A Review of Parliamentary Privilege

with an Approach to Iranian Legal System

• **Seyed Doraid Mousavi Mojab**
Ph.D. student of Criminal Law and Criminology
Tarbiat Modares University
Iran - Tehran

Abstract

The necessity of immunity of parliament and its Members has led to determine and assure particular privilege in the Constitutions or ordinary laws in the great majority of countries. This legal institution is to provide freedom of speech and to maintain the independence of representatives in the exercise of their duties without undue interference or fear.

To define and justify the necessity of it, different theories like "the prestige of representatives' legal personality" and "doctrine of necessity" have been introduced.

The legal supports, which observe the parliamentary privilege, can be generally studied in two categories with distinct descriptions and effects; first, demonstrates the benefits and utilization of privilege by the representatives before their statements, opinions and the votes cast in the exercise of their functions, which is idiomatically "the principle of non - liability". Second, it supports the Members of Parliament (MPs) before legal prosecution, arrest, imprisonment and the rest judicial measures, unless by the permission and allowance of the respective Parliament, because of irrelevant exercises and

extralegal parliamentary acts and prevents the possibility of immediate prosecution of MPs because of the attributed crimes. This kind of immunity, which practically is the logical trailer of the non - liability principle of representatives before their parliamentary duties, is named "the principle of inviolability".

The stand of every country in relation to the various forms of parliamentary privilege is a little bit different. In certain countries, one of these two forms is accepted and in other countries both of them are accepted to guarantee the whole immunity of MPs. The first approach is called solo and the second one is called integrative, respectively. In Iran, the first approach depended on the non-liability of representatives because of their statements, has been accepted in Article 86 of Constitution. The accuracy of this acceptance from the dynamic Fiqh's (Jurisprudence) point of view is approvable and the expediencies and accidental necessities require going along with the rest of countries, which accepted the principle of parliamentary privilege.

Keywords: Parliamentary Privilege, Constitutions and Ordinary Laws, Representatives' Prestige of Legal Personality, Doctrine of Necessity, Principle of Non - liability and Principle of Inviolability.

1. Definition and theoretical bases of parliamentary privilege

The privilege of Parliament is immunity conferred in order to ensure that the duties of Members as representatives of their constituents may be carried out without any fear of intimidation or punishment, and without improper impediment.

The term "privilege", in relation to parliamentary privilege, refers to immunity from the ordinary law, which is recognized by the law as right of Parliament and its Members. This privilege, in fact, is to a certain extent an exemption from general law.

However, without parliamentary privileges MPs could not discharge their function, efficiently and effectively. These privileges developed to allow Parliament to proceed with the business of making legislation and reviewing the activities of the Executive without undue interference [1; pp.123 -124]. Parliamentary privileges have the effect of ensuring that Members, witnesses and others cannot be sued or prosecuted for anything they say or do in course of parliamentary proceedings. Members of Parliament, also, are supported before legal prosecution, arrest, imprisonment and the rest judicial measures, unless by the permission and allowance of the respective Parliament, because of extralegal parliamentary acts and prevents the possibility of immediate prosecution of them.

Generally, definition of parliamentary privileges based on the doctrine of necessity. The content and extent of these privileges have evolved with reference to their necessity. The privileges of Parliament as including those rights, which are absolutely necessary for the execution of its power.

It is important to bear in mind that nowadays the purpose of parliamentary privilege is to secure the proper dignity, efficiency and independence of the legislature and not to protect individuals from due

process. This legal institution is not a personal immunity; it is an occupational immunity, which is provided to ensure that the duties of representatives may carry out perfectly. This immunity is not meant to place Member of Parliament above the law, but to protect him from possible groundless proceedings or accusations that may be politically motivated; thus it is not discriminatory institution.

It's noteworthy point that in the course of codifying the Constitution of Islamic Republic of Iran in 1979, some of those who were present emphasized "the principle of parliamentary privilege is for the position and duty, not for the person" [2; p. 933].

Another theoretical base to justify parliamentary privilege is a definite and unquestionable rule in jurisprudence, which under it, that's necessary to override on important interests. The free expression of opinion and facts in Parliament, in fact, is so important to our democratic way of life that this freedom (protected by absolute privilege) overrides any private right or interest of the person who might be defamed [3; p. 241]. In other words, the privilege protects statements made in circumstances where the public interest in securing a free expression of facts or opinion outweighs the private interest of the person about whom the statements are made [4; p. 526].

