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RESEARCH PAPER ON ARTICLES 105 AND 194: **PARLIAMENTARY PRIVILEGES AND THEIR** **INTROSPECTION.**

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Introduction

A constitution that confers immunity in one hand and silence in the next invites its interpreters to do a great deal of the drafting themselves. That, in essence, has been the condition of Articles 105 and 194 of the Constitution of India since 1950. Each Article opens with an affirmative guarantee of freedom of speech within the House, narrows into an unqualified bar on proceedings in respect of anything said or any vote given, and then, in its third clause, hands the entire remaining field of legislative privilege over to a Parliament that has, for seventy-five years, declined to occupy it. The result is a body of privilege that is simultaneously among the most forcefully worded provisions in the Constitution and among its least determinate.

Rather than surveying the full range of controversies that legislative privilege generates a task recent scholarship has already undertaken capably it confines itself to a narrower and, it is submitted, more foundational inquiry: how has the Supreme Court actually read the text of Articles 105 and 194, and what does the interpretive method chosen in each case reveal about the deeper question of whether privilege is a personal entitlement of the legislator or a functional attribute of the House? This paper lies on the case law of *Sita Soren vs Union of India*, as it is one of the recent and very elaborate discussion on parliamentary privilege as the apex court deeply interrogates what a representative can be exempted for and what not whilst also hinting slightly at powers of parliament to make its own rules.

I. The Textual Architecture of Legislative Privilege

Article 105 is drafted in four clauses of markedly different character. The first is aspirational and qualified: “Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of Parliament, there shall be freedom of speech in Parliament.”¹ The second is categorical and unqualified: no member “shall be liable to any proceedings in any court

¹ India Const. art. 105, cl. 1.

in respect of anything said or any vote given by him in Parliament or any committee thereof.”² The juxtaposition is deliberate, and it is easy to overlook. Clause (1) is textually subordinate to the rest of the Constitution and to the internal rules of the House; clause (2) is subordinate to nothing at all. A legislator's freedom to speak may be curtailed by the Speaker acting under the standing orders, but a legislator's immunity from external proceedings, once triggered, admits of no textual exception. Any interpretive theory of Article 105 must account for why the framers chose to condition the right but not the remedy.

Clause (3) is different in kind again. It does not itself define a privilege; it defines a procedure for defining privilege, vesting in Parliament the power to enact a law specifying “the powers, privileges and immunities of each House” and providing that, until such a law is made, the residual privileges shall be those in force immediately prior to the coming into force of section 15 of the Constitution (Forty-fourth Amendment) Act, 1978.³ Article 194 mirrors this scheme without material variation for the State Legislatures.⁴

When India's Constitution was framed, Article 105(3) (and its state-level twin, Article 194(3)) had a choice to make about legislative privileges — the special protections MPs and MLAs enjoy, like immunity from certain lawsuits for things said in the House. The drafters could simply have left the old colonial-era clause as it was. Instead, they wrote something different: privileges would match whatever existed “immediately before” a specific date, while also allowing Parliament to pass a new law defining privileges whenever it got around to it. That's an unique middle ground. It suggests the drafters knew the old rule, borrowing directly from the British House of Commons— no longer fit an independent India, but they didn't have a replacement ready, so they froze the borrowed rule in time instead of removing it.

The catch is that Parliament never did get around to it. Eight decades on, Indian legislative privilege is still technically confined on how the House of Commons operated at that one moment in the late 1940s — even though the House of Commons itself has since changed its own rules many times over. So Article 105(3) isn't just a dormant provision; it's a standing invitation for Parliament to finally legislate on its own privileges, one that has simply gone unanswered for nearly fifty years.

² India Const. art. 105, cl. 2.

³ India Const. art. 105, cl. 3, as amended by the Constitution (Forty-fourth Amendment) Act, 1978, § 15 (India).

