CHAPTER IV

PARLIAMENTARY PRIVILEGES VIS-A-VIS

FUNDAMENTAL RIGHTS

4.1 Introduction:

History of humanity records various instances of conflict between the governed and the government. It also records that gradually the governed asserted itself against the government and established its rights to freedom and liberty. We start from the English history, the Magna Carta (1215) was the first triumph of the people over the King. This was followed by many other instances of triumph and the right to liberty was firmly established in England. Though, there is not a formal declaration of a Bill or Rights in the British Constitution, on account of the doctrine of sovereignty of Parliament. It has been suggested that such a Bill of Rights should contain as a minimum the rights defined by the European conversion to which the United Kingdom is a party and which can be enforced against the United Kingdom by an international body. Lord Hailsham goes a little further. He has advocated a full scale written constitution for the United Kingdom. The United States of America incorporated the Bill of Rights in the Constitution.
by various amendments. References may be made in this connection to Amendments I to X, XIII to XV and XIX to the Constitution of the United States of America, to Articles 4, 31, 44, 45, 49, 55 to 58, 60 and 65 of the Swiss Constitution, to Articles 109 to 160 of the German Constitution of 1919, to Article 118 to 128 of the Constitution of the Union of Soviet Socialist Republics and to Articles 40 to 44 of the Constitution of Ireland.

The Constitution of Australia and South Africa are silent about fundamental rights. The reason in these cases are historical. In respect of Australia and South Africa, the problem did not arise as the earliest settlers carried their law with them from England. In Canada, however, the parliament adopted on August 10, 1960 an Act for the recognition and protection of Human rights and Fundamental Freedom. In Ireland the British rule was resented and hence on the realization of the cherished goal of independence the Constitution made a reference to the fundamental rights, which were denied to the people for a long time. Nigerian Constitution (1960) contains a chapter on Fundamental Rights and those of Czechoslovakia and of China contain these in the nature of 'directives' to the
legislature and in the 'statements' of 'National Objects' and not as 'positive rights'. In the United States of America, the Bill of Rights was added by amendments made to the Constitution. Hamilton opposed the idea of the inclusion of a Bill of Rights in the Constitution. He argued that such a provision will be dangerous. Madison held a similar view. However, under the influence of Jefferson, he changed his views and became the principal draftsman of the first ten amendments. One of the objections against the inclusion of a Bill of Rights in the Constitution, was that if certain rights are enumerated then only those rights can be claimed and rights not enumerated would not be available against the state. Hence, a provision was made in the Constitution in the Ninth Amendment which runs as follows: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage other retained by the people." Thus, the Constitution of the United States of America provides both for the specific enumerated rights and also for unenumerated rights. Citizens of India can claim only the specific rights mentioned in the Constitution.

The Fundamentals of the Indian Constitution are contained in its preamable which secures to its citizens,
justice, social, economic and political; liberty of thought, expression and belief, faith and worship; equality of status and opportunity; and to promote among them all fraternity assuring the ‘dignity of the individual and the unity of the nation. The theme of these objectives permeates throughout the entire constitution. It was to give effect to these objectives that fundamental rights were enacted in Part III. Even prior to the present constitution of India, the idea of Fundamental Rights was present in a tenuous form in the Indian polity. Reference may chiefly be made in this connection to Sections 298 and 299 of the Government of India Act, 1935.

These rights are regarded as Fundamental because they are most essential for the attainment by the individual of his full intellectual, moral and spiritual statute. These (subject to the qualifications defined in the Constitution itself) are inviolable in the sense that no law, ordinance, custom, usage or administrative order, can abridge or take away a ‘Fundamental Right’. “The statement of Fundamental Rights thus limits the range of state activity in appropriate direction in the interest of the liberty of the citizens.”
Speaking about the importance of Fundamental Rights in the historical decision of *Maneka Gandhi v. Union of India*, Bhagvati J., observed¹

“These fundamental rights represent the basic values cherished by the people of this country (India) since the vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent”. Although in Maneka Gandhi. Sunil Batra, Haskot and Hussainara Khatoon, the Supreme Court has taken the view that the provisions of Part III should be given widest possible interpretation yet the absolute concept of liberty and equality is very difficult to achieve in modern welfare society.

