A Mere "Academic" Exercise

On The Indian Supreme Court's Dismissal of the Legislative Privileges Case

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Last week, in *N. Ravi v Speaker, Legislative Assembly Chennai*, the Indian Supreme Court dismissed a 23-year-old challenge to the constitutionality of the exercise of legislative privilege under Article 194 to curtail a citizen's freedom of speech. The issue arose from a resolution passed by the Tamil Nadu Legislative Assembly ordering the prosecution of five journalists of *The Hindu* for remarks against the then Chief Minister Jayalalithaa. The Court dismissed the matter on the ground that the resolution ordering their arrest had subsequently been withdrawn, rendering the proceedings a mere "academic exercise". It consequently left the constitutional question open for determination on a future occasion.

I argue that dismissing the matter as "academic" was an abdication of the Indian Supreme Court's important constitutional function of developing constitutional jurisprudence. The withdrawal of the resolution did not render the case legally infructuous, and the Court improperly exercised its discretion in declining to adjudicate the matter. The Court's articulation of constitutional rights does not merely resolve the dispute before it, but also provides a basis for future claims by citizens and strengthens the enforcement of those rights. Adjudicating the matter would also have allowed the Court to develop its still nascent jurisprudence on conflicts between constitutional rights and legislative privileges, while providing guidance to future litigants and benches on similar conflicts likely to recur.

Justiciability and Judicial Discretion

In *N. Ravi*, the Court held that the withdrawal of the resolution meant that the cause of action no longer survived and the matter had therefore become infructuous. It consequently declined to adjudicate the constitutional reference in exercise of the discretion vested in it under Article 136. Importantly, however, a matter becoming infructuous does not constitute a legal bar to adjudication, but reflects a principle of judicial self-restraint. This principle rests on the idea that courts should ordinarily decide live and contested disputes rather than abstract questions.

There are good reasons for exercising this restraint. The development of constitutional jurisprudence ordinarily takes place through the adjudication of disputes between parties, and courts should not decide constitutional questions without sufficient justification merely because they have been raised before them. The Supreme Court also faces an extensive and persistent backlog of cases, making the allocation of judicial time an important consideration. In *N. Ravi*, the reference had been placed before a seven-judge bench, whose time could otherwise have been devoted to disputes with immediate consequences for the parties involved. Where the underlying dispute has ended and the answer to the constitutional question would no longer affect the parties, declining adjudication may therefore be a legitimate exercise of judicial discretion. The question, however, is whether these considerations justified declining adjudication in *N. Ravi*, given the nature of the constitutional issue and the likelihood of its recurrence.

However, there may be cases where, although the underlying dispute has ended, the legal question raised still requires clarification. This is illustrated by Subhash Desai v Principal Secretary, Governor of Maharashtra. There, the then Chief Minister Uddhav Thackeray had resigned before the Speaker's decision, meaning that the rule in Nabam Rebia v. Deputy Speaker that the Speaker cannot decide disqualification proceedings while a resolution for their removal is

pending did not apply to the facts before the Court. Nevertheless, the Court referred the correctness of *Nabam Rebia* to a larger bench, observing that it was "alive to competing considerations" arising from its conflict with observations in Kihoto Hollohan v. Zachillhu and its failure to consider Article 181 and the second proviso to Article 179. This illustrates that the absence of an immediate dispute does not necessarily outweigh the need to clarify an unsettled question of constitutional law.

A similar exception to the requirement of a live controversy is recognised in the US Supreme Court's doctrine of "capable of repetition, yet evading review". In *Southern Pacific Terminal Co. v. ICC*, the Court held that short-lived orders likely to recur should not escape judicial review merely because they have expired. The doctrine has subsequently been applied to recurring disputes such as preventive detention and internet shutdowns, where the impugned measure may ordinarily cease before judicial review can be completed.

This principle should have been considered in exercising the Court's discretion in *N. Ravi*. Resolutions passed in the exercise of legislative privilege to restrict free speech are capable of recurring, while the measures imposed pursuant to them may be sufficiently short-lived to evade judicial review. The order directing the 15-day arrest of the journalists in *N. Ravi* itself illustrates this problem. Such exercises of legislative privilege are not merely hypothetical. In 1964, after a citizen distributed pamphlets accusing a member of the Uttar Pradesh Legislative Assembly of corruption, the Assembly ordered that he be imprisoned for contempt. More recently, the Maharashtra Legislative Assembly initiated privilege proceedings against Kunal Kamra for satirical speech criticising Eknath Shinde's change of political allegiance. The possibility of recurring exercises of legislative privilege, coupled with the short duration of the restrictions they may impose, therefore provides a strong reason for departing from the ordinary requirement of a live controversy.

