

PARLIAMENTARY PRIVILEGES AS FAÇADE: POLITICAL REFORMS AND THE INDIAN SUPREME COURT

Raja Ram Pal v. Hon'ble Speaker, Lok Sabha and Others

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I. INTRODUCTION

Does the Indian Parliament have the power to expel its members under the “powers, privileges and immunities” guaranteed by the Constitution? The Indian Supreme Court was confronted with the question in *Raja Ram Pal v. Hon'ble Speaker, Lok Sabha and Others*.¹ 11 members belonging to both Houses of Parliament were caught on camera accepting money from undercover journalists for raising questions in Parliament. A television channel telecast the episode and the “Cash-for-Query” scam quickly made headlines. In a swift response, unprecedented in recent political memory, both Houses of Parliament set up committees to investigate the matter. With no reason to disbelieve the video-footage of the TV channel, the committees recommended expulsion of the members. Both Houses of Parliament, acting on the recommendations, adopted motions expelling them. Thus aggrieved, the members approached the Supreme Court alleging, *inter alia*, a lack of jurisdiction to expel and violation of their fundamental rights. Tense moments ensued when the Speaker and Chairman of the two Houses respectively refused to be enjoined as respondents. In a much-publicized view, they asserted that the matter of privileges was the *exclusive* preserve of the Parliament: courts had no power of judicial review. And it therefore fell upon the Union of India to defend the collective decision of the Parliament.

Powers, privileges and immunities of the Indian Parliament are provided under Article 105. In particular, Article 105(3) as originally enacted, provided “that the powers, privileges and immunities of each House of Parliament, and of the members and the committees of each House, shall be such as may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 the British House of Commons at the commencement of the Constitution.” In 1978, the provision was

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¹ MANU/SC/0241/2007 [*Raja Ram Pal*].

amended to do away with the reference to the “House of Commons” without materially altering the position of law.² No legislation defining privileges having been enacted, for all intents and purposes, the powers and privileges of the Indian Parliament continue to be those of the “British House of Commons at the commencement of the Constitution.” And therefore two questions became relevant: did the Parliament have the power to expel its members, and if it did, was the power subject to, judicial review? Sabharwal C.J., writing for the majority (Thakker J. concurring), concluded that Parliament *did* have the power to expel and that the same was subject to judicial review.³ Raveendran J. dissented. The particular privilege of the House of Commons, he said, could not be imported under Article 105(3): the “general scheme” of the Indian Constitution made this English privilege inapplicable to India.⁴ The kaleidoscope of legal and pragmatic reasoning that the judgments weave together, I argue, cannot be understood on its own terms: the razzmatazz must be situated within a larger canvas of political reforms that the Indian Supreme Court has haltingly pursued in the last five years and in the preceding period.

II. JUDICIAL SUPREMACY: THE USUAL WAYS OF THE INDIAN SUPREME COURT

The facts presented a set of interesting and politically charged issues: effectively pitting the Supreme Court against the Parliament. But did the Supreme Court have jurisdiction to entertain the petition? Or did the Parliament have *exclusive* authority to regulate its internal proceedings to the extent of excluding courts from inquiring into the very existence of a privilege? The parties involved did not think so: “There was virtually a consensus amongst the learned counsel[s] that it [lay] within the ... jurisdiction of this Court to ... determine the extent of power and privileges ...”⁵ And yet, the Supreme Court was not satisfied: “Having regard to the delicate balance of power distributed amongst the three chief organs of the State by the Constitution ...,” the majority decided “*not* to depend upon mere concessions ...”⁶ Rather, it considered it prudent to examine the primary question about judicial authority “so as to reassure [themselves] that [they] were not in any manner intruding into a zone that was out-of-bounds [for them.]”⁷ The modesty of the language concealed other potential motivations. As mentioned earlier, the first respondents, *i.e.* the Speaker of the Lower House and the Chairman of the Council of States, refused to participate in the proceedings. They held a much-publicized view that the Court had nothing to do with the internal proceedings of the Parliament and for the Court to take cognizance of the matter was an act of constitutional transgression. And it therefore fell upon the Union of India to defend the actions of the Parliament. Far from an act of “self-reassurance,” the discussion on the Court’s jurisdiction to interpret the extent of privileges was directed at the Speaker. The act of self-reassurance had two implicit

² The latter part of the provision was amended to read: “... privileges ... shall be those of that House and only of its members and committees immediately before the coming into force of Section 15 of the Constitution (Forty-fourth Amendment) Act, 1978.”

³ *Ibid.*

⁴ *Ibid.*

⁵ *Supra* note 1 at para. 25.

⁶ *Ibid.* [emphasis added].

⁷ *Ibid.*

messages. First, the Speaker was plainly mistaken in concluding that the Supreme Court did not have anything to do with the matter. And secondly, his obstinate refusal to participate in the proceeding was misguided: he underestimated the Court's ability to behave "responsibly."

Sabharwal C.J. framed the threshold question as follows: "Does this Court, *within the constitutional scheme*, have the jurisdiction to decide the content and scope of powers, privileges and immunities of the Legislatures and its members?"⁸ Three alternative versions, in my view, are possible in this regard. On one view, the Supreme Court could shut the door on Article 105 completely, *i.e.* whenever Parliament would purport to act under Article 105, the Supreme Court would not entertain the matter. I shall refer to this approach as the "on-the-face" version. In this version, Parliament would have unfettered authority to "interpret" the meaning of Article 105. Parliament could do anything—expel a member, torture him or subject her to a degrading treatment—so long as it purported to act under Article 105. The Court would *only* ask the following question: did the Parliament purport to act under Article 105? If the reply to that question was in the affirmative, the Court would have no further say in the matter.⁹ In other words, the Court would not have the jurisdiction to decide the content of scope of powers and privileges: Article 105 would have any content that *Parliament* would attribute to it. On the second version, the "existence version" as I shall refer to it, the Court would have jurisdiction to decide the *existence* of a privilege: does the Parliament really have the privilege it is claiming to? But it would not have jurisdiction to examine the issue further. The Parliament may act in any way so long as it has the privilege and the courts would refrain from entertaining pleas about the *manner* in which the privilege was used.¹⁰ Parliament may exercise the privilege in a way that violates the principles of natural justice, but so long as it really had the privilege courts would not interfere. Finally, a third version—the "reviewability version"—is possible. Under this version, the Court would have jurisdiction not only to decide the existence of a privilege but also to adjudicate on the manner in which it is applied. The Court would address both questions: does the Parliament have the privilege? And secondly, was the privilege appropriately exercised? If the exercise of the privilege is vitiated by fraudulent or coercive considerations or suffers from *mala fide* intention, the Court would strike down the exercise of such a privilege. On a spectrum of possible options, the on-the-face version and the reviewability version relate to two extreme positions. The on-the-face version relegates the task of interpreting Article 105 solely to the Parliament, while the reviewability version monopolizes the interpretation of Article 105 *and* the manner of its exercise for the courts to the exclusion of all other parties. The existence version holds a somewhat middle ground. It modifies the extreme positions by monopolizing the interpretation of Article 105 (for the courts) but confers complete discretion to the Parliament in the exercise of such a privilege.

⁸ *Ibid.* at para. 18. [emphasis added].

⁹ This is a particular application of the (now rejected) "Limited Review" theory of jurisdiction proposed by Gordon. See Gordon, "The Relation of Facts to Jurisdiction" (1929) 45 Law Q. Rev. 458; Gordon, "Observance of Law as a Condition of Jurisdiction" (1931) 47 Law Q. Rev. 386. For an insightful criticism see Paul Craig, *Administrative Law* (London: Sweet & Maxwell, 1999) at 466–468.

¹⁰ This is a particular application of the "Collateral Fact Doctrine" theory of jurisdiction proposed by Diplock L.J. in *Anisminic Ltd. v. Foreign Compensation Commission* [1968] 2 Q.B. 862 at 887–905. For a criticism of the theory see Craig, *supra* note 9 at 495.