How the legal rights of a man are protected, the Supreme Court in the historic judgment of judges transfer case held that any member of the public having sufficient interest can approach the court for enforcing constitutional or legal rights of such persons or group of persons who cannot approach the court because of poverty or for any

¹ AIR 1978 SC 597.
other reasons, even through a letter. But the position is quite different with privileges. Privileges, though part of the law of the land, are to a certain extent an exemption from the ordinary law. Under Article 105(3), Parliament may pass a law to define its privileges while any law in contravention with any of the fundamental rights will be invalid. If the legislature of a state under the first part of clause (3) makes a law which prescribes its powers, privileges and immunities, such law would be subject to Article 13 and clause (2) of that Article would render it void if it contravenes or abridges the Fundamental Rights guaranteed by Part III. Again the Constitution guarantees the fundamental right to freedom of speech and expression. The right includes the right to freedom of press. A question arises as to the extent of this right vis-a-vis the privileges of the Legislature. Has an editor of a newspaper the right to publish the proceedings of a state legislature if the speaker prohibits the publication? And these are the points of clash. One more thing Article 19(I)(a) guarantees freedom of speech and expression to every citizen of India. But this right is subject to reasonable restrictions under clause (2) of Article 19. The right under Article 105 is an independent
right and is not subject to restrictions under clause (2) of Article 19(1) Thus, it is clear that the freedom of speech under Article 105 is different from the freedom of speech under Article 19, which is subject to restrictions.

Now the question arose after the advent of the Indian Constitution, was whether the Fundamental Rights Control in any way the parliamentary privileges, it was also the question as to which will prevail in case of conflict between fundamental Rights and powers privileges and immunities of Parliament or the State Legislature. It will be considered by taking into consideration the important cases that came before the Courts since the inception upto now.

Four Supreme Court decisions have interpreted these provisions. The key question in each case has been this: Can a privilege or the exercise of a privilege be struck down if it violates a Fundamental Right? Would Fundamental Rights override the privileges and would privileges be subject and subservient to Fundamental Rights? Put differently, does the power of Judicial Review extend to Parliamentary privileges?
Article 13(2)\textsuperscript{2} of the Constitution contains the power of Judicial Review. The Supreme Court can strike down a ‘law’ that violates any Fundamental Right.

The earlier view held by the Supreme Court\textsuperscript{3} was that the power of Judicial Review under Article 13(2) would not extend to privileges under Clauses 1 and 2 because the language of these clauses itself precluded Judicial Review. So far as Clause 3 was concerned, the Supreme Court was of the view that the uncodified privileges were not ‘law’ within the meaning of Article 13(2) and therefore not capable of being struck down.\textsuperscript{4}

Although Article 105(3) contains a clear mandate in favour of codifying privileges, Parliament taking cue from the aforesaid reasoning of the Supreme Court has resolved to leave the privileges uncodified out fear that if privileges were to be codified in the form of a statute, they would be struck down in case of a conflict with Fundamental Rights. This fear also stems from the fact that several privileges enjoyed by the Indian Parliament today have fallen into

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\textsuperscript{2} Constitution of India. Art. 13(2): The State shall not make any law which takes away or abridges the Rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.
\textsuperscript{3} Pandit MSM Sharma v. S.K. Sinha, AIR 1954 S.C.636
\textsuperscript{4} Id.
\end{flushleft}
desuetude in England many years ago. Several privileges are likely to conflict with Fundamental Rights and these privileges are almost certain to be struck down if codified into a statute.

As a result, members today continue to enjoy a large number of privileges that are in conflict with Rights in actual practice and which have ceased to enjoy the status of privileges in England and other countries of the world.

Controversy also exists with respect to the procedure to be followed in cases of breach of privilege. Parliament is yet to lay down a set procedure for dealing with instances of breaches of privileges. For instance: Whether a hearing must be given to the accused? Whether he must be given a right of legal representation? Should there be an examination and cross examination of witnesses?

The Indian Parliament continues to follow a policy of differential procedure for each case of breach of privilege that comes up before it, guided solely by the exigencies of the hour and popular public opinion in a particular case.

Hitherto, the Supreme Court refused to interfere with such iniquitous procedure because of its restrictive
interpretation of Article 122 of the Constitution. The Court assiduously avoided any review of Parliamentary procedure even if the procedure was one that affected the life and liberty of a citizen (whether MPs or otherwise) under Article 21.