But in Iran the opponents, especially, the jurists of Guardian Council have not accepted these theoretical bases. This institution with regard to its great authorities and rights is the greatest opponent of parliamentary privilege in Iran. It must be noted that under Art. 4 of Constitution of

Islamic Republic of Iran "all civil, penal, financial, economic, administrative, military and political laws, etc. shall be based on the Islamic standards. This article and also other laws and regulations and this shall be at the discretion of the jurists of Guardian Council"[5]. The jurists argue, for example, parliamentary privilege has not Islamic origin and all are equal in the eyes of law and shari'a [6; pp. 307-308]. The Iranian courts, also, in their votes usually pay attention to the views of Guardian Council. Administrative of justice of Tehran, for example, in an announcement in 2001 has stated that the representatives of Islamic Consultative Assembly have not absolute privilege of freedom of speech and they are equal in the eyes of law [7]. Thus, we see Members of Assembly may be convicted by court because of their speeches, easily.

Albeit, the pursuit of justice and equality is an idea rooted in the conscience of the Islamic community from the beginning. It is ordained in the Qur'an and the tradition of the Prophet. God says: "oh. Mankind! Lo, we have created you male and female and have made you nations and tribes that you may know one another. Lo, the noblest of you in the sight of Allah is the best in conduct".[1] This approach is reflected explicitly in Islamic Republic of Iran's constitution (Art. 19).

The tradition of the Prophet is equally insistent upon justice and equality. The Prophet says: "men are equal as the teeth of a comb [8; p. 579].

1. Surat al- Hujurat; Verse: 13.

But it seems, the opponents of parliamentary privilege only rely on pure justice, mathematically and by virtue of special evidences they try to justify their viewpoint, whilst pure justice sometimes not only is not value, but also is injustice. Incidentally, God in the Qur'an has emphasized the savants and ignorant persons are not alike.[1] Moreover, the privilege of representatives is an explicit privilege and in democratic systems, such as Iran, people themselves have accepted it.

2. Legal basis of parliamentary privilege

In the great majority of countries, parliamentary privilege is guaranteed by the Constitution. In Iran, Art. 86 of Constitution provides: "the representatives of Majlis shall as such be free in expressing their views and giving votes and shall not be prosecuted nor arrested for their views as expressed in the Majlis or the votes given in the discharge of their duties as such". Also, Art. 84 of Constitution provides: "representatives shall be individually responsible before the people and shall have the right to express their views on all domestic and foreign issues of the country".

In New Zealand, the Russian Federation and Sri Lanka parliamentary privilege is established by another legal instrument. In Sri Lanka by *act of parliament*, in New Zealand by *statute law*, in the Russian Federation by a federal law on *the status of the Deputy of Council of*

1. Surat al- Zomar; Verse: 9.

Federation and the status of Deputy of the state Duma of the Federal Assembly of Russian Federation.

In the United Kingdom and Canada, *freedom of* ***speech*** is not explicitly codified [9; p. 1].

3. The scope of parliamentary privilege

Most national systems provide for dual protection of Members of Parliament:

- ***Non-liability or non-accountability*** for votes cast and opinions expressed in the performance of their duties, and;
- ***Inviolability*** that supports the Members of Parliament before legal prosecution, arrest, imprisonment and rest judicial measures because of irrelevant exercises and extralegal parliamentary acts, unless by the permission and allowance of respective Parliament. This form of immunity is such that, unless Parliament gives its authorization, no Member may be arrested or prosecuted for not carried out in the performance of his duties.

Now, we study these principles in detail. The scope of non-liability normally covers protection against all kinds of public penalties for acts committed in the performance of Members' duties or, more popularly formulated, deals with Members' freedom of speech. In general, MPs are not liable in civil or criminal terms for the acts encompassed within this form of immunity [10]. The chief feature of parliamentary privilege is, in fact, freedom of speech [11; p. 116]. It allows Members of

Parliament to debate any matter they wish, provides them with immunity from prosecution and protects them from actions in defamation for any comments which are made in the course of "proceeding in Parliament" [12; p. 157].