It is, however, worth pointing out that none of these versions “obviously” follows from a “plain reading of the Constitution” or from the “general scheme” of the Constitution. There is no provision in the Indian Constitution that enjoins the Supreme Court to interpret the Constitution such that if the Court were to adopt the on-the-face version, *i.e.* allow Parliament to have the only and final word on Article 105, it would be failing in its “constitutional duty” of interpreting it. But even if such a general provision were to exist, adopting an on-the-face version could hardly amount to an abdication of constitutional responsibility: the very act of adopting the on-the-face version would be an *act of interpretation*. In other words, a decision not to interpret is also an interpretation and, in this sense, whatever is the text and the structure of provisions, each of the three versions could be equally applicable. To put it differently, the three versions are neither right nor wrong: they just are. Each of the three versions could be adopted as an interpretative approach to Article 105 and reasons found to justify the same. The appropriation of any of these versions as an approach to Article 105 is really a *choice*: nothing follows “obviously.” Therefore, the very formulation of the issue, in the way Sabharwal C.J. puts it, is potentially misleading but nonetheless understandable: “Does this Court, *within the constitutional scheme*, have the jurisdiction to decide the content and scope of powers, privileges and immunities of the Legislatures and its members?” It is misleading because, as I have tried to show, nothing follows from the “constitutional scheme.” But it is understandable. Sabharwal C.J. must show fidelity to the text of the Constitution: he cannot brazenly be seen as imposing his choice into the letters of Article 105.¹¹

Given that the question was about the jurisdiction of the Supreme Court under the *Indian* Constitution, one could presumably expect to find a discussion of the “constitutional scheme.” Sabharwal C.J., however, went on an extended tour of English law to decide the point. He diligently recited the standard works in English law¹² and extracted from Erskine May’s *Parliamentary Practice* an analysis on this point.¹³ According to May, in reconciling the law of privilege with the general law, courts in England have gradually insisted on their right to decide all questions of privilege “with certain large exceptions in favor of parliamentary jurisdiction.”¹⁴ And to the extent that there has been no conflict on this point for over a century, it was for May an indication that both the Houses had to a certain extent tacitly accepted the emerging position.¹⁵ In his tour of English law, Sabharwal C.J. then turned to judicial

¹¹ This is not to suggest that Sabharwal C.J. is *consciously* imposing something that does not exist in the Constitution or at least follow from it. It is equally possible that he has himself internalized the ideals of fidelity and neutrality to an extent that he genuinely believes that one of the three versions logically follows from the “general scheme of the Constitution.” The point is, no matter how Sabharwal C.J. does it, *i.e.* whether consciously or unconsciously, he is still choosing because none of the three directly follow from the Constitution: the emphasis here is on the inevitability of choice rather than on the (possible) fidelity of the judge to the Constitution. For a general critique of choice in adjudication see Duncan Kennedy, *A Critique of Adjudication* (Cambridge: Harvard University Press, 1997) c. 4.

¹² See F.W. Maitland, *The Constitutional History of England* (Cambridge: Cambridge University Press, 1961), E.C.S. Wade & G.G. Phillips, *Constitutional Law* (London: Longman, 2003); Keir & Lawson, *Cases in Constitutional Law*, 6th ed. (Oxford: Clarendon Press, 1979), G.A. Forrest, *Ridges’ Constitutional Law of England*, 8th ed. (London: Stevens, 1950), William Anson, *The Law and Custom of the Constitution* (Oxford: The Clarendon Press, 1922).

¹³ *Supra* note 1 at para. 30.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

decisions. In particular, two cases were pressed into service, namely *Bradlaugh v. Gosset*¹⁶ and *Richard William Prebble v. Television New Zealand Ltd.*¹⁷ Deciding on the authority of the House of Commons to pass a resolution to debar a member from doing what he was entitled to under the general law of the land, Coleridge C.J., in *Bradlaugh* said: "... there is another proposition equally true, equally well established, which seems to me decisive of the case before us. *What is said or done within the walls of Parliament cannot be inquired into in a court of law...* The jurisdiction of the House over its own members, its right to impose discipline within its walls, is *absolute and exclusive*."¹⁸ Echoing a similar view in dealing with a defamation action by a former Minister of the Government of New Zealand, the Privy Council in *Prebble* held: "so far as the courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges."¹⁹ Like the Privy Council, Sabharwal C.J. approvingly referred to Blackstone's Commentaries: "The whole of the law and custom of Parliament has its original from this one maxim, 'that whatever matter arises concerning either House of Parliament, ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere.'"²⁰

So what did these copious extracts from English law achieve? Did they solve the issue of the Supreme Court's jurisdiction under the Indian Constitution? These references apparently led Sabharwal C.J. to conclude that there ought not to be any doubt that the Supreme Court had jurisdiction to entertain the matter. It is difficult to see how such a conclusion could be drawn from these English materials. May seems to have adopted the existence version: courts have jurisdiction to decide the existence of a privilege but not the manner in which it is exercised. *Bradlaugh*, *Prebble* and Blackstone, however, favor an on-the-face version: courts do not have any jurisdiction to examine, discuss or adjudge matters pertaining to the Houses of Parliament. Parliament, for them, was the sole judge of its privileges. If anything, the majority of these cases and commentaries support a contrary conclusion: the Supreme Court did *not* have jurisdiction to entertain the said matter. Did Sabharwal C.J. apply his mind to the materials?

III. COMPETING RATIONALES: WHAT DID THE SUPREME COURT RELY ON?

In concluding that Parliament had jurisdiction to expel its members, the majority and the concurring opinions relied on five distinct lines of reasoning. Firstly, the majority and the concurring opinions turned to the history of privileges and immunities law in India. In their modern form, privileges have existed in India since 1773.²¹ The precise scope of privileges at any given point was subject to significant variations and depended on the benevolence of Westminster. Between 1784 and 1860, the law

¹⁶ [1883–4] 12 Q.B.D. 271 [*Bradlaugh*].

¹⁷ [1995] 1 A.C. 321 [*Prebble*].

¹⁸ *Supra* note 16 at 275. [emphasis added] See *Burdett v. Abbott* 14 East 1, 148; *Stockdale v. Hansard* 9 Ad. & E. 1.

¹⁹ *Supra* note 17 at 327. See also *Pickin v. British Railways Board* [1974] A.C. 763; *Pepper v. Hart* [1993] A.C. 593.

²⁰ *Supra* note 1 at para. 32.

²¹ *East India Company Act, 1773* (U.K.), 13 Geo. III, c. 63.

of privileges was gradually expanded to such an extent that by 1860 the Legislative Council in India was behaving like the House of Commons in claiming the privilege of defending its own dignity against outside attacks and even summoning judges for “unwarranted and unjustified” comments on the laws passed by the Council.²² Between 1891 and 1935, many restrictions were introduced on this expanding scope but the law, in its clearest form, was laid down in the *Government of India Act, 1935*.²³ Section 71(1) of the Act reiterated the then-existing privileges of freedom of speech in the legislatures and immunity from judicial proceedings for anything said or any vote given therein. Section 71(2) authorized the legislatures to define the privileges of members by an Act and until so defined, declared them to be such as was applicable immediately before the commencement of the Act. Finally, section 71(3) prohibited legislatures from conferring on themselves “the status of a court, or any punitive or disciplinary powers other than the power to remove or exclude persons infringing the rules or standing orders, or otherwise behaving in a disorderly manner.” In other words, while legislatures could not assume the status of courts or exercise punitive or disciplinary powers, they did have the power to “remove or exclude” members. A colonial legislature, subject to an external sovereign, had the power to exclude members. Did it make sense to say that the Indian Parliament, subject to no such external authority, could not exercise such power? Thakker J., in his concurring opinion, did not think so. He said:

Even a Colonial Legislature having limited privileges [possessed] the power to expel a member.... If it is so, in my opinion, it goes without saying that the Indian Parliament, which has undoubtedly much more powers than a Colonial Legislature, can take such action and it cannot be successfully contended that Parliament does not possess the power to expel a member.²⁴

The analogy is inappropriate. Thakker J. fails to consider the “controlled” character of the Indian Constitution. The Colonial Legislature had the authority to deprive persons of their life and liberty without the due process of law. Would it follow that the Indian Parliament may also deprive persons of life and liberty without the due process of law? That the Colonial Legislature could expel members was plainly irrelevant. But the majority and the concurring opinions also extensively relied on Constituent Assembly debates to drive home the conclusion that the power to expel had been included within Article 105(3). The reference to the “British House of Commons” in the original draft predictably led to heated debates: both sentimental and substantive objections were raised.²⁵ Drawing attention to the “vague” nature of the English law of privileges, P. Deshmukh and Naziruddin Ahmad argued that the provision be redrafted limiting the residuary privileges to the law in India immediately prior to the commencement of the Constitution.²⁶ Rejecting the arguments, Alladi K. Ayyar and B.R. Ambedkar insisted on the necessity of referring to the House of Commons. “It is common knowledge,” Ayyar said, “that the widest privileges

²² See Prititosh Roy, *Parliamentary Privileges in India* (New Delhi: Oxford University Press, 1991) at 21–26.

