The Application of Parliamentary Immunity in Commonwealth Legislatures

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Introduction

The purpose of this paper is to provide an overview of the conceptualisation of parliamentary immunity in Commonwealth legislatures, without presenting another all-encompassing survey of legislatures. It provides a preliminary outlook of a larger unpublished research project. Parliamentary immunity is perhaps the most contested and widely discussed parliamentary privilege as it is critical in the delineation of responsibilities between the legislative and other branches of government. The parliamentary immunity with which this paper is principally concerned includes freedom of speech and debate in parliament and the immunity of parliamentarians from attending court to provide evidence.

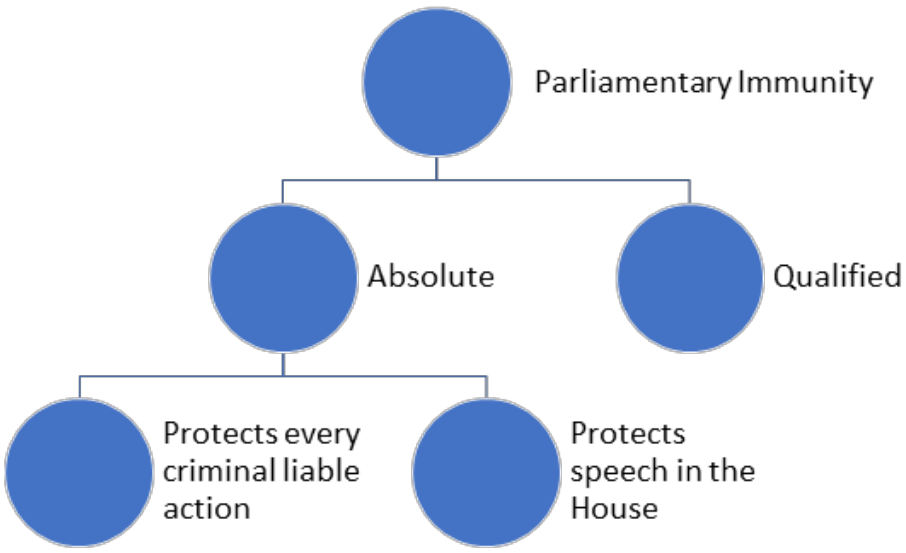
First and foremost, parliamentary immunity forms part of the body of parliamentary procedure. Parliamentary procedure is more than the formal body of written rules printed on paper (such as Standing Orders or Handbooks on Parliamentary Practices). They also include a body of unwritten rules and precedents based on long-standing traditions that may have been inherited from other parliamentary jurisdictions. For the purpose of this paper, parliamentary immunity is being defined as the protection of speech, or the guarantee that parliamentarians will not be censored or intimidated in their parliamentary functions.

Arguments in favour of censorship, in the name of promoting tolerance, have gained traction in recent years and there are many discussions surrounding the limits of speech in the backdrop of cancel culture. Political pundits and human rights experts have been debating the merits of the so-called right to offend and whether it inextricably forms part of the right to free speech. The aim of this paper is not to debate specific ideological arguments, but it is important to identify the trend of how society views free speech in order to understand that parliamentary immunity may not inviolable forever. In fact, a number of authors have dealt with parliamentary immunity, especially focusing on Commonwealth legislatures. For example, Leopold (1995) noted that parliamentary immunity is a basic principle found within all Commonwealth legislatures. Sinclair (2006) explored freedom of speech within the context of parliamentary proceedings and the interinstitutional relationship between the legislative and the judiciary in New

Zealand. His analysis was spurred by a report published by the Privileges Committee of the House of Representative in New Zealand in May 2005. This report was drafted following the Buchanan v Jennings case regarding the remit of parliamentary privilege and press freedom; specifically, whether the media can freely report (and repeat) speech that was used in parliamentary proceedings. Kakde (2015) discussed parliamentary privileges in India in detail, including the conflicts that arose between the legislative and judicial branches of government over the legal interpretations of parliamentary immunity.