Article 122 of the Constitution reads:

‘Courts not to inquire into proceedings of Parliament—

(1) The validity of any proceedings in Parliament shall not be called in question on the ground of any alleged irregularity of procedure.

(2) No officer or member of Parliament in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in Parliament shall be subject to the jurisdiction of any Court in respect of the exercise by him of those powers.’ (emphasis supplied)

5. Art. 212 contains a similar provision for the State Legislatures.
6. Constitution of India, Article 21 states; Right to life and personal liberty— No person shall be deprived of his life or personal liberty without a procedure established by law.'
In 2007, 11 Members of Parliament were caught on camera by a news channel, accepting bribes to ask certain questions in Parliament and thereby misusing their powers for illegal gratification and monetary gain. The Parliament of India suspended these Members who in turn approached the Supreme Court for relief. The Speaker and the Chairman of the Lower and Upper House of Parliament respectively, refused to appear before the Supreme Court. They asserted that the exercise of privileges fell within the exclusive jurisdiction of Parliament and that the Court had no power to entertain the matter even; let alone exercise its power of Judicial Review. The Supreme Court decided to proceed with the case inspite of Parliament’s strident stand and the Union of India therefore defended Parliament’s view in the Supreme Court.

A Constitution Bench led by Chief Justice Sabharwal brought about the first binding change in the law of privileges in India in Raja Ram Pal v. The Hon’ble Speaker, Lok Sabha (hereinafter referred to as ‘Raja Ram Pal’). The Court held that the power of Judicial Review under Article

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7. The revelation was part of a ‘Sting’ Operation carried out by the new channel Aaj Tak titled ‘Operation Duryodhan’ after the villain in the Mahabharata, an ancient Hindu text.
8. JT 2007 (2) SC 1.
13(2) would extend to the privileges on a case to case basis overruling its earlier decisions.

The Court also gave a wide interpretation to Article 122. It held that while Article 122 precluded an inquiry into the procedure of Parliament on grounds of procedural irregularity, the Article could not oust a review of a procedure if the procedure was found ‘illegal’ or ‘unconstitutional’.\(^\text{9}\) In other words, the Court restricted the scope of Article 122 to matters of procedural *irregularity* and instead of reading the word ‘irregularity’ as being all encompassing, it chose to read it restrictively, distinguishing it from an illegal and an unconstitutional procedure.

In arriving at its decision, the Supreme Court relied upon a number of foreign decisions\(^\text{10}\) as well as its own decision in the Presidential Reference of 1964\(^\text{11}\) which was only advisory. The change in the law brought about by the judgment has crucial implications on the accountability of our Parliamentarians who until now were not liable to being

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9. JT 2007 (2) SC 1, 141.
11. (1965) 1 S.C.R. 413
questioned by any Court in respect of their functions as Parliamentarians.

In this Article I shall analyse the evolution of the law as brought about by four Supreme Court decisions. In *G.K. Reddy v. Nafisual Hassan*,12 *M.S.M. Sharma v. S.K. Sinha*,13 Re Presidential Reference case,14 *Raja Ram Pal case*.15 I shall also point out several gaps in the reasoning of the Supreme Court in the *Raja Ram Pal* case. However in light of Parliament’s determination against reducing its privileges I believe that the Supreme Court’s decision is well founded though in partial violation of the principle of Separation of Powers under the Indian Constitution.

4.2 ANALYSIS OF CONFLICTING CONCLUSIONS

The earliest instance of a breach of privilege in independent India arose in the Constituent Assembly, when one of the members complained that the sentry at the gates of the Assembly was restricting entry of horse drawn carriages into the premises.16

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13. AIR 1959 SC 60.
14. (1965) SCR 413.
15. JT 2007 (2) SC 1.
16. Shri Sri Prakash representing United Provinces: General raised the issue in the House on Wednesday, the 16th of July, 1947. Constituent Assembly Debates of India, Vol. IV.
In 1950, the first exercise of the privileges came up when HR Mudgal was accused and subsequently found guilty of accepting bribes to raise questions in the House. The indictment by the Committee of Privileges, led to his resignation.

However the first Supreme Court case on the point was that of G.K. Reddy v. Nafisul Hassan\textsuperscript{17} in 1954.