⁴ India Const. art. 194. Article 194 is, for present purposes, a verbatim reproduction of Article 105 as applied to the Houses of the State Legislatures, their members, and their committees.

II. Two Pillars of Construction in the Privilege Jurisprudence

Confronted with this architecture, the Supreme Court has not settled on a single interpretive method.

A. Historical Incorporation: Sharma and the Keshav Singh Reference

An analytically distinct pillar looks not to the words of the Constitution but outward, to the inherited practice the words were understood to codify by reference. In *M.S.M. Sharma v. Sri Krishna Sinha*,⁵ the Bihar Legislative Assembly's Privileges Committee proceeded against a newspaper editor for publishing portions of a speech that the Speaker had ordered expunged. The petitioner invoked the freedom of the press under Article 19(1)(a); the Assembly relied on clause (3) of Article 194 and the corresponding privilege of the House of Commons to prohibit publication of expunged proceedings. A majority of the Constitution Bench held that the privilege conferred by clause (3), being a specific provision, was not subordinate to the general guarantee in Article 19(1)(a), and that the House of Commons possessed — and therefore the Bihar Assembly possessed — the power to control publication of its own proceedings, including the power to suppress even a wholly accurate report of what had been expunged.

Sharma's method of construction is neither purely textual nor purely purposive; it is genealogical. The content of clause (3) privilege is fixed by identifying what the House of Commons could do at a stipulated historical moment and importing that content wholesale into the Indian constitutional order, largely without asking whether the imported privilege serves any purpose that an Indian legislature, operating under a written constitution with an entrenched fundamental-rights chapter, actually requires. The same posture recurs in the Special Reference of 1964,⁶ where the Court, addressing a stand-off between the Uttar Pradesh Legislative Assembly and the Allahabad High Court over the arrest of a judge for contempt of the House, held that immunity under Article 212 protected against alleged irregularity of procedure but not against a claim of substantive illegality — a distinction later imported into the interpretation of clause (2) itself.⁷

B. Functionalism: From Narasimha Rao's Textual Absolutism to the Purposive Turn

The second pillar is functionalist, and its emergence can be dated with unusual precision to the tension between *P.V. Narasimha Rao v. State*⁸ and *Sita Soren v. Union of India*.⁹ In *Narasimha*

⁵ *M.S.M. Sharma v. Sri Krishna Sinha*, AIR 1959 SC 395 (India).

⁶ Special Reference No. 1 of 1964, AIR 1965 SC 745 (India) (commonly known as the Keshav Singh reference).

⁷ Special Reference No. 1 of 1964, AIR 1965 SC 745, ¶ 78 (India).

⁸ *P.V. Narasimha Rao v. State (CBI/SPE)*, (1998) 4 S.C.C. 626 (India).

⁹ *Sita Soren v. Union of India*, (2024) 3 S.C.R. 462 (India).

Rao, a five-judge Bench considered whether Members of Parliament who had allegedly accepted bribes to defeat a no-confidence motion could invoke clause (2) once they had actually cast the promised vote. The majority answered in the affirmative, reasoning — in essentially the same literalist register as Tej Kiran Jain — that a vote given in Parliament remains a vote given in Parliament irrespective of any corrupt inducement that may have preceded it, and that clause (2) draws no distinction between a vote's motive and its content. Justice Bharucha, dissenting in part, warned that this reading rendered the offer of a bribe consequence-free the moment the recipient performed as agreed, while leaving a recipient who reneged fully exposed — an asymmetry that rewarded fidelity to corruption over its abandonment.¹⁰