The protection against public penalties afforded by non-liability does not, however, exclude Members from disciplinary liability within the scope of Parliament or, in principle, from the application of measures of political or partisan nature, which may go to the point of exclusion. With regard to acts covered by non-liability, these include votes and opinions expressed. The majority of Constitutional texts, such as Constitution of Iran, make use of the concept of opinions expressed "in the exercise (discharge) of duties.

In most countries, non-liability is considered to belong to the public sphere, and a Member of Parliament cannot, therefore, relinquish it of his own free will. In the United Kingdom, however, since the Defamation Act 1996 entered into force, Members have been permitted to forgo their privilege in defamation trials [10].

In Iran, the principle of non-liability before statements or votes cast in the exercise of duties, despite the objections, has been expressed under Art. 86 of Constitution.

Another aspect of protection of Members of Parliament, as stated, is the principle of inviolability varies according to the degree of protection afforded to Members; it may thus be the case, unless the Parliament concerned has given its prior authorization, Members are

protected only from arrest or, in addition, from enforcement of particular measures such as searches or, from summonses before a court or, more widely still, from summonses before a court or indeed any form of criminal proceedings. Some legal systems exclude from the sphere of inviolability certain categories of offence considered as more serious [10]. For example, Art.89 of the Portuguese Constitution under certain conditions excludes premeditated offences punishable by imprisonment of more than three years.

However, the parliamentary systems are unanimous in considering that, in the case of ***flagrante delicto***, inviolability must be waived, at least partially. The term ***flagrante delicto*** covers cases where a person is encountered during or in direct connection with the committing of a punishable offence. For example, Constitution of Belgium in Art. 45 provides: "no Member of either of the two Houses may, during the session, be prosecuted or arrested as a punishment save with the permission of the House to which he belongs, except in the case of ***flagrante delicto***".

In Iran, in the course of final enactment of the new Constitution of November 15, 1979, which followed upon the victory of the Islamic Revolution on February 11, 1979, and was approved by referendum in December 1979, the principle of inviolability was not anticipated. The opponents of this principle during negotiations and codifying of Constitution rejected it.

But, before the Islamic Revolution and by the previous Constitution of Constitutional regime, the principle of inviolability had been accepted. Under Art. 12 of the previous Constitution: "no Member of the National Consultative Assembly shall be prosecuted in any manner whatsoever without the consent of the Assembly, unless he commits a misdemeanor or felony and is found in ***flagrante delicto***. In the event of his arrest in this manner, however, the Assembly must be notified". Also, under Sec. 175 and 176 of the previous parliamentary law Act 1953, the necessity of notifying the Assembly had been expressed [13], whilst we don't see such a protective shield for Members of the Islamic Consultative Assembly now.

4. Procedure

The procedure for waving parliamentary immunity is normally regulated by parliamentary rules of procedure; although, in some countries, such as Ireland and the United Kingdom, no procedure exists at all.

In most Member states of the European Union, requests to waive immunity are drawn up by the prosecution services, but in some countries may be drawn up by other authorities (the courts having jurisdiction, for example). Requests are sent to the Speaker of the House concerned either directly or, in some cases, via another such as the Minister of Justice or prime Minister. The request, once received, is forwarded to the competent committee. This may be a specially formed

to assess each specific case or a permanent committee. The latter is more common. The decision of the Chamber concerned is usually based on recommendations of the competent committee.

In the Parliaments of some Member states there are specific rules imposing certain limitations on the debates, particularly as regards the Speaker who are allowed to take part. In the Bundestag, the Member in questions cannot participate in the substantive debate. On the other hand, debates on questions of immunity take place "behind closed doors" in some Parliaments (such as the Luxemburg Chamber of Deputies and the European Parliament). The decisions of the parliamentary assemblies on requests concerning the lifting of immunity are taken by secret ballot in Spain, Greece, Italy and Portugal.

One of the most important variations connected with the procedures for waiving parliamentary immunity stems from the fact that, in some systems, a time limit is established within the Chamber concerned must grant or refuse the authorization requested and the specific consequences arise from the non-observance of that time. The Greek Constitution, for example, states that, if the Chamber does not decide on the request for authorization within a period of three months, the request is considered rejected [10].

In Islamic Republic of Iran, regretfully, such as the United Kingdom, no procedure exist at all, and a Member of the Islamic Consultative Assembly may be prosecuted, searched, arrested or placed on trial

without the prior consent and authorization of the Assembly, whilst, as stated before, under Art. 12 of the previous Constitution there was specific procedure and rules for waiving parliamentary immunity.