\textbf{4.2.1 The GK Reddy case}

G.K. Reddy, the editor of the magazine \textit{Blitz} was committed for contempt by the Uttar Pradesh Legislature. In the Supreme Court, the Attorney General admitted that Reddy had not been produced before a Magistrate within 24 hours. The Supreme Court held that his Fundamental Right under Article 22(2)\textsuperscript{18} had been violated and ordered his release. However, the Court did not enter into the larger question of whether privileges would be subject and subservient to Fundamental Rights. The case created that

\textsuperscript{17} AIR 1954 S.C. 636.

\textsuperscript{18} Constitution of India. art. 22(2): ‘Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the Court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of the Magistrate.’
impression however,\textsuperscript{19} although the Court did not explicitly say so in its judgment.

4.2.2 MSM Sharma (I)

Five years later, the GK Reddy case was overruled by the Supreme Court in \textit{Pandit M.S.M. Sharma v. S.K.Sinha}\textsuperscript{20(I)}\textsuperscript{21} (hereinafter referred to as the ‘Searchlight case’). In 1954, the Editor of a newspaper \textit{Searchlight} was held guilty of contempt of the Bihar State Legislature when his newspaper carried a report of proceedings expunged by the Speaker of the Bihar Legislature. The editor applied to the Supreme Court seeking an injunction of the contempt proceedings, defending the publication of the report as being protected by the freedom of speech and expression guaranteed by Article 19(1)(a).\textsuperscript{22} This argument was in furtherance of the general proposition that the guaranteed Fundamental Rights of citizens would be applicable to the privileges and that the privileges would be subject and subservient to them. He further contended that his right to life and personal liberty guaranteed by Article 21 would be violated if he were

\begin{itemize}
\item \textsuperscript{19} M.P. JAIN, INDIAN CONSTITUTIONAL LAW 100 (Wadhwa & Co., Nagpur 5th ed. Reprint 2006).
\item \textsuperscript{20} AIR 1959 S.C. 395.
\item \textsuperscript{21} A petition was filed by the same petitioner seeking a review of the earlier judgment. The case was dismissed on grounds of Constructive Res Judicature. See \textit{MSM Sharma v. S.K. Sinha}, AIR 1959 S.C. 60.
\item \textsuperscript{22} Constitution of India. Art. 19(1)(a): All citizens shall have the right to freedom of speech and expression.
\end{itemize}
produced before the Committee of Privileges of the Bihar Legislature, which was empowered to order his imprisonment. He argued that the procedure likely to be followed by the Committee was not ‘law’ within the meaning of Article 21. The arguments made on behalf of MSM Sharma may be summed up thus:

1. **The Article 19(1)(a) argument**: The intent of the Constituent Assembly was that the privileges should be codified eventually. Once codified, they would be ‘law’ within the meaning of Article 13(2) and therefore liable to be struck down if they violated any Fundamental Right. Since a codified ‘law’ would be subject to Article 19(1)(a), it could not have been the intention of the Framers that the law when still uncodified, should not be so subject. It was urged that the uncodified law too should be made subject to the Fundamental Right of speech and expression guaranteed by Article 19(1)(a).\(^{23}\)

2. **The Article 21 argument**: It was urged that the right to life and personal liberty guaranteed by Article 21 could be deprived in the proceedings before the Committee of Privileges. It was argued that the life or personal

\(^{23}\) AIR 1959 S.C. 395, 408 at para 25.
liberty of a citizen could only be abrogated by a procedure established by ‘law’ and the procedure likely to be followed by the Committee was not ‘law’ within the meaning of Article 21. The counsel argued that the Court should strike down the summons of the Committee since the exercise of that privilege could result in a violation of a Fundamental Right. The counsel for MSM Sharma cited the *G.K. Reddy case* as a precedent for this second argument. It was argued that the Court would be bound by GK Reddy case hence the Fundamental Right guaranteed by Article 21 would have primacy over the privilege conferred by Article 194(3). The Article 21 argument pre-supposed that privileges would be subject and subservient to Fundamental Rights.24

By a majority vote of 4:1, the Constitution Bench led by Chief Justice Das held as follows:

1. The Court held that the freedom of speech in a Legislature contained in Article 194(1),25 being specific

25. Constitution of India. Art. 194- Powers, Privileges etc. of the Houses of Legislature and of the members and committees thereof—(1) Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of Legislature, there shall be freedom of speech in Legislature. This corresponds to art. 105(1) which lays down a similar privilege for the Union Parliament. See supra 2
as against the general freedom of speech under Article 19(1)(a), the general restrictions that applied to 19(1)(a) by virtue of Article 19(2) would not apply to specific freedom of speech under Article 194(1).