It is this asymmetry that Sita Soren was convened to resolve. A seven-judge Bench, overruling Narasimha Rao unanimously, declined to ask what clause (2) permits as a matter of grammar and asked instead what clause (2) is for. The Bench articulated a conjunctive, two-part test: a claim to immunity must, first, be tethered to the collective functioning of the House, and second, be necessary to the discharge of the member's essential legislative duties.¹¹ Bribery fails on both limbs — it is not an incident of the House's collective business, and accepting a bribe is manifestly not necessary to the performance of any legislative function, however loosely defined. On this reasoning, the offence of accepting a bribe connected with a vote is complete the instant the gratification is accepted, regardless of whether the vote is later cast, reneged upon, or never called for at all; the earlier asymmetry accordingly dissolves.¹² Read alongside Sharma and the 1964 Reference, Sita Soren effects a quiet but decisive relocation of interpretive authority: privilege is no longer to be measured primarily against what an inherited body of English practice happened to permit, nor against what the bare words of clause (2) can be stretched to cover, but against the functional question the framers of clause (1) had asked all along — does the claimed protection serve the House's capacity to deliberate and decide?

III. Judicial Interference and Its Outer Boundary: Raja Ram Pal Reconsidered

A purposive test of the kind Sita Soren adopts necessarily expands the occasions on which a court must ask what a House was actually doing — and therefore raises, with renewed urgency, the question of how far a court may go in scrutinising the internal conduct of a legislature without itself trespassing on the separation of powers. The governing authority remains Raja Ram Pal

¹⁰ Narasimha Rao, (1998) 4 S.C.C. at 626 (Bharucha, J., dissenting in part).

¹¹ Sita Soren, (2024) 3 S.C.R. at 462, ¶¶ 41–47.

¹² Sita Soren, (2024) 3 S.C.R. at 462, ¶ 51.

v. Hon'ble Speaker, Lok Sabha,¹³ decided by a Constitution Bench in the aftermath of the expulsion of several Members of Parliament following a sting operation that captured them accepting money in exchange for raising questions in the House. The expelled members challenged their expulsion as an exercise of judicially reviewable power; the Speaker's office resisted review altogether, invoking the finality that Article 122 appears to confer on the internal proceedings of the House.

The Court charted a middle course that has proved durable. It held that the immunity conferred by Article 122 against inquiry into “irregularity of procedure” does not extend to an inquiry into whether the House acted with jurisdiction, in good faith, and in a manner consistent with the Constitution; a decision vitiated by mala fides, by substantive illegality, or by constitutional infirmity remains reviewable notwithstanding its provenance in an internal proceeding.¹⁴ What Raja Ram Pal declines to authorise is review on the ground of mere procedural irregularity — a House that departs from its own standing orders in a manner that causes no constitutional harm is not, on that basis alone, answerable to a court. The distinction tracks, with a degree of doctrinal continuity worth noting, the very line the 1964 Reference had drawn between irregularity and illegality under Article 212 four decades earlier.

Placed alongside Sita Soren, Raja Ram Pal supplies the institutional half of what is otherwise a purely substantive test. Sita Soren tells a court what privilege is for; Raja Ram Pal tells a court how far it may go in testing whether a given claim serves that purpose without converting judicial review into a general supervisory jurisdiction over legislative housekeeping. The two doctrines together imply a workable, if still evolving, principle: a court may ask whether an asserted immunity is tethered to the collective functioning of the House and necessary to a legislator's essential duties, but it may not, in the course of asking that question, substitute its own view of how the House ought to have conducted itself procedurally. Judicial interference, on this reading, is not a matter of degree so much as of category — constitutional and jurisdictional questions are always open; questions of internal regularity are, absent bad faith, closed.

IV. Codification Revisited: An Unclaimed Textual Invitation

The interpretive difficulties surveyed above share a common origin: each is, at bottom, a dispute about content that clause (3) of Articles 105 and 194 empowers Parliament to resolve by ordinary legislation, and that Parliament has not resolved. It is worth asking, in closing, why the invitation

¹³ Raja Ram Pal v. Hon'ble Speaker, Lok Sabha, (2007) 3 S.C.C. 184 (India).