Further, the constitutional requirements for adjudicating the reference were satisfied. Article 145(3) requires a minimum bench of five judges where a case involves a substantial question of law as to the interpretation of the Constitution. In *Chunilal Mehta v. Century Spinning & Manufacturing Co. Ltd.*, the Court held that a question of law is substantial where it materially affects the rights of the parties or is of general importance, and where it is either unsettled by decisions of the Supreme Court, difficult to resolve, or admits of alternative views.

The reference in *N. Ravi* plainly raised a question of constitutional interpretation concerning the interplay between Article 194(3) and Article 19(1)(a). The orders referring the matter first to a five-judge bench and subsequently to a seven-judge bench also recognised that the question "had very wide ramifications". Although *M.S.M. Sharma v. Sri Krishna Sinha* had previously considered the relationship between legislative privilege and freedom of speech, the conflicting observations in *Special Reference No. 1 of 1964* demonstrated that the law remained neither settled nor free from difficulty. The constitutional question therefore satisfied the threshold for adjudication, making the Court's decision to decline review a matter of judicial discretion rather than constitutional necessity.

The Constitutional Function of Adjudication

In dismissing the matter as a mere "academic exercise", the Court overlooked two considerations. First, the gravity of the underlying incident. Had the Supreme Court not intervened, the resolution would have resulted in the arrest of *The Hindu*'s journalists, directly curtailing their personal liberty. This assumes particular significance because the speech in question was made in the course of the journalists' professional duties in criticising the government, a core function of the press. The serious consequences of such a restriction, including its potential chilling effect on free speech, should have warranted adjudication by the country's highest constitutional court. These concrete harms suffered by the journalists cannot be undone by the subsequent withdrawal of the resolution.

Second, and more importantly, the function of the Supreme Court is not limited to deciding the dispute between the parties before it. In adjudicating individ-

ual disputes, it also articulates and develops the constitutional rights of citizens. Through the system of precedent, the Court builds upon its existing jurisprudence and performs an important expressive function by clarifying the scope and content of constitutional rights. The constitutional reasoning developed in individual cases can then provide the basis for future claims by litigants seeking to enforce those rights.

This function has been fulfilled by constitutional benches of the Court even where the immediate dispute had ceased to have practical consequences. In *Rameshwar Prasad v. Union of India*, fresh elections to the Bihar Legislative Assembly had already been notified by the time the judgment was delivered. Nevertheless, the Court held the dissolution of the Assembly under Article 356 unconstitutional, while declining to exercise its discretion to restore the dissolved Assembly. Similarly, in *S.R. Bommai v. Union of India*, the nine-judge bench proceeded to settle the law on Article 356 even though elections had already been held in Karnataka by the time the case was decided in 1994 and Bommai's government, dismissed in 1989, could no longer be restored.

Sita Soren v. Union of India illustrates the limited extent to which the Court had previously addressed the scope of legislative privilege. There, the Court considered whether accepting a bribe to vote in a particular manner was protected by the privilege available to legislators in the discharge of their duties. Although the functional test formulated in *Sita Soren* may assist in determining the scope of legislative privilege, *N. Ravi* required the Court to address a distinct question concerning its exercise against citizens. It would first have had to determine whether the exercise of legislative privilege that restricts citizens' speech is constitutionally permissible. If so, it would then have had to determine the extent to which legislators may restrict citizens' freedom of speech and the circumstances in which such a restriction constitutes a legitimate exercise of legislative privilege.

Conflicting Constitutional Rights and Privileges

The adjudication of the question referred in *N. Ravi* would also have helped the Court further develop its jurisprudence on conflicts between constitutional rights and privileges, which remains in its nascent stages. In *Mazdoor Kisan Shakti Sangathan v Union of India*, the Court had to balance the right of protestors against that of residents. It was held that conflicts between fundamental rights must be resolved by balancing the competing claims in light of the larger public interest. Subsequently, in *Association for Democratic Reforms v Union of India* (Electoral Bonds case), drawing on the proportionality standard used to test restrictions on fundamental rights, the Court evolved a structured double proportionality standard for resolving conflicts between fundamental rights.

It would therefore have been significant to see how the Court would approach the conflict between citizens' freedom of speech and expression and the exercise of legislative privilege to restrict that freedom. In particular, it would have clarified whether the Court would apply the structured double proportionality standard developed in *ADR*, or adopt an approach of ad hoc balancing similar to that in *MKSS*. Such adjudication would have provided an opportunity to clarify the appropriate methodology for resolving conflicts between constitutional rights and privileges, an issue that is likely to recur before constitutional courts.

Conclusion

The Court's dismissal of *N. Ravi* as a mere "academic exercise" came at the cost of an important opportunity for constitutional adjudication. The dispute was not only capable of recurring, but raised unresolved questions concerning the protection of free speech, the constitutional role of the Court, and the relationship between legislative privilege and fundamental rights. By declining to adjudicate, the Court left these questions for another case, while forgoing the opportunity to provide guidance to citizens, litigants, and future benches. In doing so, it narrowed the constitutional value that adjudication of the dispute could have produced beyond the parties before it.

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