# Reconceptualizing Legislative Privileges

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Earlier this month, the Indian Supreme Court delivered a judgment in a reference pertaining to the law and scope of legislative privileges under the Indian Constitution. The primary question before the court was whether legislative privileges extend to the protection from prosecution of a legislator who receives a bribe to speak or vote in a certain manner in the legislature. Overruling an earlier decision, a seven-judge bench of the Court held that the Indian Constitution does not confer absolute privileges upon the legislators. The jurisdiction of the courts remains intact, and legislators can be prosecuted by a court of law for crimes committed within or outside the legislative chambers. An analytical summary of the Court's decision can be found here.

In reaching its decision, the Court had the opportunity to restate the law on legislative privileges in India and discuss its development both during the pre- and post-independence eras. The law, as it stands today, raises several questions about the contemporary appropriateness of the original understanding and scope of legislative privileges. These questions are not only relevant to the Indian constitutional system, but they are crucial for any system that is facing threats to the health of its legislative bodies.

In the following sections of this post, I'll first discuss the existing law on legislative privileges in India, which is unique in its origination and formulation. I'll then argue that there is a need to reconceptualize the understanding of legislative privileges in order to support the legislative systems in performing their roles and functions in their true essence.

## Law on Legislative Privileges in India

Articles 105 and 194 of the Indian Constitution deal with legislative privileges of the Houses, committees, and legislators of Parliament and state assemblies, respectively. These provisions perform two roles: first, they explicitly guarantee near-absolute freedom of speech to the legislators while ousting the jurisdiction of the courts for any speech made or vote given by the legislators; and second, they allow the legislatures to self-define their powers, privileges, and immunities in all other aspects. However, until the legislatures make a law in this regard, the privileges 'shall be those of the House of Commons of the Parliament of the United Kingdom'.

Despite a specific reference to the House of Commons, there is a clear and conscious divergence in the understanding and jurisprudence of legislative privileges in India. This break is guided by the unique purposes that privileges were thought to perform in India and the fundamental difference in the conception of the Indian constitutional system from that of the UK, i.e., the rejection of parliamentary supremacy in favor of constitutional supremacy.

In terms of the purposes, apart from the classic role of creating co-equal branches of government and securing the legislative branch from any form of interference from the monarch/executive branch, legislative privileges were envisaged as a tool to perform a few other functions. First, it was a way to proclaim the supreme authority of the Indian parliament and state assemblies on lawmaking and governance in India. During British rule, the privileges extended to the legislative assemblies were rather restricted. The Governor-General, the executive representative of the Crown, was allowed to intervene in the discharge of legislative business, thus compromising the independence of the House. Envisaging wide privileges in the post-independence Constitution indicated a symbolic and functional break from the past.

Second, under the Indian constitutional system, lawmaking authority has been completely delegated to the legislative bodies. The Constitution makes no space for the involvement of the people and civil soci-

ety in this process. In this situation, legislative privileges were considered a way to enable independent debate, deliberation, consultation, and scrutiny of governmental business in order to (a) improve the quality of laws and (b) seek accountability from the executive. Privileges, therefore, sustain 'the core function of a democratic legislative institution.' [¶65] As the Supreme Court observed,

> *"The recognition of that right is premised on the need to secure the institutional foundation of Parliament and the State legislatures as key components of the dialogue, debate and critique which sustains democracy." [¶48]*

Third, legislative privileges were also to support the project of transformative constitutionalism, as near-absolute freedom of speech enables the legislators to introduce the diversity of India, its people, and their ideas, will, expectations, and aspirations, without being concerned about the potential backlash in the form of executive suppression.

These purposes and the idea of constitutional supremacy, working together, inform the existence and scope of uncodified legislative privileges in India. Therefore, while legislatures may, by law (constitutional amendment, legislative enactment, or rules and standing orders regulating the procedure of the House), define or restrict privileges of the House, courts remain the final arbiter on such changes. [¶69]

To undertake this function and rule on the existence and scope of any privilege, the seven-judge bench of the Supreme Court has laid down a two-fold necessity test:

> *"the assertion of a privilege by an individual member of Parliament or Legislature would be governed by a twofold test. First, the privilege claimed has to be tethered to the collective functioning of the House, and second, its necessity must bear a functional relationship to the discharge of the essential duties of a legislator." [¶91]*

## The Need for Reconceptualizing Legislative Privileges

In a blog post published on this decision, Kartik highlighted how the idea of 'essentiality' and the court's power to determine whether an action is essential to the duties of a legislator could prove to be problematic in terms of the relationship between the legislature and the judiciary. Beyond this, there is another issue with the existing law on legislative privileges in India, which the Court consciously ignores despite it being fundamental.[1] This may well be on account of the Court's inclination to restrict its opinion to the matter in hand – bribery. However, as the Court was sitting as a seven-judge bench and laying down an important principle for the future benches to follow, it should have designed it having considered other aspects as well. In the paragraphs to follow, I elaborate on this to support my argument for a reconceptualization of legislative privileges.