There is no academic work which offers a universal conceptualisation of parliamentary privileges or parliamentary immunity. There exists a distinction in the literature between absolute and qualified parliamentary privilege (Alrfua, Sabah & Alrfoua, 2018; Alzubi, 2020; Batchelder, 2014; Carroll, 2017; Kwaw, 2021) which applies to parliamentary immunity. The first concept revolves around the idea that parliamentary immunity is absolute, and parliamentarians should be able to speak freely without exception, especially to be able to criticise and scrutinise the injustices performed by the ruling majority. An absolute privilege is not limited by any restrictions and remains effective regardless of the intention of the parliamentarian. On the other hand, a qualified privilege is only effective insofar as the person who has made the communication was acting in good faith and without malice (Hardt, 2013). In other words, each case must be interpreted on its own merits depending on the context. Reflecting the distinction between qualified and absolute privilege, Wigley (2003) presents two models of parliamentary immunity. The first is the 'Legislative Agency Model' which encapsulates the exclusive cognisance principle (Chatterjee & Patel, 2022; Kakde, 2015) and blocks any investigation into a parliamentarian's wrongdoing from those agencies with the power to juridically investigate such instances (including the police, prosecutors and law courts). The second is the 'Authorisation Model', which requires the authorisation of the assembly for another branch of government to prosecute the offending parliamentarian. Wigley (2003) argues that while the former is insufficient to ensure the proper functioning of democracy, a well formulated Authorisation Model is better suited to "protect and promote self-government" (p. 24). This distinction is important to understand the scope of protection that parliamentarians in different legislatures

enjoy. Parliaments are places of debates and discussions, very often on contentious and dividing issues. Kwaw (2021), who also makes the distinction between qualified and absolute privilege, offers a different outlook on their distinction. Qualified privilege infers a moral duty that the public has an interest to receive the information, while absolute privilege denotes that immunity is applicable in every instance. This distinction entails that the former depends on the interpretation of the given Speaker, putting the role of the presiding officer in the centre of parliamentary immunity. Despite the apparent chasm between qualified and absolute privilege, scholars have offered different interpretations of the latter. In 1972, the Supreme Court in America adopted a rigid interpretation of parliamentary immunity. It distinguished between 'political' and 'legislative' activities and concluded that immunity only applies to 'legislative' activities; an interpretation which denotes a form of qualified privilege. According to Batchelder (2014), this decision "jeopardizes the proper functioning" (p. 384) of Parliament. In other words, he argues that qualified privilege does not guarantee sufficient separation of powers. The Supreme Court distinction offers a restricted view of what constitutes legislative activity and fails to consider the functional element of parliamentary immunity (Batchelder, 2014).



Preliminary research indicates that Commonwealth legislatures, including provincial parliaments, have a near identical conceptualisation of parliamentary immunity, and of what it entails. Despite variances in how it is codified into law, differences in how contempts are punished, and different systems of electing a Speaker, all Commonwealth legislatures agree that parliamentary immunity is a cornerstone of parliamentary democracy (Gay & Horne, 2011).

This paper identifies 3 main variables that influence how parliamentary immunity is applied within Westminster-based Commonwealth legislatures:

1. **<u>Codification of parliamentary immunity</u>**

Different Commonwealth legislatures have codified the principle of parliamentary immunity in different levels of the law. Codification, in this case, infers that parliamentary privileges have been defined in that specific legal instrument, or that at least freedom of speech has been described sufficiently in that law. As a result, parliamentarians can defend their right by claiming its existence in these laws. For example, the legislature of Malta has enshrined parliamentary privileges in its Constitution, in a specific parliamentary act on the functioning of Parliament entitled "House of Representatives (Privileges and Powers) Ordinance", and even in its Standing Orders. Therefore, Malta is an example of a Commonwealth legislature which has codified parliamentary privileges in every level of the law that is under study. Another example would be the Overseas Territory of Bermuda, which has enshrined parliamentary privileges in its Constitution Order 1968, in its Parliament Act 1957[1] and also in its Standing Orders. On the other hand, the provincial legislatures of Western Australia (legislative assembly and legislative council) enjoy the codification of parliamentary privilege in the Parliamentary Privileges Act 1891, but their Standing Orders does not contain a clear definition of these privileges. Nonetheless, the legislative assembly has adopted a code of conduct which defines freedom of speech. Despite these differences, Commonwealth legislatures have a similar conceptualisation of parliamentary immunity codified in their laws.