¹⁴ Raja Ram Pal, (2007) 3 S.C.C. at 184, ¶ 431.

has gone unanswered for so long, and what a codifying statute would actually need to accomplish. Two observations bear on the first question. The first is institutional self-interest: a legislature invited to define the outer limits of its own contempt and punitive powers has an obvious incentive to prefer the latitude of an undefined common-law inheritance to the precision of a statute that could later be read narrowly against it. Presiding officers of Parliament and the State Legislatures are recorded as having considered codification proposals as far back as 1921, without any of those proposals maturing into legislation.¹⁵ The second is doctrinal complacency: because the judiciary has, through the very interpretive moves traced in Part III, gradually supplied external boundaries — the illegality/irregularity distinction of the 1964 Reference, the essentiality test of *Sita Soren*, the jurisdictional-excess standard of *Raja Ram Pal* — the practical cost of parliamentary inaction has been substantially, if unevenly, absorbed by case law rather than by statute. Judicial supplementation has, paradoxically, reduced the political pressure that might otherwise have forced Parliament's hand.

As to the second question, a codifying statute enacted under clause (3) would not be writing on a clean slate; comparative practice offers at least two contrasting templates. The House of Commons' own foundational privilege — those proceedings in Parliament “ought not to be impeached or questioned” in any court — has stood substantially unaltered on the statute book since the Bill of Rights of 1689¹⁶, suggesting that a core immunity for speech and voting can be stated with durable simplicity. Australia, by contrast, enacted a comprehensive Parliamentary Privileges Act in 1987 that both affirms the substance of Article 9 of the 1689 Bill of Rights and expressly delimits its scope — clarifying, among other things, that the privilege does not extend to criminal conduct merely because it occurs in connection with proceedings in Parliament.¹⁷ A codifying statute for India could draw on the second model without abandoning the first: retaining an unqualified textual core for clause (2) immunity over speech and votes as such, while codifying— rather than leaving to case-by-case adjudication — the essentiality test that *Sita Soren* has now articulated judicially, together with the procedural safeguards *Raja Ram Pal* presupposes but does not itself prescribe: notice, an opportunity to be heard, and a reasoned, published order in any proceeding capable of penal consequence.

Such a statute would not resolve every interpretive question canvassed in this paper; the boundary between conduct tethered to collective functioning and conduct merely coincident with legislative business will always require some quantum of judicial elaboration. What

¹⁵ See Rajya Sabha Secretariat, *supra* note 19, at 14 (noting that codification proposals have been considered by the Presiding Officers of Parliament and State Legislatures since 1921, without legislative action).

¹⁶ Bill of Rights, 1689, 1 W. & M. Sess. 2, c. 2, art. 9 (Eng.).

¹⁷ Parliamentary Privileges Act 1987 (Cth) (Austl.).

codification would accomplish is more modest and, for that reason, more attainable: converting principles presently scattered across seven decades of Constitution Bench judgments into a single, accessible text against which future claims of privilege could be tested in the first instance.

V. Conclusion

Articles 105 & 194 when read as a whole, when compared amongst MSM Sharma Case says “anything said” and “any act done” inside the parliament and assembly can be given a protection as judiciary blindly qualified English practice. Narasimha Rao case pressed literalism to a point that produced a doctrinally indefensible asymmetry. Sita Soren case concluded the ambiguity by separating the permitted and non-permitted acts to regulate the privileges provided to the MLAs/MPs.

Table of Authorities

Constitutional & Statutory Provisions: Indian Constitution. art. 105; India Const. art. 194; The Constitution (Forty-fourth Amendment) Act, 1978; Bill of Rights, 1689, 1 W. & M. Sess. 2, c. 2 (Eng.); Parliamentary Privileges Act 1987 (Cth) (Austl.).

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P.V. Narasimha Rao v. State (CBI/SPE), (1998) 4 S.C.C. 626 (India); Raja Ram Pal v. Hon'ble Speaker, Lok Sabha, (2007) 3 S.C.C. 184 (India); **Sita Soren v. Union of India**, (2024) 3 S.C.R. 462.

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