The idea of legislative privileges is tied to the purposes underlying the creation of the legislative chamber and the functions that it is supposed to perform. Privileges are the supporting infrastructure that ensures that the legislature remains unconstrained from any untoward obstacle and successfully performs its functions. Therefore, they are conferred primarily upon the legislature as an institution. It is in recognition of the role that individual legislators have to perform to make the legislative system work that privileges are extended to them. For this reason, the first tranche of the twofold test, as extracted above, focuses on the 'functioning of the House.' It is also important to note the manner in which the Court started its inquiry while developing the two-fold test. Note the focus on individual legislator's privileges as a derivative of the privileges conferred upon the House:

[1] As will be clear in later paragraphs, I am here hinting towards the pervasive influence of political parties in legislative functioning. *See* Separation of Parties, Not Powers. The reason I use the phrase 'consciously ignores' is because, in another judgment issued less than a month ago, the Supreme Court, speaking through the same judge, CJI Chandrachud, had expressly recognized the role that political parties play in a parliamentary system. Even otherwise, the Court has, in the recent past, dealt with multiple matters arising from partisan functioning by the House Speakers, and therefore, it remains cognizant of the issues ailing the Indian parliamentary system.

> *"Having established that the privileges and immunities exercisable by members of the House individually must be tethered to the functioning of the House, we must now explore which privileges may be deemed to accrue to the House collectively and by extension to individual members." [¶85]*

Legislative privileges are, therefore, considered as security from any form of external threat to the institution of the legislature. This approach fails to account for the internal threats that parliamentary systems are facing globally. It does not account for the overpowering role that majority parties can play in neutralizing the opposition, effectively turning constitutional positions into partisan, and controlling any speech that is critical of the government. (For instance, see here for how the parliamentary system has been compromised from within in India). While the legislature would seem to be functioning as usual under these circumstances – with laws being passed and committees being constituted – it actually functions only to fulfill the formal constitutional process requirements. And the situation could turn extremely grim at times. For instance, during the last winter session, the Indian Parliament suspended more than 140 members of the opposition parties when they raised the demand for a discussion on the issue of breach of security of the parliamentary premises. While such a historic number of members remain suspended, the ruling party continued the legislative business as usual and passed numerous laws.

When the opposition members do not find a suitable platform to raise their concerns within the legislature, they are forced to act outside the legislature. However, speeches made outside the legislature are not protected from judicial scrutiny, allowing the executive to further curb the opposition's voice, at times on flimsy grounds. Therefore, a deeper thought needs to be given to the idea of legislative privileges considering the challenges that democracies and parliamentary systems face.

A reformulation of the understanding of legislative privileges must particularly focus on three aspects: (a) the nature, (b) the location, and (c) the timeframe of the actions being protected. 'Nature' pertains to the kind of actions, beyond speech actions, that would fall under legislative privileges. 'Location' pertains to the place where the action takes place and whether the privilege is extended only to actions taken within the premises of the legislature. 'Timeframe' pertains to the time when an action takes place.

## Concluding Remarks

The existing Indian jurisprudence on legislative privileges is unhelpful to the contemporary dangers as highlighted above. Neither the current constitutional provisions (Articles 105 and 194) nor this seven-bench decision of the Supreme Court could accommodate the reformulated understanding of legislative privileges. The constitutional provisions are minimal in their current form. They only deal with the freedom of speech of the legislators within the premises of the legislature, leaving other matters to future law and resorting to the privileges enjoyed by the House of Commons in the UK in the meantime. While the necessity test laid down by the court is wide in its formulation, the court has given mixed signals about certain aspects. For instance, consider the court's opinion on the aspect of the 'timeframe' of the protected actions. On the one hand, the Court, at multiple places in the judgment, supported the argument that legislative privileges extend only to consequences 'arising out of' a speech act of a legislator [a future-looking formulation]; on the other, the court extends the ambit of privileges to cover any action/consequence 'bearing a clear relation to' a speech act in the concluding paragraph. [¶186] Such expanded construction could accommodate both a future-looking and a past-looking formulation. This leaves the readers unclear about the true scope of legislative privileges. Reformulation of the legislative privileges, therefore, demands a novel legislative framework.

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