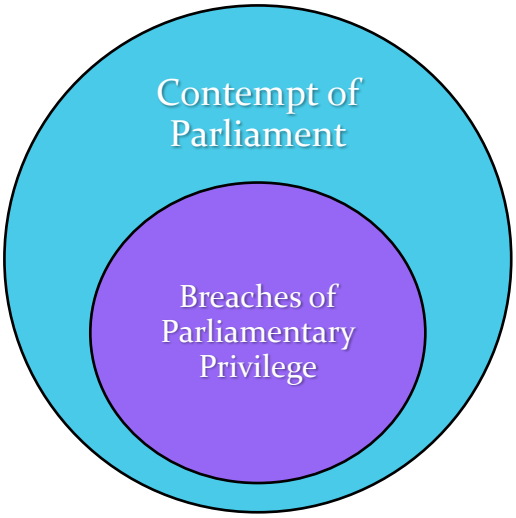
[1] Under Part II: Immunities & Protection of the Legislature

Numerous authors have also pointed out that the lack of codification has led to misinterpretations of parliamentary immunity, which led to incursions by the judiciary into the legislative domain. For example, Singh (1965) concluded that the proper codification of parliamentary privileges will avoid unnecessary conflicts with the judiciary stemming from different interpretations of the law (including the Constitution). Chauhan (2016) also noted that parliamentary immunity in India has led to controversial events because it was interpreted differently by different entities. On the other hand, Chatterjee & Patel (2022) inferred that Indian legislators lack the political will to codify parliamentary privileges beyond the Indian Constitution. This is because if legislatures codify parliamentary immunity and delineate its boundaries, they also have to define contempt of parliament and breaches of parliamentary privileges. In this respect, parliamentary immunity and contempt of parliament are two sides of the same coin. In an uncodified environment, parliamentarians may enjoy greater 'freedom' because it is difficult to qualify contempt of parliament. This argument presents two conundrums. This is problematic because it encourages the perception that parliamentarians are above the law. Codification of parliamentary privileges does not entail the curtailment of parliamentary freedom, but rather the avoidance of misinterpretation, ensuring the rights of the minority in parliament are protected. An uncodified environment entails having vague and disorganised (or even absent) rules of procedure, which would open the door for multiple interpretations of the same legal principle with nebulous conclusions. This is the reason why in certain legislatures, even within the same country, parliamentary immunity is applied differently (Kakde, 2015) and why certain jurisdictions are characterised by legal deadlocks between the judiciary and legislative branches of government. The hypothesis that emerges from the literature suggests that the greater the codification of parliamentary privileges, the better the protection of speech.

2. Punishments of Contempt

As noted in the previous section, the codification of parliamentary privileges also implies the codification of contempt of parliament. Waugh (2005) defines contempt as the interference or obstruction in the order of parliamentary proceedings. In his paper,

he delves into the different forms of contempt that may arise during normal proceedings, as well as the different reactions, or punishments, these disruptions can bring about (2005). He based his observations on a report published by the House of Lords and the House of Commons in 1999, which contains a chapter dedicated to disciplinary and penal powers. In fact, the thorough classification compiled by this Joint Committee serves as the basis of one of the conditions under review in this research, i.e., the handling of contempt and form of punishment of misconduct.



There is an important conceptual difference between contempt of parliament, and a breach of parliamentary privilege. By definition, a breach of parliamentary privilege is automatically a contempt of parliament; on the other hand, not every contempt of parliament is a breach of privilege (Kakde, 2015; Singh, 1965; Gay & Horne, 2011; Waugh, 2005). For example, refusing to appear before a committee, such as the Public Accounts Committee, which is empowered to scrutinise government expenditure, is considered as contempt but not a breach of parliamentary privilege. When parliamentarians are deemed to have abused parliamentary immunity, they have breached parliamentary privilege. Therefore, the parliamentary rules surrounding the punishment of contempt play a role in whether parliamentary immunity is protected. For the purposes of this research, 5 levels of punishment have been identified: admonition (which includes namings, warnings and rebukes), fine, suspension, expulsion, and finally imprisonment. Leopold (1995) quoted the deliberations in 1978 in the House of Commons where parliamentarians agreed that the penal punishment, the most extreme form of punishing contempt, should be used as sparingly as possible. In fact, expulsions and imprisonments are very rare punishments in Commonwealth legislatures. Nonetheless these punishments exist in the parliamentary procedure of some Commonwealth legislatures. The hypothesis that

emerges from the literature suggests that the absence of severe punishments for contempt, the greater the protection of speech.