2. As regards Clause 2 of Article 194, it was held that it was not the intention of the Framers to make the immunity for speeches made or votes given in a legislature subject to the Fundamental Right guaranteed by Article 19(1)(a). The Court observed that the immunity in Clause 2 of Article 194, conspicuously lacked the phrase, ‘subject to provisions of the Constitution’ which was a part of Article 194(1).

3. Applying the rule of Harmonious Interpretation, the Court held that the more specific privileges in Article

Nothing in sub-clause (a) of Clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests the sovereignty and integrity of India, the security of the State, friendly relations with Foreign States, public order, decency or morality or in relation to contempt of Court, defamation or incitement to an offence.


No member of the Legislature of a State shall be liable to any proceedings in any Court in respect of anything said or any vote given by him in the Legislature or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of a House of such a Legislature of any report, paper, votes or proceedings. This corresponds to art. 105(2) which lays down a similar privilege for the Union Parliament. See supra 3.

194 available to Parliament would *override the general rights of their constituents contained in Article 19(1)(a)* and hence that the privileges of a Legislature would not be subject to Fundamental Rights.  

4. The Court overruled the *GK Reddy case* on the ground that the GK Reddy case was a result of a concession made by the counsel (the counsel had conceded that Reddy had not been produced before a Magistrate) and hence not a ‘considered opinion’. In other words, the GK Reddy had not expressed an opinion one way or another and was not a binding precedent.  

5. The Court observed that in case if the editor was to be produced before the Committee of Privileges in the Bihar Legislature, the rules framed by the Assembly under Article 208 would constitute a *procedure established by law*, and therefore rejected the argument that Article 21 could be violated.  

Therefore on the one hand the Court negatived MSM Sharma’s contention that the privileges would be subject and subservient to Fundamental Rights, yet paradoxically it

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30. *Id.*  
32. ‘Procedure established by law’ was interpreted to mean a fair, just and reasonable procedure only later.  
examined the merits of the Article 21 argument, which as we have seen, presupposed that privileges would be subject to Fundamental Rights. Having concluded that privileges are not subject to Fundamental Rights, the Court ought to have dismissed the Article 21 argument altogether for the same reason viz. that the privileges are not subject to the right guaranteed by Article 21. Inexplicably, the Court not only considered the argument but while rejecting the argument, rejected it for a very different reason – that the rules framed by the Legislature constitute ‘law’ within the meaning of Article 21.

It must be questioned therefore: What if the Court had found that the rules framed by the Legislature do not constitute a procedure established by ‘law’? That the right guaranteed by Article 21 would indeed be violated if the MSM Sharma was produced before the Committee. In such a scenario, would the court have taken its conduct to its logical conclusion? Would it have applied Article 21 to the privileges, striking down the exercise of the privilege by virtue of which Sharma was summoned and could possibly be imprisoned?
It is important to bear in mind that the Court made no comment whatsoever on whether Article 21 would override privileges. The Court merely held that Article 19 (1)(a) would not override privileges. It proceeded to examine the Article 21 argument on merits without clarifying the larger question as to whether Article 21 was to apply to privileges as a matter of rule, even though Fundamental Rights in general and Article 19 (1)(a) in specific, were found not to apply to and override the privileges.

This unanswered question formed the crux of the judicial interpretations on which the 1964 Presidential Reference and subsequently, the case of Raja Ram Pal turned. Both these Benches imputed to the Court’s scrutiny of the Article 21 argument, an indication that certain Rights would override privileges and that the privileges would be subject and subservient to these select Fundamental Rights even if they were not so subject to the right guaranteed by Article 19(1)(a).

