CONFLATE AND SUBVERT: (UN)READING LEGISLATIVE IMMUNITY IN SITA SOREN V. UNION OF INDIA

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The Supreme Court in Sita Soren v. Union of India overruled the majority opinion in P.V. Narasimha Rao v. State, holding that the offence of bribery by Members of Parliament is not protected by parliamentary immunity. Even though the judgement was positively received, this essay argues that the case is microcosmic of the dangers of courts speaking over the text of the Constitution in order to reach conclusions amenable to its conscience and public opinion. The Court makes grave errors in its interpretation of Article 105(2) of the Constitution of India, conflating the qualitative differences between two separate provisions, missing an opportunity to correct the position of law after P.V. Narasimha Rao. The essay argues that the Court's attempt at watering down the protection under Article 105(2) is perilous in the backdrop of the backsliding of investigative agencies. Further, The Court turned the constitutional priorities on their head by ruling out any presumptive immunity to the accused Member of Parliament under Articles 105(2) and 194(2) ignoring the drift and "gaze" of the provision. Finally, the essay presents a test that ought to be applied where legislative immunity is claimed.

TABLE OF CONTENTS

I. INTRODUCTION

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The seven judges of the Supreme Court in *Sita Soren* v. *Union of India* ('Sita Soren')[1] were in perfect harmony as they overruled the majority opinion in *P.V. Narasimha Rao* v. *State* ('P.V. Narasimha Rao')[2] unanimously through Chief Justice D.Y. Chandrachud. The judgement for the most part did not come as a surprise; the outcome already appeared certain when the case was referred to a seven-judge constitution bench for reconsideration.[3] The Court dealt with several important issues. It quoted copiously from Indian and foreign precedents, and finally settled the question of the applicable test for Articles 105(2) and 194(2) of the Constitution of India regarding parliamentary immunities. The Court held *inter alia* that the offence of bribery by Members of Parliament ('MPs') was not protected by parliamentary immunity.[4] Further, it extended the application of the two-pronged "necessity test" laid down by the Court to Article 105(2) of the Constitution.[5] The test being that the claimed privilege should be *first*, tethered to the collective functioning of the House, and *second*, its necessity must bear a functional relationship to the discharge of the essential legislative duties.[6] Even though the judgement has been widely celebrated,[7] rectifying "a mistaken interpretation of the Constitution",[8] this essay argues that the Court makes grave errors in its interpretation of Articles 105(2) and 194(2).

The Court in Sita Soren stated that it is the text, context, and the object and purpose of Articles 105(2) and 194(2) of the Constitution that should guide its interpretation.[9] This is the standard applied by this essay to evaluate the fruits of the Court's labour. Ironically, for its allusions to the "text and context" the judgment fails to resolve the errors in the majority opinion in P.V. Narasimha Rao, and presents an analysis which is in many ways microcosmic of the dangers of Courts not merely wandering too far from, but perilously disregarding the text of the Constitution.

Part II gives a brief background of events leading up to the decision of the Supreme Court. In Part III, the author delves into the decision of the Court, analysing and critiquing its reasoning, laying down what the proper construction of the articles relating to parliamentary immunity ought to be, showing that the Court conflated two different qualities of immunities under Articles 105(2) and 105(3). Furthermore, the author will also briefly discuss the Court's misplaced reliance on foreign precedents while also delving into certain areas where the Sita Soren Court did better than in PV Narasimha Rao in laying out the confines of the immunity under Articles 105(2) and 194(2). Subsequently, in Part IV, the essay presents a test that the Court ought to have formulated for availing immunity under Articles 105(2) and

[1] Sita Soren v Union of India, (2024) 3 S.C.R. 462 ('Sita Soren').
[2] P.V. Narasimha Rao v State (CBI/SPE), (1998) 4 SCC 626 ('P.V. Narasimha Rao').
[3] A five judges' bench, to whom the case was referred to by a division bench of the Court, cited three reasons for which they unanimously doubted the correctness of P.V. Narasimha Rao and further referred it for reconsideration by a seven judges' bench; all five of those judges who doubted the majority opinion in P.V. Narasimha Rao were among the seven judges who later overruled the judgement in Sita Soren. The five judges included Chief Justice D.Y. Chandrachud, Justice A.S. Bopanna, Justice M.M. Sundresh, Justice J.B. Pardiwala, and Justice Manoj Misra.
[4] Sita Soren, *supra* note 1, ¶111.
[5] *Id.,* ¶92.
[6] *Id.,* ¶91.
[7] *See* V. Venkatesan, *Supreme Court Corrects Course, Ends Immunity for Bribe-Taking Legislators*, FRONTLINE, March 6, 2024, available at https://frontline.thehindu.com/columns/legal-acumen-supreme-Court-corrects-course-ends-immunity-for-bribe-taking-legislators/article67919924.ece (Last visited on December 10, 2024); *See also* Kartik Kalra, *Privileges Constrained*, VERFASSUNGSBLOG, March 12, 2024, available at https://verfassungsblog.de/privileges-constrained/ (Last visited on December 10, 2024) (characterising the decision as progressive and democracy-furthering).
[8] Sita Soren, *supra* note 1, ¶40.
[9] Sita Soren, *supra* note 1, ¶6 (quoting Sita Soren v. Union of India, (2023) 12 S.C.R. 753, ¶24).