3. Neutrality of the Speaker

The neutrality of Speakerships is the third variable that influences the degree of protection of parliamentary immunity. In the beginning of every legislative term, one of the first items of business is the election of a Speaker. The role of the Speaker is imperative to the successful functioning of a legislative assembly (Armitage, 2010; Bach, 1999; Bergougnous, 1997; Griffin, 1997; Hitchner, 1959; Hitchner, 1959; Laundy, 1960; Madue, 2017; Milner, 1947). They keep discipline through tradition or "ancient usage" of parliamentary procedure and Standing Orders (Leopold, 1989, p. 58). In the United Kingdom, the Speaker's impartiality is only guaranteed by convention and tradition, which have developed over hundreds of years. While in some (older) legislatures these conventions seem to suffice, younger legislatures are still experiencing events that are putting these learned traditions to the test (see Ghany (1997) on Trinidad & Tobago).

The Speakerships play a vital role in determining whether a parliamentarian breached parliamentary privilege as they interpret Standing Orders. Their neutrality shields them from political partisan interests and ensures that their decisions, referred to as Speaker rulings, remain impartial. The Office of the Speaker in Commonwealth parliaments, including its inherent qualities of political independence and non-partisan service, has originated from the parliament in Westminster (Ghany, 1997). For example, former House Speaker of Canada John Fraser (1988) inferred that the status of the Speaker in Canada was largely influenced by British parliamentary procedural developments. Depending on when independence was gained, the self-governments were created in the image of Britain of that particular time. Thus, the Speakership in Canada was set up after the Office of Speaker in Britain had 'internalised' impartiality. Fraser (1988) argues that if self-government was achieved a century earlier, Canada would have inherited the doctrine of a partisan Speaker (instead of an impartial Speaker). The independence of Speakers is the guarantee that the rights of every MP will be protected by high standards of fairness and impartiality, while maintaining the integrity of the House (Laundy,

1960). The hypothesis that emerges from the literature suggests that the greater the neutrality of Speakerships, the better protection of speech.

Reflections

These variables, i.e., the codification of parliamentary immunity, the severity of the punishments of contempt and neutrality of speakerships, influence how parliamentary immunity is applied in Commonwealth legislatures. This immunity can be misused by parliamentarians, especially if it shields corruption to avoid criminal prosecution. This is a prime example of how parliamentary procedure can be politicised for partisan interests. The phrase 'Politics of Parliamentary Procedure' emerges from Palonen's (2016) seminal work titled the same. Palonen (2016) describes how politics shaped the evolution of parliamentary procedures in Westminster from 1570s to the present. He included the tactical use of procedure and delved into agenda-setting and debate in Parliament among other procedures. This politicisation of parliamentary procedure for political partisan interests is still relevant and deserves more scholarly attention. For example, Oliver (1997) noted that without external pressure, the House of Commons would have been unable to carry out the necessary reforms proposed by the Nolan Committee, to elevate the parliamentary standards in public life. This assertion casts a shadow over the *raison d'etre* of parliamentary privilege. If a parliament is unable to self-regulate and discipline MPs for their misconduct, then the ground of upholding parliamentary privilege is undermined. If parliaments are unable to self-regulate, then the freedom of speech afforded to parliamentarians for that same reason is exposed and threatened by those advocating censorship.

In conclusion, it is important to find a balance between transparency and accountability because parliamentary privileges created a veil of inequality between normal citizens and parliamentarians (Beetham, 2006; Chatterjee & Patel, 2022). This is especially true when parliamentary privilege is "reduced to a tool for exploitation and as an escape from being answerable to any independent authority" (Chatterjee & Patel, 2022, p. 12). It is imperative that parliamentary immunity is not politicised and abused for partisan reasons.

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