²³ (U.K.) 26 Geo. 5, c. 2.

²⁴ *Supra* note 1 at para. 380.

²⁵ See India, *Constituent Assembly Debates: Official Reports* (Book 1–3) (1946–47) at 144–158.

²⁶ *Ibid.* at 148.

are exercised by members of Parliament in England.”²⁷ And “if the privileges are confined to the existing privileges of legislatures in India as at present constituted, the result,” he added, “will be that a person *cannot be punished for contempt of the House*.”²⁸ These assertions led the majority to conclude that in referring to the House of Commons, the Constituent Assembly had intentionally widened the scope of privileges in the Constitution to include the power to expel members.

Secondly, both the majority and concurring opinions held that a power to expel did not infringe other provisions of the Constitution. The petitioners argued that importing a power to expel would violate other constitutional provisions, including the provisions relating to “vacancy” and “disqualifications”.²⁹ The provisions dealing with “vacancy” and “disqualifications”, they argued, were a *complete* code unto themselves. And “expulsion” not having been explicitly mentioned, could not be impliedly read in. Sabharwal C.J. rejected the argument. He distinguished between “disqualification” and “expulsion”. “Disqualification struck at the very root of the candidate’s qualification and rendered him or her unable to occupy a member’s seat.”³⁰ Expulsion, on the other hand, “dealt with a person who was otherwise qualified, but in the opinion of the House of the legislature, had become unworthy of membership.”³¹ While in operation, disqualification prevented candidates from seeking re-election while expulsion did not. In other words, the terms “disqualification” and “expulsion” were mutually *exclusive* and when the Constitution provided for disqualification, it said nothing about expulsion. Nor were the provisions dealing with vacancy a complete code: death, for example, had not been mentioned. And similarly, expulsion had not been mentioned because it was covered by the scope of other provisions.³²

Raveendran J. disagreed. The Indian Parliament as a creature of the Constitution had limited jurisdiction, he said. Unlike the British Parliament that had the right to make or unmake any law which no court could set aside or override, the Indian Parliament [had] to act within the limitations imposed by the Constitution.³³ He referred to the general structure of the provisions dealing with the Parliament and

²⁷ *Ibid.*

²⁸ *Ibid.* [emphasis added].

²⁹ Art. 101 provides for grounds of vacancy. A seat becomes vacant if a person (a) becomes members of both Houses (must resign from one); (b) becomes a member of a State Legislature and any House of Parliament (must resign from one); (c) resigns from his seat or is disqualified under article 102 and (d) if he is absent without permission for a period of sixty days. Art. 102 lays down the grounds for disqualification. A person is disqualified “for being chosen as, and for being, a member of either House of Parliament” if (a) he held an office of profit; (b) he was of unsound mind and was so declared by a competent court; (c) he was an undischarged insolvent; (d) he was not a citizen of India, or had voluntarily acquired the citizenship of a foreign State; and (e) he was so disqualified by or under any law made by Parliament.

³⁰ *Supra* note 1 at para. 90.

³¹ *Ibid.*

³² *Ibid.*

³³ See *Re Delhi Laws Act*, 1912 AIR 1951 SC 332. (“There is a basic difference between the Indian and the British Parliament in this respect. There is no constitutional limitation to restrain the British Parliament from assigning its powers where it will, but the Indian Parliament qua legislative body is fettered by a written constitution and it does not possess the sovereign powers of the British Parliament.”) See also *Special Reference No.1 of 1964* AIR 1965 AIR 745 [*Special Reference*]; *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225; *Sub-Committee on Judicial Accountability v. Union of India* 1991 (3) SCC 65.

concluded that the provisions were a complete code. The Indian Constitution, by its very nature, was detailed and comprehensive, and that which had not been expressly included was necessarily excluded.³⁴ Not having been expressly provided for, expulsion as a ground for vacancy could not be impliedly read in, Raveendran J. said.³⁵ “The British Parliament had devised expulsion,” he argued, “as part of its power to control its constitution to get rid of those who were unfit to continue as members, in the absence of a written Constitutional or statutory provision for disqualification.”³⁶ But in a written Constitution with detailed provisions for disqualifications and vacancy, there was no question of exercising any inherent or implied power of “expulsion”.³⁷ What about death? The reason for the absence of death as a ground for vacancy, Raveendran J. thought, was obvious: “Article 101 refers to vacation of seat by a ‘person’ who is a member of the House, that is, *a person who is alive*. When a person is dead, obviously he is not a Member of the House.”³⁸ “It would be absurd,” he added, “to contend that a person even after death [would] continue to hold the seat.”³⁹ For Raveendran J., it was immaterial whether the British House of Commons had the power to expel: even if it did, the nature and scheme of the Indian Constitution excluded the possibility of importing the same. And, having concluded that the Parliament did not have the power to expel members, for him, there was nothing more to consider.

Thirdly, in concluding that Parliament had the power to expel, both Sabharwal C.J. and Thakker J. turned to the English law of privileges. In what capacity did the House of Commons have the power to expel its members? Studying the works of May, Rutledge and Maitland, Sabharwal C.J. concluded that the English Parliament by the fourteenth century had begun to exercise a small measure of judicial power, particularly with reference to appeals of treason and Bills of Attainder where the accuser was the King.⁴⁰ By 1305, Parliament had become the King’s “Great Court”, *i.e.*, the highest Court of royal justice.⁴¹ As a Court of Record, the House of Lords had always claimed the inherent power both to imprison and impose fines in matters of contempt. But a similar power for the Commons was not easily forthcoming. Eventually, the House of Lords conceded this power in favour of the House of Commons at the conference between the two Houses.⁴² Expounding the nature of this power to punish for contempt, the Privy Council in *Kielley v. Carson*⁴³ explained that the power was inherent in the House of Lords and the House of Commons, *not* as a body with legislative functions, but as a descendant of the “High Court of Parliament” and by virtue of the *lex et consuetudo parliamenti*. Based on this account of English history, the petitioners claimed that the House of Commons had the power to expel because of two *specific* privileges, namely the privilege to regulate its own composition and the privilege to punish for contempt of itself.

³⁴ *Supra* note 1 at para. 422.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ashby v. White* (1703) W.L. 3.

⁴³ (1842) 4 Moo. P.C. 63.

The power of expulsion, the petitioners claimed, was intrinsically linked to the privilege to provide for and regulate its own composition.⁴⁴ The Indian Parliament, in contrast, could never claim any such power of self-regulation: the same having been provided for under the Constitution.⁴⁵ That the Indian Parliament could not claim a privilege to regulate its composition was never in question. But Sabharwal C.J. disagreed on the “exclusive” relation between the power of the House of Commons to expel its members and its privilege to provide for its own Constitution. For him, the power to exclude was not solely derived from the privilege to regulate its own constitution: it was an independent privilege that arose out of the privilege to regulate its own proceedings. “The right to enforce its privileges either by imposition of fine or by commitment to prison or by expulsion,” he said, “was not part of any other privilege but was by itself a *separate and independent* power or privilege.”⁴⁶ And, therefore, the Indian Parliament could exercise the power to expel even though it could not claim the specific privilege of regulating its own constitution.

The petitioners also submitted that the second basis for the power to expel—power to punish for contempt of itself—could not be claimed by the Indian Parliament. The power to punish for contempt was a judicial power enjoyed by the House of Commons in its capacity as a High Court of Parliament.⁴⁷ The Indian Parliament did not have judicial powers; it was not a Court of Record.⁴⁸ And, therefore, the Indian Parliament, unlike the House of Commons, could not exercise the power to punish for contempt.⁴⁹ Distinguishing punitive power (essentially judicial in nature) from the power of self-protection (incidental to every legislative body), the petitioners asserted that the Indian Parliament could claim only the latter.⁵⁰ And this limited remedial power of contempt did not include the power to expel. Carefully distinguishing the circumstances of the earlier precedents, Sabharwal C.J. held that the Parliament could exercise the power to punish for contempt even *without* being a High Court of Record. This conclusion, he insisted, was consistent with the law laid down in *Special Reference*: “[T]here is no doubt that the House has the power to punish for contempt committed outside its chamber, and from that point of view it may claim one of the rights possessed by a Court of Record.”⁵¹

Fourthly, both the majority and the concurring opinions relied on past parliamentary experiences in upholding the power of expulsion. On three occasions—H.G. Mudgal (1951), Subramaniam Swamy (1976) and Indira Gandhi (1978)—Parliament had resorted to expulsion. Both Sabharwal C.J. and Thakker J. approvingly referred to the speech given by the then Prime Minister J.N. Nehru during the course of debates in 1951. Referring to the scope of privileges under Article 105(3), Nehru

⁴⁴ *Supra* note 1.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ See *Yeshwant Rao v. MP Assembly* AIR 1967 MP 95; *Hardwari Lal v. EC* (1977) ILR P&H 269; *K. Anbashagan v. TN Assembly* 1987 Indlaw MAD 120.

⁴⁹ *Supra* note 33.

⁵⁰ See *Keilley v. Carson* (1842) 4 Moo. P.C. 63; *Fenton v. Hampton* (1858) 11 Moo. P.C. 347; *Doyle v. Falconer* (1865–67) L.R. 1 P.C. 328; *Barton v. Taylor* (1886) 11 A.C. 197.

⁵¹ *Supra* note 33. See also *M.S.M. Sharma v. Krishna Sinha* AIR 1960 SC 1186; *State of Karnataka v. Union of India* AIR 1978 SC 68 [*State of Karnataka*].

said: “this House as a sovereign Parliament must have inherently the right to deal with its own problems as it chooses”. “There is no doubt,” he added, “as to what the practice in the House of Commons ... has been and is. Cases have occurred from time to time there, when the House of Commons has appointed a Committee and taken action.”⁵² In Indira Gandhi’s case, while this line of reasoning was employed to expel her in 1978, Parliament retracted its earlier motion in 1981. During the course of the debates in the Parliament in 1981, B.R. Bhagat explained the law of privileges: “The law of privileges ... is a form of criminal law and ... excepting the House of Commons ... in all other Parliaments this offence or the contempt of the House or the breach of privilege of the House is punished by the courts. The essence of criminal law is that it is easily ascertainable.” “The law of privileges, on the other hand,” he said, “is bound to remain vague and somewhat uncertain unless codified.”⁵³ And finally, double punishment of expulsion and imprisonment for breach of privilege, Bhagat insisted, “was unheard of and unprecedented.”⁵⁴ Acknowledging the lack of jurisdiction and impartiality in conducting its earlier motion, Parliament rescinded Gandhi’s expulsion in 1981. This retraction, the petitioners argued, reinforced the claim that power to expel was against laws, conventions and parliamentary practices. Sabharwal C.J. rejected the argument. The debates, he said, were merely “views of learned members” that “deserved to be respected.”⁵⁵ But on the point of interpretation of Article 105(3), the Supreme Court and not the Parliament was the “final arbiter”. And in this capacity as the “final arbiter”, Sabharwal C.J. chose Nehru’s “views” on the law of privileges as *the* “constitutional view.”

Finally, the majority and the concurring judges relied on “comparative law” as a basis for concluding in favor of Parliament. Thakker J., in his concurring opinion, was particularly notorious: more than half of his judgment had extensive citations from U.S., U.K., Australia and Canada. He turned to Cooley’s commentary on the U.S. Constitution: the power to expel members for any cause that renders them unfit to occupy a seat “is sometimes conferred by the constitution, but exists whether expressly conferred or not.”⁵⁶ It was, according to him, “a necessary and incidental power, to enable the House to perform its high functions”.⁵⁷ Similarly, Thakker J. approvingly cited Willoughby⁵⁸ and Pritchett.⁵⁹ Explaining the law of privileges in the U.S., Pritchett said: “The Constitution does provide ... that each House may expel its members by a two-third vote, or punish them for ‘disorderly behavior.’ Congress is the sole judge of the reasons for expulsion [and] the offence need not be indictable.”⁶⁰ Finally, turning to judicial decisions, he discussed the law laid down

⁵² *Supra* note 1 at para. 190.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.* [emphasis added].

⁵⁶ See Thomas Cooley, *Treatise on the Constitutional Limitations*, 5th ed. (N.J.: Lawbook Exchange, 1998) at 133.

⁵⁷ *Ibid.*

⁵⁸ W. Willoughby, *Constitutional Law of the United States*, 2d ed. (NY: Baker, Voorhis & Co., 1929) at 256.

⁵⁹ C. Pritchett, *American Constitution*, 3d ed. (NY: McGraw-Hill, 1977) at 146.

⁶⁰ *Ibid.*

in *Re Chapman*,⁶¹ *Julion Bond v. James Floyd*,⁶² *Powell v. McCormack*,⁶³ and *U.S. v. Daniel Brewster*⁶⁴ and concluded:

It is clear that in the United States, the House possesses the power of observance of discipline by its members and ..., such power extends to expulsion. It is also clear that such power has been actually exercised ... even [in cases where] the conduct [was] not a "statutory offence" or was not committed ... in an official capacity.⁶⁵

It is difficult to follow the relevance of this conclusion. Thakker J. does not seem to get the rather simple point that the power of expulsion has been specifically granted by the text of the U.S. Constitution.⁶⁶ The House in the U.S. possesses the power to expel because the text *says* so. And the power has been exercised because the House *has* the power. It is difficult to understand how the text of that provision and decisions interpreting the same could be of any relevance in addressing "expulsion" under Article 105(3) of the *Indian* Constitution. But American law was merely the appetizer. Thereafter he went on long tours of Australian, Canadian and English law, using the materials in a way conducive to his preferred conclusion.⁶⁷ And notwithstanding his fanatical obsession with "comparative" materials, Thakker J. offers no explanation for using *these* jurisdictions and not others. Why U.S., Australia, Canada and UK? Why not Pakistan, Sri Lanka and Bangladesh? What is true about the former jurisdictions that is not true about the latter?⁶⁸ In his dissent, Raveendran J. challenged the utility of such judicial tourism. "Decisions of foreign courts," he said, "though useful to understand the different constitutional philosophies and trends in law" are of "limited or *no* assistance in interpreting the special provisions of Indian Constitution, dissimilar to the provisions of foreign constitutions."⁶⁹ He reiterated warnings from earlier cases: "decision[s] must depend upon the words of the Constitution which the Court is interpreting and since no two Constitutions are in identical terms, it is extremely unsafe to assume that a decision on one of them can be applied without

⁶¹ 41 L. Ed. 2d. 1154.

⁶² 17 L. Ed.2d. 235.

⁶³ 395 U.S. 486 (1969).

⁶⁴ 408 U.S. 501 (1972).

⁶⁵ *Supra* note 1 at para. 325.

⁶⁶ Art. 5(1), cl. 2: "Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member."

⁶⁷ For literature on Australian law see Enid Campbell, *Parliamentary Privilege in Australia*, 2d ed. (NSW: Federation Press, 2003); Lumb & Ryan, *The Constitution of the Commonwealth of Australia*, 2d ed. (Sydney: Butterworths, 1977). For literature on Canadian law see John Bourinot, *Parliamentary Procedure and Practice in the Dominion of Canada*, 4th ed. (Toronto: Canada Law Book, 1916); *Speaker of the House of Assembly v. Canadian Broadcasting Corporation* 1993 (1) SCR 319; *Fred Harvey v. Attorney General* 1996 (2) SCR 876. For literature on English law see Searle Holdsworth, *A History of English Law*, (London: Methuen, 1982); Wade & Forsyth, *Administrative Law*, 9th ed. (Oxford: OUP, 2004); William Anson, *The Law and Custom of the Constitution*, 5th ed. (Oxford: The Clarendon Press, 1922) vol. 1.

⁶⁸ It could well be the case that similar issues have not been addressed under the latter jurisdictions. But this fact by itself does not negate the argument "comparative law" in the way it is currently conceptualized usually means law of the "white" world.

⁶⁹ *Supra* note 1 at para. 422. [emphasis added].

qualification to another.”⁷⁰ Drawing attention to the “historical, social and economic” context in which the Indian Constitution was framed, he warned against the indiscriminate use of foreign constitutions to identify Indian interpretations.⁷¹ The English Constitution was “unwritten and flexible” while the American version was “short and rigid.”⁷² In contrast, the Indian Constitution was “long and exhaustive”: it had been sufficiently expounded by the makers themselves.⁷³ And, therefore, one had to be cautious in judging the utility of foreign decisions in explicating the Indian Constitution.

These caveats notwithstanding, five distinct lines of reasoning taken together led the majority and the concurring opinions to conclude that Parliament had the power to expel its members under its “privileges and immunities”. Or more appropriately, five lines of argument were invoked to rationalize a particular conclusion. Arguments based on constitutional history, constitutional text and structure, English law of privileges, parliamentary practices, and “comparative law” were woven together with dexterity to produce the desired effect. And the question arose: is such a power to expel members subject to judicial review?

IV. JUDICIAL REVIEW OF PARLIAMENTARY PRIVILEGES

The respondents submitted that the power to expel was not subject to judicial review: it fell within the “exclusive cognizance” of Parliament.⁷⁴ In denying the power of judicial review, they made two specific claims. Firstly, they submitted that parliamentary privileges were not subject to fundamental rights: both originated in the Constitution and one could not be made subject to the other. This relationship between privileges and fundamental rights had been explored on two earlier occasions. In *M.S.M. Sharma v. Krishna Sinha*,⁷⁵ the petitioner, Sharma, violated the Speaker’s order prohibiting the publication of Assembly proceedings including parts that had been expunged from the records.⁷⁶ Challenging the Speaker’s show cause notice, Sharma claimed that the order threatened to violate his right to freedom of speech and expression under Article 19(1)(a) and the right to life and personal liberty under Article 21. The scope of freedom of speech given to the Parliament under Article 105 (and State Legislatures under Article 194), the Supreme Court concluded, was distinct from the right to freedom of speech and expression guaranteed to citizens under Article 19(1)(a). The latter was a general right of all citizens while the former was *specific* to the Legislature. Applying the principle of “harmonious construction”, the Supreme Court concluded that the general must yield to the specific.⁷⁷ But with regard to the claim that the proceedings threatened to deprive the petitioner of his “personal liberty without procedure established by law” under Article 21, the Court suggested differently. The Legislature (and the Committee on Privileges) had

⁷⁰ See *Re C.P. and Berar Sales of Motor Spirit & Lubricants Taxation Act*, 1938 AIR 1939 FC 1; *M. Sundaramier v. State* AIR 1958 SC 468.

⁷¹ *Supra* note 1 at para. 421.

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ AIR 1959 SC 395 [*Sharma*].

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

framed Rules of Procedure and, if the petitioner were to be deprived of his personal liberty, such deprivation would be in accordance with procedure established by law. Therefore, a complaint of breach of fundamental rights under Article 21 could not be made. In other words, while privileges were not subject to the right to freedom of speech and expression, they were subject to the right to life and personal liberty.⁷⁸ The possibility of applying fundamental rights (other than freedom of speech and expression) was considered in *Special Reference*. Insisting that the *Sharma* Court had left open the question of applying other rights to parliamentary privileges, the Supreme Court said: "If Article 21 applies, Article 20 may conceivably apply, and ... if a citizen complains that his fundamental right had been contravened either under Article 20 (right against self-incrimination and double jeopardy) or Article 21 ... it would plainly be the duty of this Court to examine the merits of the said contention".⁷⁹ In other words, while *Sharma* held that Article 19 did not but Article 21 did apply, *Special Reference* concluded that Articles 20 and 21 applied.

These precedents applying fundamental rights to parliamentary privileges, the respondents argued, were limited to *non-members*. Relying on English and Canadian precedents, they insisted that the same could not be applied to legislative members. The court's jurisdiction, they said, was limited to reviewing the *existence* of privileges: it did not extend to the manner in which privileges were exercised.⁸⁰ Coleridge C.J. explained the law in *Bradlaugh*: "What is said or done within the walls of Parliament cannot be inquired into in a court of law The jurisdiction of the Houses over their own members, their right to impose discipline within their walls, is absolute and exclusive."⁸¹ The Canadian Supreme Court echoed the same view: "To prevent abuses cloaked in the guise of privilege from trumping legitimate Charter interests, the courts must inquire into the legitimacy of a claim of parliamentary privilege The courts may properly question whether a claimed privilege exists If the court concludes that it does, no further review lies."⁸² The law in India, the respondents argued, was exactly same.⁸³ Like in U.K. and Canada, Indian courts had no jurisdiction to regulate the internal affairs of the Parliament. And applying fundamental rights to parliamentary privileges would have the effect of abridging one part of the Constitution based on another: an approach the Canadian Supreme Court had regarded as impermissible.⁸⁴

Rejecting the argument that the law laid down in *Sharma* and *Special Privileges* was limited only to non-members, Sabharwal C.J. said: "The views expressed ... in the context of [the] manner of exercise of the privileges are of *general* import They would hold good not merely against a non-member ... but even against a member of the Legislature who also is a citizen of this country and entitled to the protection of the same fundamental rights".⁸⁵ In saying so, Sabharwal C.J. interestingly rejected the use of foreign precedents. "It is to be remembered," he sermonized,

⁷⁸ *Ibid.*

⁷⁹ *Supra* note 33.

⁸⁰ *Supra* note 1.

⁸¹ (1884) 12 Q.B.D. 271 [*Bradlaugh*] at 275. See also *Stockdale v. Hansard* (1839) 9 Ad. & E. 1

⁸² *Harvey v. New Brunswick* [1996] 2 S.C.R. 876.

⁸³ See *Indira Gandhi v. Raj Narain* 1975 Indlaw SC 473; *Narasimha Rao v. State* 1998 Indlaw SC 690.

⁸⁴ *New Brunswick Corporation v. Nova Scotia Speaker* [1993] 1 S.C.R. 391.

⁸⁵ *Supra* note 1.

“that the plenitude of powers possessed by the Parliament under the written Constitution is subject to legislative competence and restrictions of fundamental rights”.⁸⁶ In refusing to apply English and Canadian precedents with respect to the power of judicial review, Sabharwal C.J. was rejecting *precisely* that which he had accepted earlier in the judgment. While deciding the existence of the power to expel, he had rejected the argument that English precedents were inapplicable simply because they had been decided in the context of a (unwritten) constitutional culture. Without the slightest sense of irony, Sabharwal C.J. now made the same argument: “the law in England of exclusive cognizance has *no* applicability in India which is governed and bound by the Constitution of India.”⁸⁷ In other words, decisions from other systems with radically different constitutional arrangements could not be imported. Was that not the precise argument of the petitioners? This selective argumentative amnesia is hardly surprising: there were strategic gains to be made by selectively invoking comparative law. Accepting English (and Canadian, Australian and U.S. precedents) provided the Court with a “basis” for concluding that Parliament had the power to expel. Rejecting the same precedents subsequently opened up the possibility of concluding that such power was subject to judicial review.

Secondly for the respondents, Article 122 provided a textual basis for ousting the Court’s jurisdiction. According to Article 122(1), “the validity of any proceedings in Parliament shall not be called in question on the ground of any alleged irregularity of procedure.” Rejecting the argument, Sabharwal C.J. distinguished “procedural irregularity” from “substantive illegality”. “Article 122(1) prohibits,” he said, “the validity of any proceedings in Parliament’ from being ‘called in question’ in a court *merely* on the ground of ‘irregularity of procedure.’” “Substantive illegality” was in stark contrast to “procedural illegality” and could not be included in the latter. Nor was it possible, he said, to read a finality clause in the provision: “The broad principle laid down in *Bradlaugh* acknowledging exclusive cognizance of the Legislature in England has no application to the system of governance provided by our Constitution wherein no organ is sovereign and each organ is amenable to constitutional checks and controls.”⁸⁸ The Supreme Court, Sabharwal C.J. added, had been entrusted with the “duty to be the watchdog” of the Constitution and reading a finality clause onto Article 122(1) would be tantamount to judicial gloss even in cases of “substantive illegality”.⁸⁹ He found support for this proposition in Indian precedents. In *Union of India v. Jyoti Mitter*,⁹⁰ interpreting Article 217(3) that authorized the President to “finally” decide the age of High Court judges, the Supreme Court held:

The President ... performs a judicial function of grave importance Notwithstanding the declared finality of the order of the President, the Court has jurisdiction in appropriate cases to set aside the order, if it appears that it was passed on collateral considerations or the rules of natural justice were not observed, or that the President’s judgment was colored by the advice or representation made by the executive or it was founded on no evidence.⁹¹

⁸⁶ *Ibid.*

⁸⁷ *Ibid.* [emphasis added].

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ 1971 Indlaw SC 120.

⁹¹ *Ibid.* at para. 32.

A similar position was articulated in *Kihoto Hollohan v. Zachillhu*:⁹² “Notwithstanding the existence of finality clauses, this court [would] exercise its jurisdiction of judicial review whenever and wherever breach of fundamental rights [is] alleged.” These precedents, Sabharwal C.J. concluded, had the effect of displacing the English doctrine of exclusive cognizance of internal proceedings of the House. And, therefore, any attempt to read a limitation into Article 122 restricting jurisdiction to examine Parliament’s procedure “in case of unconstitutionality, as opposed to illegality would amount to doing violence to the constitutional text.”⁹³

Finally, the respondents submitted that the power of judicial review could not be said to exist (or even if it existed, could not be exercised) because of the absence of any judicially manageable standards. “Validity,” the Solicitor General argued, “[could] be tested only with reference to a norm [and] where such normative standards are not available, judicial review must be impliedly excluded.”⁹⁴ Unlike administrative tribunals, Parliament was not an inferior body: it could not be attributed jurisdictional errors. While frontiers of judicial review had been widened to include illegality, irrationality and procedural impropriety, such principles, he argued, had absolutely no basis in judging parliamentary action.⁹⁵ Sabharwal C.J. rejected the arguments: “there was no foundation to the plea,” he said, “that a Legislative body [could] not be attributed jurisdictional error.”⁹⁶ On what grounds would the Supreme Court review the action of Parliament? On the basis of the law laid down in *Special Reference, State of Rajasthan v. Union of India*,⁹⁷ *S.R. Bommai v. Union of India*,⁹⁸ Sabharwal C.J. concluded that while the truth or correctness of materials or the adequacy of materials could not be gone into, the Supreme Court could review the manner in which the decisions were made. Such review would be done especially if decisions were tainted on grounds of illegality, irrationality, and perversity or if such decisions were vitiated by *mala fide* or non-compliance with rules of natural justice. The conclusion is somewhat confusing and certainly contradictory. Before concluding the possible grounds for review, Sabharwal C.J. approvingly referred to the observations of Ramaswamy J. in *S.R. Bommai*: “The traditional parameters of judicial review could *not* be extended to the area of exceptional and extraordinary powers”.⁹⁹ Ramaswamy J. added:

Judicial review of the Presidential Proclamation is not concerned with the merits of the decision, but to the manner in which the decision had been reached. The satisfaction of the President cannot be equated with the discretion conferred upon an administrative agency of his subjective satisfaction upon objective material like in detention cases, administrative action or by subordinate legislation.¹⁰⁰

⁹² 1992 Indlaw SC 889. See also *Union of India v. Tulsiram Patel* 1985 Indlaw SC 401.

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ 1977 Indlaw SC 272.

⁹⁸ 1994 Indlaw SC 2206.

⁹⁹ *Ibid.* at 260.

¹⁰⁰ *Ibid.*

Ramaswamy J. seems to have denied the possibility of that which Sabharwal C.J. insisted: the grounds of review of ordinary administrative agency could be superimposed in cases of review of actions of high constitutional authorities. Equally, Sabharwal C.J. does not tell us the *standard* by which the grounds may be applied to particular facts. Nonetheless, applying these grounds to the particular facts of the petitioners, the majority upheld the expulsion.

There is a pervasive sense of over-eagerness, a real desire to find a “power to expel that was subject to judicial review”. The subtext has a latent but strong sense of desperation: it was the illusive Holy Grail that *had* to be found. But rationalizing any conclusion is no easy task, especially if one has to get around a mass (mess?) of laws and precedents. The convoluted use of comparative law and the contradictory invocation of case-laws eloquently testify to the complexities of such an exercise. The assertion that the judgment was an exercise in rationalization, by definition assumes that a particular conclusion had already been reached. That raises the question: *why* would the Supreme Court necessarily want to find a “power to expel”? What concerns could have motivated such a conclusion? What more can be said about the “story” of parliamentary privileges that the text of the judgment does not? That is an issue I turn to in the next section.

V. *P.V. NARASIMHA RAO V. STATE: A CONSTITUTIONAL NADIR*

Contrast the willingness of the Supreme Court in *Raja Ram Pal* to bend over backwards with its approach in *P.V. Narasimha Rao* less than a decade ago.¹⁰¹ In 1993, a no-confidence motion against the then Prime Minister Narashima Rao threatened the existence of his government. With an intent to defeat the motion, Rao and his senior cabinet colleagues bribed 10 members of the Lower House to have them vote against the no-confidence motion. Nine members complied while one member, having accepted the bribe, abstained from voting. Charges were filed at the trial court against all bribe givers and takers under the *Prevention of Corruption Act, 1988* (‘PCA’) read along with the provisions relating to criminal conspiracy under the *Indian Penal Code, 1872*. A petition to quash the charges framed by the trial court having been rejected by the High Court, the appellants approached the Supreme Court. Their actions, the appellants claimed, were privileged under Article 105(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, papers, votes or proceedings.” By a majority of 3:2, the Supreme Court immunized bribe takers against prosecution for their alleged crimes.

In concluding that the bribe takers enjoyed immunity under Article 105(2), Bharucha J. (as he was then) emphasized the broad character of protection, being “in respect of” anything said or any vote given.¹⁰² The broad protection, according to him, was “absolute and necessary,” given the role Members of Parliament perform.¹⁰³ He considered the same set of Indian precedents including *Sharma, Special*

¹⁰¹ (1998) 4 SCC 626 [*Narasimha Rao*].

¹⁰² *Ibid.* at para. 109.

¹⁰³ *Ibid.*

*Reference and State of Karnataka*¹⁰⁴ and invoked comparative law. He accepted the English position of law in the way the Salmon Commission had articulated in 1976: “neither the statutory nor the common law applies to bribery or attempted bribery of a Member of Parliament in respect of his parliamentary activities.”¹⁰⁵ He then turned to U.S. law. The Speech or Debate Clause under Article 1(6) referring to the U.S. Senators and Representatives says: “for any speech or debate in either House, they shall not be questioned in any other place.” Interpreting the same, the U.S. Supreme Court in *U.S. v. Johnson*¹⁰⁶ ordered a new trial against Congressman Johnson only after eliminating from the record elements (including speeches) that were protected under the Speech or Debate Clause. The position was contested again in *U.S. v. Daniel Brewster* and Burger C.J. (for the majority) refused to grant immunity to the Senator who had been charged with accepting bribes relating to his official acts. The clause, he said, was not written into the Constitution simply for the personal or private benefit of Members but to protect the integrity of the legislative process.¹⁰⁷ The purpose was not, he added, “to make Members of the Congress super-citizens, immune from criminal responsibility.”¹⁰⁸ In his dissent, Brennan J. asserted that neither the Senator’s vote nor his motives for voting, however, dishonorable, could be the subject of a civil or criminal proceeding outside the halls of the Senate. He challenged Burger C.J.’s interpretation of *Johnson* and concluded that in turning its back on the decision, the Supreme Court was arrogating to the judiciary an authority committed by the Constitution exclusively to the Senate of the U.S. Bharucha J. adopted the dissenting opinion. Broadly interpreted, Article 105(2) protected members, he said, “against proceedings in court that relate to, or concern, or have a connection or nexus with anything said, or a vote given, by him in Parliament.”¹⁰⁹ The prosecution, on the facts of the case, necessarily had to consider the motivations that led the nine members to vote against the no-confidence motion. And that was exactly what Article 105(2) immunized members from. Based on this approach, he concluded that those who had accepted bribes were not answerable in a court of law for the alleged conspiracy and agreement while those who had offered bribes would not enjoy any such protection on the ground that it did not relate to their votes given in Parliament.¹¹⁰

In his dissent, Agarwal J. followed the usual practice: he went on a tour of English, Australian, Canadian and U.S. law and addressed the *same* body of law that Bharucha J. had considered. But he came to the opposite conclusion. The expression “in respect of” had to be construed, he said, only to immunize legitimate acts of members: it could not be invoked to secure immunity against criminal acts.¹¹¹

¹⁰⁴ *Supra* note 5.

¹⁰⁵ *Ibid.* at para. 121.

¹⁰⁶ 383 U.S. 169 (1966) [*Johnson*].

¹⁰⁷ 408 U.S. 501 (1972) [*Brewster*].

¹⁰⁸ *Ibid.*

¹⁰⁹ *Supra* note 101 at para. 133.

¹¹⁰ *Ibid.* at para. 143. Expressing a degree of remarkable detachment, he added: “We are acutely conscious of the seriousness of the offence that the alleged bribe-takers are said to have committed. If true, they battered a most solemn trust committed to them by those they represented Even so they are entitled to the protection that the Constitution plainly affords them. Our sense of indignation should not lead us to construe the Constitution narrowing, impairing the guarantee to effective parliamentary participation and debate.”

¹¹¹ *Ibid.* at para. 43.

Adopting the majority position of *Brewster*, he added: the object of the immunity was to ensure independence of the individual legislators.¹¹² But any interpretation that immunized members from prosecution for criminal acts would be repugnant to healthy functioning of parliamentary democracy and subversive to the idea of rule of law.¹¹³ Consequently he would find both bribe takers and givers answerable in ordinary courts of law.

Predictably, *Narasimha Rao* generated a monstrous outrage. It was routinely condemned as “shocking”, “unacceptable” and a “travesty of constitutional interpretation.” A.G. Noorani led the assault: “In the nearly half a century of its existence, few rulings of the Supreme Court incurred such odium, and so deservedly, than that so merrily handed down in *Narasimha Rao*.”¹¹⁴ But the unpleasant conclusion of *Narasimha Rao* should not mask its methodological similarities with *Raja Ram Pal*. The nature of authorities, precedents and jurisdictions cited in *Narasimha Rao* was hardly different from those referred to in *Raja Ram Pal*. On both occasions, the Supreme Court went on long tours of English, Australian, Canadian and American laws, considered the *same* set of Indian precedents, substantially similar sets of foreign precedents and “interpreted” the *same* collection of provisions on powers, privileges and immunities. Also similar was the sense of desperation: just like the majority in *Raja Ram Pal*, the majority in *Narasimha Rao* bent over backwards, but only to find a constitutional immunity for the members. Evidently, in 10 years between 1998 and 2007, something had changed. What was it?

VI. “COMING ALIVE”: CLUSTERS IN CONSTITUTIONAL ADJUDICATION

Much ink has been spilt on the Indian Supreme Court’s dramatic resurgence in the post-Emergency years.¹¹⁵ It crafted a new identity, cultivated a novel normative constitutional standard and imposed an approach to public law adjudication that is pervasively present in India’s legal canvas.¹¹⁶ Indeed, there is little, if anything, about the Indian life that has remained untouched by the sparkle of this judicial razzmatazz. But the application of this new identity/approach to all possible areas did not happen overnight. On the contrary, the Supreme Court has shown a remarkable tendency to “come alive” at *particular* moments. In the late 1970s, issues relating to prison reforms and prisoners’ rights led the new experiment.¹¹⁷ It gave birth to a vocabulary of prison jurisprudence that empowered prisoners or at least alleviated their sufferings somewhat. Krishna Iyer J. was particularly at the forefront of this humanizing effort.

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ See A.G. Noorani, “Bribes in Parliament: A Shocking Ruling by the Supreme Court” in *Constitutional Questions in India* (New Delhi: Oxford University Press, 2000) at 222–225.

¹¹⁵ For a critical introduction see Upendra Baxi, “The Avatars of Indian Judicial Activism: Explorations in the Geographies of [In]Justice” in S.K. Verma & Kusum, eds., *Fifty Years of the Supreme Court of India: Its Grasp and Reach* (New Delhi: Oxford University Press, 2000) 156. See also S.P. Sathe, *Judicial Activism in India* (New Delhi: Oxford University Press, 2002).

¹¹⁶ For a vivid account of this identity/approach paradigm see Gobind Das, *Supreme Court in Quest of Identity*, 2d ed. (Lucknow: Eastern Book Co., 2000).

¹¹⁷ See *Babu Singh v. State* AIR 1978 SC 527, *Charles Sobraj v. Superintendent* AIR 1978 SC 1514, *Sunil Batra v. Delhi Administration* AIR 1978 SC 1675, *Prem Shanker v. Delhi Administration* AIR 1980 SC 1535.

In contrast, child adoption (particularly international adoption), bonded labour and compensatory remedies “came alive” in the early 1980s.¹¹⁸ The Court laid down extensive guidelines for international adoption, amplified the meaning of “begar” under Article 23 and expanded the nature of remedies available under Article 32 for violation of fundamental rights. In the mid-1980s, general issues of criminal justice system seized the Court’s imagination. In a series of judgments, the Supreme Court worked out the law relating to speedy trial in criminal cases particularly in the context of children.¹¹⁹ Similarly, the early 1990s saw educational rights and matters relating to custodial violence dominate the Court’s docket.¹²⁰ The Court showed keen desire to expand the right to life and personal liberty under Article 21 and also discipline the police for extra-legal methods of interrogation. In contrast, the mid-1990s was all about environmental rights and gender rights.¹²¹ As Shyam Diwan put it, “Short of putting on their gum boots and wading into the murky waters of the Ganga to clean up the mess, a bench of the Supreme Court has [done] a whole lot and more to restore the health of rivers.”¹²² It was equally the era of progressive decisions in favour of women’s rights, whether in the work place or else where. But the late 1980s and the late 1990s tended to be much more eclectic: the nature of issues considered involved a non-homogenous character. Some issues, however, defy any such categorization: they have proved to be immensely perennial.¹²³ Each of these categories—late 1970s, early 1980s, mid-1980s, early 1990s, mid-1990s, ‘clusters’ as I shall refer to them—occurs because cases of the same kind have tended to stick together.

Let me clarify what the idea of clusters is *not* about. Firstly, clusters, in the way I use it here, makes no claim to exclusivity. This idea of “coming alive” in the form of clusters is not to suggest that except for that limited time, the Supreme Court has not been involved with issues otherwise associated with the period. If examples are needed, many may be found. Prisoners’ rights, for example, have been litigated throughout the 1980s and 1990s. To say that prisoners’ right “came alive” as a cluster in the late 1970s is only to say that at that moment prisoners’ rights *dominated* the Court’s imagination. Similarly, child adoption amongst others was *definitive* of the

¹¹⁸ See *Lakshmi Kant Pandey v. Union of India* AIR 1984 SC 469, *Lakshmi Kant Pandey v. Union of India* 1985 Supp (SCC) 701, *Rudul Shah v. State* AIR 1983 SC 1086, *Sebastian Hongrey v. Union of India* AIR 1984 SC 956, *Bhim Singh v. State* (1985) 4 SCC 677, *PUDR v. Union of India* AIR 1982 SC 1473, *Bandhua Mukti Morcha v. Union of India* AIR 1984 SC 802.

¹¹⁹ See *Sheela Barse v. State* 1987 Indlaw SC 1051, *Sheela Barse v. Secretary, Children Aid Society* 1986 Indlaw SC 249, *Sheela Barse v. Union of India* 1986 (2) Scale 865 *Sheela Barse v. Union of India* 1986 (3) SCC 632, *Sheela Barse v. Union of India* 1986 (3) SCC 596.

¹²⁰ See *Mohini Jain v. State* AIR 1992 SC 1858, *Unni Krishnan v. State* 1993 (4) SCC 111, *T.M.A. Pai Foundation and Others (I) v. State* 1993 (4) SCC 276, *Nilabeti Behera v. State* (1993) 2 SCC 746, *Arvinder Singh v. State* (1994) 6 SCC 565, *Inder Singh v. State* (1995) 3 SCC 702, *Sawinder Singh Grover v. State* 1994 SCC (Cri) 1464.

¹²¹ See *Wadhwa v. Union of India* (1996) 2 SCC 594, *M.C. Mehta v. Union of India*, (1996) 5 SCC 281, *M.C. Mehta v. Union of India* (1998) 6 SCC 63, *Vellore Citizens’ Welfare Forum v. Union of India* AIR 1996 SC 3011, *Indian Council for Enviro-Legal Action v. Union of India* (1996) 3 SCC 212, *Virender Gaur v. State* (1995) 2 SCC 577, *Gaurav Jain v. Union of India* AIR 1997 SC 3021, *Madhu Kishwar v. State* (1996) 5 SCC 125, *Sarla Mudgal v. Union of India* AIR 1995 SC 1531, *Ahmedabad Women Action Group v. Union of India* AIR 1997 SC 3614, *Vishaka v. State* (1997) 6 SCC 241.

¹²² Shyam Diwan, “Cleaning the Ganga” [1995] Econ. & Pol. Weekly 1557.

¹²³ This is true particularly of issues such as basic structure, judicial review of executive powers, affirmative action and rights of minority educational institutions.

Court's identity/approach praxis in the early 1980s. Equally, women's rights and environmental concerns were definitive of the Court's identity/approach in the mid-1990s. Secondly, cluster is not a substantive category: it does not tell us *how* the Court may have decided a given set of issues. Subject to these limitations, the idea of clusters is helpful to the extent that it allows us to break down the Supreme Court's identity/approach praxis into a construct that brings issues and moments together: at any given moment, particular issues were definitive of the Court's concern. As an introductory idea, I would argue that cases within a cluster tend to be decided similarly: they seem to have the potential to generate a "force" in a particular direction. For example, issues concerning women's rights were likely to have been decided progressively in favour of women particularly at the moment of the cluster. Equally, within the clusters, there has been a tendency to favour conclusions that make State and state agencies accountable for their legislative or administrative excesses.

Let us return to MPs, corruption and immunity. Consider the approach of the Supreme Court to issues of political and electoral reform in the last five years or so. In *B.R. Kapur v. State of TN*,¹²⁴ invalidating the appointment of Ms. Jayalalitha as the Chief Minister of TN, the Court concluded: "a person who is convicted for a criminal offence and sentenced to imprisonment for a period of not less than two years cannot be appointed the Chief Minister of a State and cannot continue to function as such." The Constitution, the Supreme Court said, prevails over the will of the people as expressed through the majority party. And, therefore, it did not matter if the people wanted Ms. Jayalalitha as the Chief Minister: the Constitution, the Supreme Court added, prohibited such an appointment.¹²⁵ In *Union of India v. Association for Democratic Reforms*,¹²⁶ the Supreme Court "enacted" a set of guidelines intended to curb the increasing criminalization of politics. Based on a cumulative "reading" of the constitutional powers of the Election Commission and the Court's powers under Articles 32 and 142, Shah J. directed the Election Commission to seek information about the criminal antecedents of candidates including information about past convictions, acquittals or discharges. Not unexpectedly, political parties resisted the progressive approach: they conveniently connived to water down the legal effects of the judgment by introducing the *Representation of the People (Amendment) Ordinance, 2002*. In *PUCI v. Union of India*,¹²⁷ the Supreme Court struck down the Ordinance as unconstitutional. Insisting that the law laid down in *Association for Democratic Reforms* had attained finality, the Court concluded that legislatures did not have the authority to nullify a decision interpreting the Constitution. Consider similarly the recent decision denying the protection of "previous sanction" to public servants in *Lalu Prasad and others v. State of Bihar and others*.¹²⁸ No prior sanction from the competent authority, the Court said, was required to prosecute public servants, including present and former ministers, in corruption cases. Or consider the decision of the Court in *Prakash Singh v. Union of India and others* laying down guidelines for police reforms.¹²⁹ The current model of police bureaucracy, the Court insisted, has allowed the politicization of the police force and made personnel

¹²⁴ 2001 (7) SCC 231.

¹²⁵ *Ibid.*

¹²⁶ 2002 (5) SCC 294.

¹²⁷ 2003 (4) SCC 399.

¹²⁸ 2006 Indlaw SC 997.

¹²⁹ 2006 Indlaw SC 514.

dependent on political masters in a way that had subversive implications for the rule of law. Finally, consider in similar light the decision of the Supreme Court on 17 February 2007 to refer to a Constitution Bench, a Public Interest Litigation seeking directions from the Supreme Court not to appoint persons with criminal background as ministers. Challenging the appointment of tainted ministers in the Union Cabinet, petitioner Manoj Narula contended that the induction of persons with dubious track records led to criminalization of politics in general and the ministries in particular. Accepting the petition, the Court has directed states to file their responses within four weeks.

The pattern is impossible to miss. In the last five years, the Supreme Court has “come alive” in matters of political reform in a way it had not previously done. The cluster, to use our earlier vocabulary, is the result of an increasing realization that the political process is incorrigibly unwilling to pursue reforms. And without some judicial prodding, political parties would perpetually exploit the crime-politics nexus that has long afflicted Indian democracy. *Raja Ram Pal*, I would argue, is but a small piece in this larger jigsaw: it explicates the Supreme Court’s “zero tolerance” towards corruption and its supposed determination to reform the political process.¹³⁰ *Raja Ram Pal* was hardly about parliamentary privileges. Rather, it was about reforms using the façade of privileges. That was precisely what *Narasimha Rao* lacked: the background “force” of a cluster that would have carried the Supreme Court to an opposite conclusion.¹³¹ And, therefore, we return to my opening argument: the kaleidoscope of legal and pragmatic reasoning that *Raja Ram Pal* weaves together cannot be understood on its own terms. The razzmatazz must be situated within a larger canvas of political reforms that the Supreme Court has haltingly pursued in the last five years and in the preceding period.

VII. CONCLUSION

The alacrity with which Parliament acted to expel the fallen MPs was unprecedented in recent political memory. For once, the political process seemed determined not to shield tainted politicians. In some sense, the Parliament acted exactly in the way the Supreme Court would have wanted it to. To allow them constitutional immunity subsequently would tantamount to turning the Constitution into a protective den for criminals. Would the Supreme Court have done it? It did so once before and suffered an ignominy that is best forgotten. To do so again would have been a public relations disaster of unimaginable proportions: the popular support that legitimizes its “constitutional antics” may have been irreparably damaged. And, in this sense, the MPs never had a chance in the Supreme Court even before they had petitioned it.

So what was *Raja Ram Pal* about? Whatever else it may have been about, *Raja Ram Pal* was decidedly not about parliamentary privileges. The liberal dose of constitutional text, precedents and comparative law in the judgment reflects institutional limitations that restrain judicial reasoning. But to fall for it as an exegesis of the

¹³⁰ This cluster, like all clusters, is not without exception. On two occasions before, the Supreme Court has shown striking commitment to address the issue of corruption. See *Common Cause v. Union of India* (1996) 4 SCC 33, *Vineet Narain v. Union of India* (1998) 1 SCC 226.

¹³¹ This interpretative argument must not be read as an approval of such judicial antics: the purpose is merely to describe an approach rather than take a position on it.

constitutional text and precedents is a potentially misleading exercise. To search the *judgment* for “reason” is like searching the desert for the sea: it does not exist. Reasons must be found elsewhere and, as I have tried to argue, the idea of the cluster of political reform gives us one possible set of reasons to understand the machinations of *Raja Ram Pal*.