4.2.3 The 1964 Presidential Reference

In 1964, one of the first open standoffs between the Courts and the Legislatures surfaced. The Uttar Pradesh

34. (1965) 1 S.C.R. 413.
Legislature found a private citizen, Keshav Singh guilty of Contempt of the Legislature. Keshav Singh had committed a breach of privilege of MLA NN Pandey by printing and publishing certain contemptuous pamphlets. He was summoned to the Legislature. Thereafter he wrote a disrespectful letter to the Speaker and acted in an unruly manner when being reprimanded in the Legislature. A warrant was issued by the Speaker for Keshav Singh’s detention for a period of seven days. However the warrant did not contain the facts constituting the alleged contempt. Keshav Singh moved the High Court of Uttar Pradesh seeking issuance of the writ of *Habeas Corpus*. A Division Bench ordered his release on interim bail pending decision on the *habeas corpus* petition. In an unprecedented move, the Uttar Pradesh Legislature issued Contempt notices not just to the lawyer of the accused but also to the Judges of the High Court for having entertained the petition. The Legislature passed a resolution to the effect that all of them including the High Court judges were to be produced before it in custody. This marked the beginnings of a first rate Constitutional crisis. The following day, Mandamus petitions were filed by the judges as well as the advocate for
Keshav Singh before the Uttar Pradesh High Court. A Full Bench of the Uttar Pradesh High Court comprising 28 Judges (all except the two Judges) made directions restraining the Speaker of the Legislature from issuing warrants and restraining the Marshal of the House from executing the warrant if it had already been issued.

Taking note of the rapidly deteriorating situation, the President of India exercising his discretionary power of a Reference,35 sought the Supreme Court’s opinion on the issues involved.

A bench of seven Judges opined upon a multitude of issues connected with the controversy. In doing so, the interpretation of the Searchlight case became *sine qua non*. The Court led by Chief Justice Gajendraghadkar placed a radically different interpretation on the law of privileges, making them generally subject to Fundamental Rights and secured for itself the power to determine the legality and constitutionality of legislative procedure. However, being an advisory opinion, it did not enjoy the same force of an actually decided case.

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35. Constitution of India. Art. 143: Power of the President to consult Supreme Court.
By a vote of 6:1, the Court held that the correct interpretation of the Searchlight case would be this: While Article 19(1)(a) would not override the privileges, Article 21 would. Further it was held that if Article 21 applied to privileges then Article 20\textsuperscript{36} would also conceivably apply. However, the Court did not stop there. The majority further went on to state that the general proposition that privileges would not be subservient to Fundamental Rights was incorrect. The Judges ruled that the Privileges may or may not be subservient to the remainder of the Fundamental Rights; however the argument that they were certainly not subservient was incorrect. Whether the privileges were subservient to a particular Fundamental Right and therefore liable to be struck down in case of a conflict with that right, would have to be determined on a case to case basis, as and when specific Fundamental Rights were alleged to have been violated by the exercise of a privilege.

\textsuperscript{36} Constitution of India. Art. 20:
(1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of commencement of the offence.
(2) No person shall be prosecuted and punished for the same offence more than once.
(3) No person accused of any offence shall be compelled to be a witness against himself.
Moreover the Court attributed all of these findings to the Searchlight case ratio. The majority held that the Searchlight Court had considered the Article 21 argument on merits. Hence it concluded that the Searchlight Court did not preclude the application of all Fundamental Rights to privileges; it precluded the application of Article 19(1)(a) only.\textsuperscript{37} Why else would the Searchlight Court have considered the Article 21 argument at all, the majority asked? The Searchlight Court, the majority concluded, never expressed an opinion that privileges are not subject to Fundamental Rights in general; it merely expressed an opinion that privileges are not subject to Article 19(1)(a) specifically. The fact that it inquired into the Article 21 argument on merits, was taken on proof that the Searchlight Court must have intended to make the privileges subject to Article 21 at least:

\begin{quote}
Therefore we do not think it would be right to read the majority decision as laying down a general proposition that whenever there is a conflict between the provision of the latter part of Article 194(3) and any of the provisions of the fundamental rights
\end{quote}

\textsuperscript{37} (1965) 1 S.C.R. 413, 451.
guaranteed by Part III, the latter must always yield to the former. The majority decision, therefore, must be taken to have settled that Article 19(1)(a) would not apply, and Article 21 would.\(^\text{38}\)

The conclusive dictum of the Court may be summarised as follows: The right to speech and expression guaranteed by Article 19(1)(a) would not override the privileges. The Court held thus because it found itself bound by the Searchlight case.

The right to life and personal liberty guaranteed by Article 21 would override privileges. The Court attributed this to the inquiry on merits of the Article 21 argument in the Searchlight case.

If privileges were subject and subservient to the right guaranteed by Article 21 they would also be subject to the right guaranteed by Article 20. Finally, other Fundamental Rights may override the privileges, but these would have to be determined as when they were impugned, on a case to case basis. In order to appreciate the rationale of the pronouncement in this case, it is necessary to step away for

\(^{38}\) (1965) 1 S.C.R. 413, 451.
a moment from a legal analysis and dwell into the implication of the task faced by the learned Judges:

1. The case was a Presidential Reference and therefore stood on a lower footing than an ordinary pronouncement. The judgment would be strictly ‘advisory’.  

2. The question before the Judges contained much more than a mere analysis of a facet of law. The ruling would set the tone in future clashes between the Judiciary and the Legislatures in the country. It was of singular importance that the independence of the Judges be maintained. A ruling favour of the Legislatures may have been diastrophic to the cause of an independent Judiciary.

3. At stake was the dignity of Judges. If the Legislature was allowed to call Judges to the Bar of the House for Contempt, it may have struck the death knell for the maintenance of a Court’s dignity.

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4. Lastly, the Court could not allow the impression that it had ruled in favour of the Judges due to a vested interest in the matter being the Apex Court of the land. Necessarily, the judgment became a fine balancing act. The Court did not take an activist approach. It chose not to overrule the Searchlight case although it had the strength to do so.\(^4^0\) Instead, the majority preferred to show themselves bound by the Searchlight judgment, attributing to it the very conclusions it wished to draw. Having so interpreted it, the majority forthwith found itself bound by the Searchlight judgment.

The ruling was rejected by the Uttar Pradesh Legislature as being advisory and obiter dicta. However, it marked the beginning in the subservience of privileges to Fundamental Rights. The reasoning was adopted in the Raja Ram Pal case giving it the force of settled law.

\textbf{4.2.4 Raja Ram Pal Case: The Reference Revisited}

It has been already enunciated that the events that led to the Raja Ram Pal case\(^4^1\) 11 MPs were caught taking bribes on camera by a news-channel. The video which was telecast repeatedly, led to an uproar. In a quick reaction,

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\begin{itemize}
\item \textsuperscript{40} The Presidential Reference Bench had 7 Judges whereas the Searchlight Bench had had only 5 Judges.
\item \textsuperscript{41} \textit{Raja Ram Pal v. The Hon'ble Speaker}, Lok Sabha JT 2007 (2) SC 1
\end{itemize}
Parliament stepped in to control the damage. Immediate inquiries were ordered and expeditious verdicts sought. The Committee of Privileges which heard the matter found all the MPs guilty and recommended their immediate disqualification. The recommendations were accepted and all 11 MPs were disqualified. The MPs filed writ petitions in the Supreme Court seeking reinstatement.

A Constitution bench of the Supreme Court comprising: Sabharwal, CJI, K.G. Balakrishnan, D.K. Jain, C.K. Thakker, Raveendran, JJ heard the matter. For the first time since 1964, the Supreme Court had the opportunity of settling the law as regards Parliamentary Privileges once and for all. By a vote of 4:1\(^{42}\) the Court formalised the change sought to be brought about by the Presidential Reference and secured for itself the power to review the exercise of privileges by Parliament.

According to Shubhankar Dam,\(^{43}\) the judgment formed part of “the larger canvas of political reforms that the Supreme Court has haltingly pursued in the last five years and in the preceding period.”

\(^{42}\) The majority comprised of CJI Sabharwal, Balakrishnan and D.K. Jain, JJ, with Thakker, J. concurring. Raveendran, J. dissented.

\(^{43}\) Shubhankar Dam, “Parliamentary Privileges as Facade: Political Reforms and the Indian Supreme Court” 2007 Sing. J. Legal Stud. 162
However, the Court however continued to attribute the subservience of privileges to Fundamental Rights to the *conduct* of MSM Sharma Court in considering the merits of the Article 21 argument:

“In light of the law laid down in the two cases of Pandit Sharma and in the case of UP Assembly we hold that the broad contention on behalf of the Union of India that the exercise of Parliamentary privileges cannot be decided against the touchstone of fundamental rights or the constitutional provisions is not correct. *In the case of Pandit Sharma the manner of exercise of the privilege claimed by the Bihar legislative Assembly was tested against the “procedure established by law” and thus on the touchstone of Article 21. It is a different matter that the requirements of Article 21 as at the time understood in its restrictive meaning, were found satisfied. The point to be noted here is that Article 21 was found applicable and the procedure of the legislature was tested on its anvil. This view was followed in the case of UP Assembly*
which added the enforceability of Article 20 to the fray.” 44 (emphasis supplied)

The conduct of the MSM Sharma Court was given greater import than the actual text of its judgment. While this is a continuation of the Presidential reference, the Raja Ram Pal court had none of the aforementioned constraints or challenges which the Presidential Reference Bench faced.

The Court did lay down in unequivocal terms that privileges may be subject to Fundamental Rights on a case to case basis, but its reasoning was derived entirely from the Presidential reference ratio and therefore suffers from the same fallacy. The majority concluded that they were “unable to fathom any reason why the general proposition that fundamental rights cannot be invoked in matters concerning Parliamentary privileges should be accepted.”

However the Court also unambiguously reserved for itself the power to review Parliamentary proceedings. Rejecting the Doctrine of Exclusive Cognisance 45 of Parliament, the Court held that the doctrine was applicable only in England where Parliament was sovereign and was

44. JT 2007 (2) S.C. 1, para 348
45. The Doctrine stipulates that Parliament has the exclusive power to deal with breaches of privileges. As per the Doctrine, the Supreme Court has no jurisdiction to entertain even, a matter arising from a breach of privilege, let alone try it. It is in furtherance of this Doctrine that the Speaker of the Lok Sabha refused to appear before the Supreme Court for to do so would be to accept tacitly that the Parliament does not have exclusive jurisdiction.
incapable of being imported into India’s limited Constitution with its system of checks and balances.

Relying on Constituent Assembly Debates, the court concluded that Article 122 was intended to prohibit cases of interference with internal Parliamentary proceedings on the ground of mere procedural irregularity:

“The touchstone upon which Parliamentary actions within the four-walls of the Legislature were examined was both the constitutional as well as substantive law. The proceedings which may be tainted on account of substantive illegality or unconstitutionality, as opposed to those suffering from mere irregularity thus cannot be held protected from judicial scrutiny by Article 122(1) inasmuch as the broad principle laid down in Bradlaugh acknowledging exclusive cognisance 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, in which scheme of things, this Court is entrusted
with the duty to be the watchdog of and guarantor of the Constitution”.

“Article 122(1) thus must be found to contemplate the twin test of legality and constitutionality for any proceedings within the four walls of Parliament... Any attempt to read a limitation into Article 122 so as to restrict the court’s jurisdiction to examination of the Parliament’s procedure in case of unconstitutionality, as opposed to irregularity would amount to doing violence to the constitutional text.”

The Supreme Court judgment in the *Raja Ram Pal case* is the first binding change in the law of privileges. The Court whether out of a desire to bring about political reform or otherwise, has conclusively wrested for itself the power to review an exercise of privileges. The review rests on the tests of legality and constitutionality. While legality refers to the absence of bonafides, constitutionality includes the test of Fundamental Rights. As a result, in every case where a privilege interferes with or abrogates any Fundamental Right, the exercise of the privilege is liable to be struck down. The judgment makes Parliamentary privileges

46. JT 2007 (2) S.C. 1 at para 362.
47. JT 2007 (2) S.C. 1 at para 382.
subservient to Fundamental Rights on a case to case basis and makes the Supreme Court the ultimate arbiter in determining when a Right has been violated and when it has not. The judgment is in keeping with the central theme of separation and balance of powers which permeates through our Constitution and in step with the Supreme Court’s activist approach.

It is generally believed and occasionally confirmed, that in ruling as they do, Judges consider the broader aspect, of the effect the ruling may ultimately have. On more than one occasion, the Supreme Court has accorded Constitutional interpretations that have either been admired as innovative and avant-garde or castigated as being tenuous and untenable. Whether, the newfound applicability of Fundamental Rights was premeditated or perchance, this landmark interpretation to the law of privileges in India will be judged on its effect and efficacy for the constituents whose representatives make up Parliament.

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48. Former Chief Justice of India, Hon’ble Justice Y.V. Chandrachud, ‘[W]e consciously deliver wrong judgments. For example, if an unfortunate woman is pitted against a callous husband or in divorce cases, we try to decide as far as possible in favour of the woman’ in meLAWnge, Government Law College, Mumbai, annual magazine 2006-07, 011.