5. Breach of parliamentary privilege

When any of the rights and immunities, both of the Members, individually, and of the Assembly in its collective capacity which are known by general name of privilege, are disregarded or attacked by any individual or authority, the offence is called a breach of privilege, and is punishable under the law of Parliament. In most countries, the Parliament also claims the right to punish actions, which, while not breaches of any specific privilege, are offences against its authority or dignity, such as disobedience to its legitimate commands or libels upon itself. Such actions, though called "breaches of privileges" are more properly distinguished as "contempt".

In Iran, there is no sanction before breach of parliamentary privilege.

Conclusion

Parliamentary privilege is a concept recognized in the great majority of countries. This privilege has evolved over hundred of years and originates from the many battles, which Parliament has fought to establish its right to be free from interference.

It is widely understood that the principle of non-liability (the privilege of freedom of speech), which is confirmed by Art. 86 of Iran's Constitution, is enjoyed by Members of Islamic Consultative Assembly and that one consequence is that no civil or criminal proceedings may be instituted against a Member of the Assembly in respect of anything said or done by him. The word anything, in fact, is equivalent to everything. Thus, if a Member of the Assembly makes a statement, which is defamatory of citizen, no action can be taken by a citizen for defamation against such Member. Although, in some countries, such as Iran, the legislator considered a mechanism enabling people to seek some redress when their reputations have been damaged under the cloak parliamentary privilege. Parliamentary law of Islamic Consultative Assembly, for example, gives a right of reply to citizen whose reputation has been attacked under parliamentary privilege.

Additionally, it seems freedom of speech is not limited in location, being accorded both outside as well as within the parliamentary estate. The privilege is in this case limited to the execution of the Members' parliamentary mandate more than to the location where the contested words were spoken. The adherents of absolute privilege in Iran are in favor of this point of view.

Finally, it must be said that in Islamic Republic of Iran, as a democratic country, there is not perfect protective framework of parliamentary privilege for representatives. The status of parliamentary privilege in Iran after the Islamic Revolution in 1979, generally, in comparison with its status before the Revolution has been shaken; whilst, as we know, parliamentary privilege, in fact, is the backbone of parliamentary democracy and for the sovereignty of the people must never be lost sigh of. Parliamentary privilege is not for

gratifying the ego of the individual parliamentarian, but for enabling the Member to perform duties is manifestly beneficial to the public at large.

Sources

[1] Ansari, masood; ***Legal Immunities***, 1st ed., Iran: Ishraqhi Publishing, 1974.

[2] ***Assembly's detailed Negotiations of final reviewing of Constitution*** (Islamic Republic of Iran), 35th Session, Vol. 2, 1st ed., Iran: Tehran, the Secretariat of Assembly, 1983.

[3] Padfield, C. F.; ***Law Made Simple***, 7th ed., England, Made Simple Books, 1988.

[4] Keenan, Denis; *Smith and Keenan's* **English Law**, thirteen ed., England, Longman, 2001.

[5] ***Islamic Republic of Iran's Constitution***; (it was approved by referendum in December 1979).

[6] ***Collection of Guardian Council Views***, Interpretative and advisory Regarding Constitution Articles with Questions and Notifications (1359-1380), Iran: Tehran, Publisher: the Center of Researches of Guardian Council, 1st ed., 2002.

[7] ***" Announcement of Administration of Justice"***, *Norooz Newspaper*, December 29, 2001.

[8] Al-sadouq, Abi Ja'far, ***man la yahzorohou al-faqhih***, Lebanon: Dar-Sab, 1980.

[9] Myttenaere, Robert; ***Report of Parliamentary Privilege***, adopted at the Moscow Session, September 1998.

[10] McGee, Simon; ***Rules on Parliamentary Immunity in the European Parliament and the Member States of the European Union*** (Final Draft), Belgium, Toornstra (Publisher), Spring 2001.

[11] Madwick, Peter and Woodhouse, Diana; the Law and Politics of the Constitution "of the United Kingdom", 1st ed., Oxford Brooks University, 1995.

[12] Calvert, Harry; ***an introduction to British Constitutional Law***, Financial Training Publications L. T. D, 1st ed., London, 1985.

[13] ***Parliamentary law of the National Consultative Assembly act 1953***.