194(2). Finally, in Part V, the author argues that the law laid down by the Sita Soren Court is perilous as it denudes the concerned articles of any real applicability against excesses of power.

II. A BRIEF BACKGROUND OF THE DECISION

On March 30, 2012, an election was held to elect two members of the Rajya Sabha representing the State of Jharkhand. Sita Soren was a member of the Legislative Assembly of Jharkhand, belonging to the Jharkhand Mukti Morcha ('JMM').[10] It was alleged that Soren accepted a bribe from an independent candidate for casting her vote in his favour; however, she did not do so and instead voted in favour of a candidate belonging to JMM.[11] The election was annulled and fresh elections were held where she again voted in favour of the JMM candidate.[12] As for the charges of bribery, Sita Soren moved the High Court to quash the criminal proceedings against her, claiming protection under Article 194(2) of the Constitution of India, relying on the judgement in P.V. Narasimha Rao.[13]

The High Court declined to quash the criminal proceedings holding that since she did not cast her vote in favour of the alleged bribe giver, her case did not come in the ambit of the protection under Article 194(2) as per the law in P.V. Narasimha Rao.[14] An appeal was placed before a bench of two judges of the Supreme Court, who decided that the case was to be referred to a larger bench of the Court.[15] The three-judge bench before which the matter was then placed further referred the matter to a five-judge bench "having regard to the wide ramification of the question that has arisen, the doubts raised and the issue being a matter of public importance".[16] Finally, on September 20, 2023, a five-judge bench of the Supreme Court recorded *prima facie* reasons doubting the correctness of the decision in P.V. Narasimha Rao and referred the matter to a larger bench of seven judges for reconsideration,[17] this brought the matter before the bench whose decision forms the subject matter of this essay; however, before assessing the judgement of the Supreme Court in Sita Soren, it is profitable at this juncture to briefly discuss the relevant constitutional provisions and delve into the decision of the Supreme Court in P.V. Narasimha Rao as it was the precedent that the Court was reconsidering in the present case.

A. OVERVIEW OF THE RELEVANT CONSTITUTIONAL PROVISIONS

Article 105 of the Constitution makes the provision for the privileges of the Houses of Parliament and its members — Article 194 being its equivalent provision for the State Legislatures (the analysis hereafter in reference to Article 105 is equally applicable to Article 194). Article 105 has four clauses. The first clause is in the form of a right, providing for freedom of speech in Parliament subject only to the provisions of the Constitution, and the

[10] *Id.*, ¶3.
[11] *Id.*
[12] *Id.*
[13] *Id.*, ¶4.
[14] Sita Soren v Union of India, (2014) SCC OnLine Jhar 302, ¶13 (Justice R.R. Prasad held "…I am of the view that the act of the petitioner of receiving money pursuant to the conspiracy and the agreement with R.K. Agarwal, will have no nexus with the vote on account of the fact that she did not cast vote in favour of the said R.K. Agarwal and, thereby, she will have no immunity as guaranteed under Sub-clause (2) of Article 194 of the Constitution of India.").
[15] Sita Soren v. Union of India, (2014) SCC OnLine SC 1889, ¶2 (the Court noted that "Since the issue arises for consideration is substantial and of general public importance, we refer these matters to a larger Bench of three Hon'ble Judges to be constituted by Hon'ble the Chief Justice of India.").
[16] Sita Soren v. Union of India, (2019) SCC OnLine SC 2298, ¶4.
[17] Sita Soren v. Union of India, (2023) 12 S.C.R. 753 ('Sita Soren 5J').

rules and standing orders regulating parliamentary procedure. The second clause which was of interest to the Court in Sita Soren and P.V. Narasimha Rao has two parts, both being declarations of immunity. The first part, the focus of the two cases, declares that "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". The second part states that "no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings". The third clause is a power bestowed on the Parliament to define its privileges by law, and till it is so defined, the provision gives the Parliament all the powers, privileges and immunities enjoyed by it before the Forty-fourth Amendment to the Constitution, *viz.* privileges enjoyed by the House of Commons of the Parliament of the United Kingdom at the commencement of the Constitution.[18] *Finally*, the fourth clause states that the aforementioned three clauses as applicable to the members of Parliament shall also apply to those who have by virtue of the Constitution the right to speak and take part in the proceedings of the Parliament or any of its committees. This essay, like Sita Soren and P.V. Narasimha Rao, will focus on the first part of the immunity under Article 105(2).

B. THE DECISION IN P.V. NARASIMHA RAO

In 1991, during the 10th Lok Sabha elections, the then Prime Minister P.V. Narasimha Rao was alleged to have bribed Members of Parliament to vote against a no-confidence motion brought against his government. One of the MPs who was allegedly bribed, