging for both parliamentarians and other stakeholders to understand the extent and limitations of parliamentary privilege.

For instance, the lack of a codified definition of what constitutes "freedom of speech and debate" under article 19(2), can lead to differing interpretations by courts, potentially impacting the exercise of this privilege²¹. The absence of specific guidelines and procedures for exercising parliamentary privilege can create ambiguity in determining when and how these privileges should be invoked. This can lead to instances of abuse or misuse of privilege, undermining the purpose of these protections.

Limited accountability and transparency:

When the Vice President says the powers of the parliament can amend the entirety of the constitution, thus deny the existence of the Basic Structure, the same executive could later extend the privilege of Members of Parliament, thus granting the legislature, after an already strong executive more powers and unbalancing the precarious balance between the pillars of the democracy, which would weaken the judiciary of India²².

²⁰ Raj, H., 1980. Evolution of Parliamentary Privileges in India. *The Indian Journal of Political Science*, 41(2), 295-308.

²¹ Tejaswini Kaushal, A Bird's Eye View of the Right to Freedom of Speech and Expression in India, MANUPATRA ARTICLES (Sept. 1, 2023, 11:36 PM), <https://articles.manupatra.com>.

²² Shreeparna Chakrabarty, Vice-President Jagdeep Dhankar says court can't dilute Parliament's sovereignty, THE HINDU, (Sept. 1, 2023, 11:39 PM) <https://www.thehindu.com/news/national/dhankar-says-sovereignty-of-parliament-cannot-be-compromised-rakes-up-njac-bill-again/article66364347.ece>

Without a comprehensive code that provides clear guidelines and mechanisms for enforcing and adjudicating privilege claims, it becomes difficult to hold members of parliament accountable for their actions or statements when they use parliamentary privilege as absolute privilege.

In the absence of codification, determining the limits of privilege becomes subjective and can vary from case to case. This can make it challenging to scrutinise the actions of parliamentarians and assess whether they have exceeded the bounds of their privileges. As a result, the accountability of members of Parliament to the people may be compromised.

The lack of a well-defined framework for parliamentary privilege can also impact public perception and trust in the legislative process. When privileges are exercised without clear guidelines or accountability mechanisms, it can give rise to perceptions of favouritism, unfairness, or abuse of power. This can erode public confidence in the functioning of the legislature and the integrity of its members²³.

To illustrate this challenge, consider the case of a member of parliament making defamatory statements about an individual outside the legislative chamber. The absence of a codified framework makes it difficult to determine whether such statements are protected under parliamentary privilege or if they should be subject to legal consequences. This ambiguity can undermine accountability, which would give unbridled power to the members of Parliament to use and abuse the law so as to suit their needs and would be considered even more of a class apart than they are currently seen.

III. Survey and Analysis of Results

This study delves into the seeks to unravel the opinions and insights of academicians, researchers, and practitioners in terms of codification of Parliamentary Privileges. The crux of this exploration revolves around the question of whether there should be a formalised code to govern the privileges enjoyed by parliamentarians in India – a realm that remains largely uncoded to date.

The delicate balance between the legislature, executive, and judiciary forms the backdrop

²³ Tyler, T.R., 1997. Citizen discontent with legal procedures: A social science perspective on civil procedure reform. *Am. J. Comp. L.*, 45, p.871.

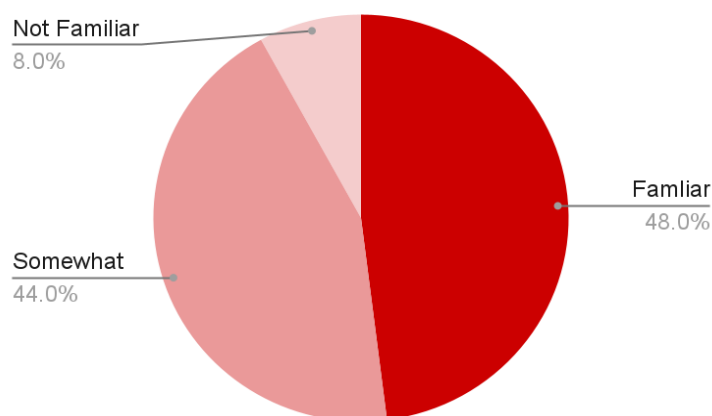
against which parliamentary privileges find their place. These privileges, while essential for the safeguarding of parliamentary autonomy, can also be perceived as a delicate balance between empowerment and accountability.

This study, in collaboration with individuals deeply entrenched in the legal discourse, embarks on an expedition to map the intellectual landscape surrounding the codification debate. By engaging with the voices of academicians, the researchers, and the practical insights of practitioners, this research aims to dissect the merits, demerits, and implications of a potential codified framework for parliamentary privileges. In doing so, it aspires to contribute to the nuanced understanding of the mechanisms that underpin democratic governance and legislative dynamics and help in decisions regarding future policy on this topic.

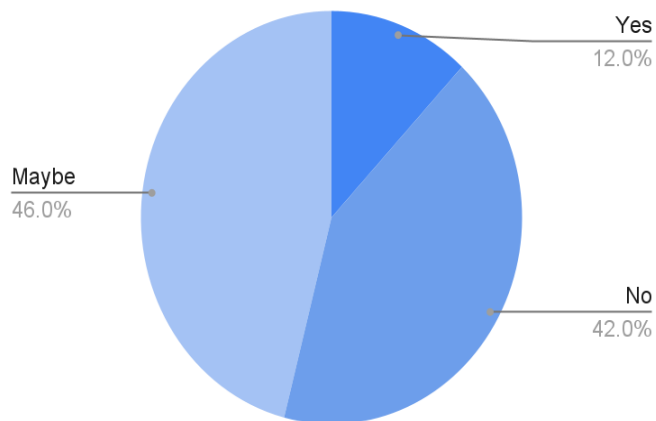
Questions

1. How familiar are you with Parliamentary Privileges?
2. Is there a need for codification?
3. Is Parliamentary Privileges a right or a duty?
4. Is the current system of Parliamentary Privilege suitable according to you?
5. Who would enforce the Code of Parliamentary Privileges if enacted?

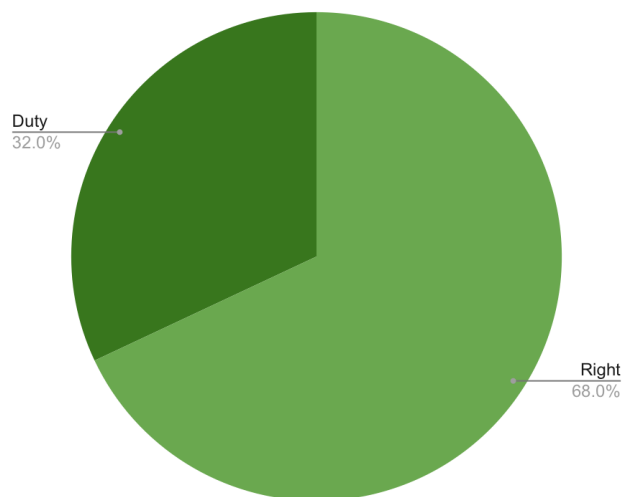
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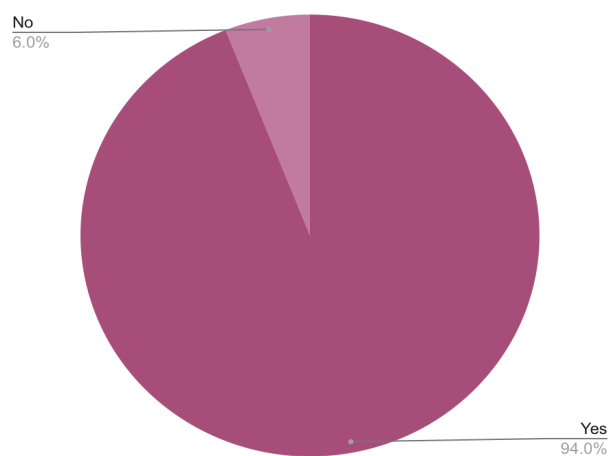
2. Is there a need for codification?



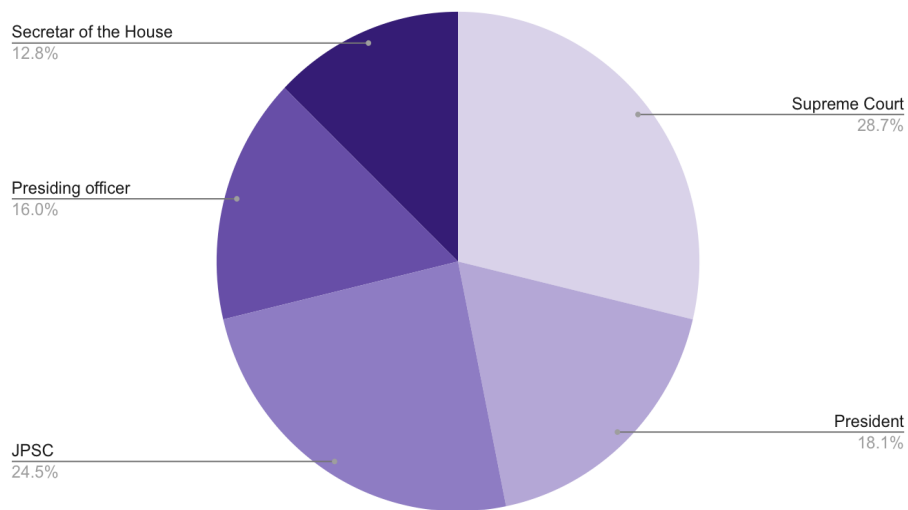
3. Is Parliamentary Privilege a Right or a Duty?



4. Is the current system of Parliamentary Privilege suitable according to you?



5. Who would enforce the Code of Parliamentary Privilege once implemented



Interpretation of Survey results

1. 92% of the respondents are somewhat familiar and very familiar with Parliamentary Privileges. The sample group used in this survey has a very good understanding of Parliamentary Privilege for the sake of this study
2. The current system of Parliamentary Privileges is acceptable only to 12% of the respondents. This means the current system followed has to be changed. This could be codification of parliamentary privileges and it's related clarity as only 6% of the respondents stated that Parliamentary Privileges have to be done away with.
3. 45% of the respondents state that Parliamentary Privileges is both a right and a duty.

This shows that while Parliamentarians enjoy privilege, they also have a certain duty to fulfil towards the citizens as a whole and towards their constituents in particular.

4. Enforcing Authority: The survey has mixed results. The Supreme Court is the most preferred authority to judge the Parliamentary Privileges, followed by a Joint Parliamentary Standing Committee. 18% of the respondents are of the opinion that the President (on advice of an expert committee) is to be the enforcer of a proposed Code of Parliamentary Privileges.

Note: The data interpreted is from a survey that is yet to be concluded. Data has been taken

till Sept 1, 2023.

IV. Importance of Codification of Parliamentary Privilege

The House of Commons, from which the Parliamentary privileges are inspired, has itself broken from the past – acts and utterances defamatory of the Parliament or its members are no longer treated as privilege questions²⁴.

It would prevent frequent disruptions in the Parliament²⁵, since the MPs would not have unbridled power of immunity to enable shouting and creating ruckus over petty matters in order to grab public attention.

The expression “until so defined” under Article 105 does not mean an absolute power not to define privileges at all²⁶.

It would strengthen the right of information of the citizens with respect to things said or done during the Parliamentary sessions, as the ambiguity with respect to what information constitutes or does not constitute breach of privileges would be clearly demarcated. However, there is no doubt about the fact that privileges are required for enabling the legislators to perform their functions independently and effectively as well as for maintaining the dignity, honour and authority of the Houses²⁷. However, this can be ensured through codification as well. Proper checks and balances and responsible use of power are in line with the democratic principles of our nation. Thus, constitutional sovereignty as opposed to Parliamentary sovereignty must reign supreme in our polity.

Legal certainty and consistency

Codifying parliamentary privilege in India would provide legal certainty and consistency in defining and enumerating the privileges enjoyed by members of parliament²⁸. A

²⁴ PARLIAMENTARY PRIVILEGE- FIRST REPORT, CHAPTER 2, 1999 (Great Britain).

²⁵ *Ibid.*

²⁶ *Supra*, see note 3

²⁷ Singh, D., 1965. Parliamentary privileges in India. *The Indian Journal of Political Science*, 26(1), pp.75-85.

²⁸ Dr. Raj singh, Parliamentary Privileges in India: A Comparative study with the United Kingdom, France, Australia, and South Africa, 6(3) JETIR, 720, 722 (2019)

comprehensive legislation or rulebook can clearly define the scope, limitations, and procedures for exercising these privileges, leaving little room for ambiguity or differing interpretations.

By providing a well-defined framework, a codification of privileges can ensure that all stakeholders, including members of parliament, the judiciary, and the public, have a clear understanding of the immunities enjoyed with parliamentary privilege. This would facilitate a more consistent and predictable application of these privileges, reducing legal uncertainties and potential conflicts.

For instance, a codified definition of freedom of speech and debate can help establish the parameters within which parliamentarians can exercise this privilege. It can provide guidelines for what constitutes protected speech and establish limits to prevent the abuse of this privilege. This clarity would benefit both members of parliament and individuals affected by their statements, ensuring a fair balance between the freedom of expression and the protection of individual rights.

Back in 1998, a narrow 3:2 majority of the Supreme Court ruled that Members of Parliament (MPs) ‘can claim immunity from prosecution on a charge of bribery in a criminal court’²⁹. It was looking into the bribery scandal that had rocked Prime Minister PV Narasimha Rao’s Congress Government. Prime Minister Rao had allegedly bribed several MPs to vote against a 1993 ‘No Confidence Motion’, which would have ended his Government. The Supreme Court gave immunity to the MPs who took the bribe, citing legislative privilege under Article 105(2) – the parliamentary equivalent of Article 194(2).

The Court is now revisiting the issue but at the state level³⁰. The latest controversy arose when Jharkhand MLA Sita Soren allegedly took a bribe to vote for a candidate in the 2012 Rajya Sabha elections. Despite the Narasimha Rao precedent, the Jharkhand High Court ruled that she couldn’t avail of Article 194(2). Splitting hairs, the High Court reasoned that there must be a connection between the bribe taken and vote made. Since Sita Soren didn’t end up voting for the candidate she had promised to endorse, the High Court concluded that she couldn’t use her vote to claim immunity under Article 194(2).

²⁹*Supra* see note 14

³⁰*Sita Soren v. Union of India*, 2014 SCC OnLine Jhar 1428

Furthermore, a codification of privileges can establish specific procedures for enforcing and adjudicating privilege claims. This would help in avoiding arbitrary decisions or prolonged legal battles, as there would be established mechanisms in place to address privilege-related disputes. Having clear procedures would enhance the predictability and efficiency of privilege-related proceedings, ensuring that the rights and interests of all parties involved are adequately protected.

Enhancing parliamentary effectiveness:

Codifying parliamentary privilege can contribute to enhancing the effectiveness of the legislative process in India³¹. By explicitly recognizing and protecting the freedom of speech and debate of members of parliament, a codified framework can foster an environment conducive to robust discussions, constructive criticism, and the exploration of diverse perspectives.

Clear guidelines and protections for parliamentary privilege would encourage members of parliament to express their views and opinions freely without fear of legal consequences. This, in turn, would promote active participation, rigorous debates, and the development of well-informed legislation.

To illustrate this point, consider a situation where a member of parliament wishes to raise concerns about a government policy. The existence of a codified framework for parliamentary privilege provides assurance that the member can freely express their dissenting views without fear of legal repercussions. This protection encourages open and critical discussions, which are essential for effective lawmaking and the representation of diverse perspectives within the legislature.

A codification of privileges can also provide safeguards against any attempts to stifle dissent or suppress minority voices within the legislature. By protecting the rights of individual parliamentarians, a codified framework can strengthen the democratic principles of representation and pluralism.

For example, a codified framework could establish procedures for protecting whistleblowers within the legislature. Whistleblowers play a crucial role in exposing corruption or

³¹ *Supra*, see note 28

wrongdoing, but without clear protections, they may face retaliation or legal consequences. By codifying privileges that shield whistleblowers from repercussions and provide mechanisms for their protection, the legislative process becomes more accountable and transparent.

The need to protect the freedom of speech of members of parliament.

Maintaining checks and balances:

Privileges and prevent their misuse in terms of curbing the freedom of the press unnecessarily.

Codifying parliamentary privilege is crucial for striking the right balance between privilege and accountability. It would ensure that the principle of natural justice prevails. Currently, the MPs have not only the right to be the judge in their own case but also decide what is considered a breach and what punishment should be given for that breach. While privileges are essential for the independence of the legislature, they must be exercised responsibly and within the bounds of the law without misuse (like in terms of curbing the freedom of the press). A comprehensive codification would enable the establishment of clear guidelines and mechanisms to prevent the abuse of privileges.

By delineating the limits and conditions under which privileges can be invoked, a codification can help prevent instances where parliamentary privilege is used as a shield to engage in unlawful activities or to protect members of parliament from legitimate scrutiny.

Furthermore, a codified framework would ensure that parliamentary privilege is not seen as an absolute power that is immune from judicial review. It would help establish a system where the judiciary can examine and determine the validity of privilege claims, thereby maintaining the principle of checks and balances between the different branches of government.

In the Indian context, the codification of parliamentary privilege becomes crucial to maintain the delicate balance between the separation of powers. By establishing clear guidelines and mechanisms for judicial review of privilege claims, the codification ensures that privileges are not misused as a shield to avoid accountability or encroach upon the jurisdiction of the judiciary. This balance is crucial for upholding the principles of constitutional governance, separation of powers and preserving the rule of law.

Codifying parliamentary privilege can also contribute to preserving public trust and confidence in the parliamentary system. Clear guidelines and mechanisms for accountability would demonstrate the commitment of the legislature to transparency and fairness, reassuring the public that privilege is not a tool for shielding misconduct or avoiding scrutiny.

For instance, a comprehensive codification that includes provisions for public disclosure of financial interests and conflicts of interest among members of parliament would enhance transparency and contribute to public trust. This kind of transparency would ensure that members of parliament are accountable for their actions and avoids situations where personal interests might influence decision-making.

Intention of makers of Constitution will be followed in Letter and Spirit

In the Constitutional Assembly Debates, the issue of codification of parliamentary privileges was widely debated upon³². The conclusion reached was that the laws of the House of Commons in regards to Privileges would be considered until India comes up with it's own law. After a 1979 amendment³³, this was forgotten and we have relied on a patchwork system to implement the law and strayed away from the intention of the makers of the Constitution.

Under the Common Law system of the United Kingdom, the Parliament is supreme³⁴. “The Parliament can make a man, a woman, and a woman, a man” is an effective way to point out this supremacy. However, in India, the Constitution is supreme and supersedes the Parliament³⁵(this will be discussed in detail further in an interesting theory). Therefore, the privileges accorded to the members of the House of Commons can not be considered suitable for the members of the Indian Parliament as well.

V. Proposed Code and Analysis of the Framework

Long Title

³² 8 Constituent Assembly Debates, 87, 1949

³³ INDIA CONST. Art. 105(4), *amended by* The Constitution(44th Amendment) Act, 1978

³⁴ UK PARLIAMENT, <https://www.parliament.uk/site-information/glossary/parliamentary-sovereignty/> (last visited Sept. 1, 2023).

³⁵ Kesavananda Bharati Sripadagalvaru & Ors. v. State of Kerala & Anr. (1973) 4 SCC 225

Preamble.

S1. Short Title and Scope

S2. Definitions

S3. Jurisdiction

S4. Enforcer

S5. Difference between Parliament and State Assemblies

S5A. Difference between Lok Sabha and Rajya Sabha

S6. Privileges allowed

Freedom of Expression

Freedom from Criminal Prosecution

Right to Privacy of members vs. Right to Information

Publication of activity of Parliament by member

Publication of activity from Parliament by non-associated entity/media

Authority to carry out duty towards constituents

S. 7 Role of Presiding Officer of the House

S8. Role of Judiciary

S9. Role of Media

S10. Role of the Union Government

S11. Role of the Parliament.

S12. Safeguards against misuse of Privilege

Already existing precedents should be given statutory recognition and harmonious interpretation of conflicting precedents should be done to remove ambiguity.

VI. International Examples and Comparative Analysis

Comparative analysis of Parliamentary privilege in other democracies:

Several democracies have codified parliamentary privilege to provide a clear legal framework for its exercise. Examining international examples can offer valuable insights into the benefits and challenges associated with codification. Some notable examples include:

a. **United Kingdom:** The United Kingdom has a comprehensive codification of parliamentary privilege through the House of Commons and House of Lords Act. This legislation outlines the privileges and immunities enjoyed by members of parliament, including freedom of speech, freedom from arrest, and protection of parliamentary proceedings. The codification in the UK serves as a valuable reference for other Westminster style democracies, including India.

Cases:

Strodes' case: The Court held that Strode was protected by parliamentary privilege and could not be sued for defamation. The Court reasoned that the privilege was necessary to ensure that members of Parliament could speak freely without fear of reprisal.³⁶

Stockdale v Hansard: The court held that the House of Commons did not have privilege to order the publication of defamatory material outside Parliament. The court reasoned that the privilege of freedom of speech in Parliament is necessary to allow Parliament to function effectively, but that this does not extend to allowing Parliament to publish defamatory material outside Parliament.³⁷

Haxey's case: It establishes the principle that the House of Commons has the power to punish members for contempt of Parliament, even if the act of contempt was committed outside of Parliament. It was established that the House of Commons has absolute privilege over its proceedings, which means that no court can interfere with what happens in Parliament.³⁸

b. **Australia:** Australia has the Parliamentary Privileges Act³⁹, which defines and regulates parliamentary privilege. It sets out the privileges and immunities of members of parliament, as well as the procedures for their enforcement and adjudication. The codification in Australia

³⁶ May, T.E., 1844. *A treatise upon the law, privileges, proceedings and usage of Parliament*. C. Knight & Company.

³⁷ Ibid

³⁸ Ibid

³⁹ Ibid

provides a framework for balancing privilege with accountability and ensures consistency in the application of privileges.

c. **Canada:** The Parliament of Canada Act codifies parliamentary privilege in Canada⁴⁰. It establishes the privileges, powers, and immunities of members of parliament and provides a framework for their exercise and protection. The codification in Canada has contributed to the clarity and consistency of privilege-related matters within the legislative context.

*New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly), 1993*⁴¹

*Canada (House of Commons) v. Vaid, 2005*⁴²

d. **France:** analysis from 1789, as the first modern national assembly.

French Parliamentarians enjoy irresponsibility for what they did as parliamentarians, and partial inviolability – that is, severe restrictions for the police or justice to arrest or detain them. Both irresponsibility and inviolability are mandated by article 26 of the Constitution of France⁴³.

Lessons learned from international experiences:

The codification of parliamentary privilege in other democracies offers valuable lessons for India. Examining these experiences helps identify best practices and potential challenges in codifying privileges. Some key takeaways include:

a. **Effective mechanisms for defining and regulating privileges:** Codification provides clarity and certainty in defining the scope and limitations of parliamentary privilege such as in Australia and Canada. It ensures that privileges are not left open to subjective interpretations, reducing inconsistencies and conflicts. Drawing from international examples, India can develop a comprehensive legislation that explicitly enumerates privileges while allowing for flexibility to adapt to evolving needs.

⁴⁰ 3 House of Commons Procedure and Practice, Chapter 3: Privilege and Immunities, (2017)

⁴¹ *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319

⁴² *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667, 2005 SCC 30

⁴³ FR CONST. Article 26

b. Judicial oversight and interpretation of privileges: Codification allows for a clear delineation of the roles and powers of the judiciary in reviewing privilege claims. It ensures that the judiciary can play a role in upholding the rule of law and preventing the misuse or abuse of parliamentary privileges while also not encroaching on the sovereignty of the Parliament and the right of members to carry out their duty to their constituents. The Indian context where the Constitution is supreme instead of Parliament(as in the UK), the Parliamentarians do not have absolute privilege where they can overrule the constitution itself. India can learn from international experiences to strike a balance between judicial review and the principle of parliamentary independence.

c. Balancing privilege with accountability and functioning of members: Codification provides an opportunity to strike a balance between protecting the rights and freedoms of members of parliament and ensuring their accountability to the public. It allows for the inclusion of safeguards and mechanisms to prevent the abuse of privileges and to hold parliamentarians accountable for their actions such as in Australia. India can incorporate best practices from other countries to ensure that privilege does not impede transparency, accountability, or public interest.

VII. Potential Concerns and Mitigation Strategies

Potential challenges and criticisms:

The codification of parliamentary privilege in India may face certain challenges and criticisms, which need to be addressed to ensure a well-rounded and effective framework. Some of the potential concerns include:

a. Impact on judicial independence and separation of powers: Some may argue that codification could encroach upon the independence of the judiciary, as it may restrict the judiciary's ability to interpret and review privilege claims⁴⁴. It is crucial to strike a balance that respects both the independence of the judiciary and the need for a clear legal framework for parliamentary privilege. To address this concern, the codification can include provisions that outline the scope of judicial review and maintain the legal principles of separation of powers.

⁴⁴Jain, D. C. Judicial Review of Parliamentary Privileges: Functional Relationship of Courts and Legislatures in India. *JILI* 9, no. 2 (1967): 205–22. <http://www.jstor.org/stable/43949934>.

b. Striking a balance between abuse of privilege and intended usage: There is a concern that codification may grant excessive protection to members of parliament, potentially shielding them from accountability for their actions or it may remove even the basic protections of members of parliament and may render them ineffective representatives of their constituents due to their fear of legal liability or absolute public scrutiny of their statements in the House⁴⁵. Mitigation strategies should focus on including provisions that prevent the misuse of privileges and establish clear accountability mechanisms while enabling the members to carry out their duties. For example, the codification can incorporate provisions that require members of parliament to disclose conflicts of interest and financial interests to maintain transparency and accountability.

c. Ensuring inclusivity and protecting the rights of marginalised groups: Care should be taken to ensure that the codification of parliamentary privilege does not inadvertently marginalise or exclude certain groups or individuals. The framework should be inclusive and should not unduly restrict the rights of citizens or limit their ability to question or criticise the actions of members of parliament. To address this concern, the codification can incorporate provisions that protect the rights of marginalised groups, and ensure equitable representation.

Mitigation strategies to ensure effective functioning of code:

To address the concerns and criticisms surrounding the codification of parliamentary privilege in India, the following mitigation strategies can be considered:

a. Establishing an independent parliamentary privileges committee: This committee can be responsible for overseeing the enforcement and adjudication of privilege claims. Comprising members from different political parties and legal experts, the committee can ensure fairness, transparency, and impartiality in decision-making. The committee can play a crucial role in addressing privilege-related disputes, reviewing privilege-related legislation, and providing recommendations for necessary amendments. A Joint Parliamentary Standing Committee as is the procedure now allows members to be a judge of their own cause and lead to perversion of principles of natural justice⁴⁶. Letting the Judiciary judge such cases every

⁴⁵ Faizan Mustafa, Bring the House up to dates THE HINDU (Jul. 11, 2017, 12:02 AM), <https://www.thehindu.com/opinion/op-ed/bring-the-house-up-to-date/article19253239.ece>

⁴⁶ House of Commons Committee on Standards, Review of fairness and natural justice in the House's standards system, Session 2021-22, 7, 1 Mar. 2022

time might lead to blurring of lines of separation of power

b. Incorporating safeguards against misuse of privileges: The codification can include provisions that explicitly prohibit the abuse of privileges, impose penalties for their misuse, and provide mechanisms for citizens to challenge privilege claims that are perceived to be unjust or unfair. It can also establish clear procedures for investigating and addressing complaints related to privilege abuse. These safeguards would help maintain the integrity of the privilege framework and ensure that privileges are not misused to evade accountability.

c. Ensuring regular reviews and revisions of the codification: The codification should not be considered a static document. It should be periodically reviewed and revised to address emerging challenges and concerns. This can be achieved through a consultative and participatory process involving parliamentarians, legal experts, civil society organisations, and the public. Regular reviews and revisions would ensure that the codification remains relevant, effective, and reflective of societal values and expectations.

d. Ensuring primary intention on creation of parliamentary privileges is maintained:

The codification of Parliamentary Privileges was the initial aim of the Constituent Assembly⁴⁷. This has been left unfilled for too long and it is time for us to help complete the constitution envisaged by the makers of the constitution.

VIII. Conclusion

The codification of parliamentary privilege in India is of paramount importance to ensure transparency, accountability, and the effective functioning of parliamentary democracy. A comprehensive codification would provide legal certainty, define the rights and immunities of members of parliament, and establish mechanisms for enforcing and adjudicating privilege claims. By drawing on international examples, addressing potential concerns, and incorporating appropriate mitigation strategies, India can develop a robust codification that strikes the right balance between privilege and accountability.

A clear and well-defined framework for parliamentary privilege would promote legal certainty, enhance the effectiveness of the legislative process, and maintain the checks and balances

⁴⁷ *Supra*, see note 32

necessary for a healthy democracy. It would foster an environment where freedom of speech and debate thrives, while ensuring that privileges are not abused or misused. By establishing accountability mechanisms and promoting transparency, the codification would help build public trust and confidence in the parliamentary system.

It is imperative that India embraces the codification of parliamentary privilege as a means to reinforce democratic institutions, safeguard individual rights, and uphold the principles of constitutional governance. With careful consideration of the Indian context, the lessons learned from international experiences, and the incorporation of appropriate safeguards, India can develop a codification that serves as a cornerstone for a robust and accountable parliamentary democracy.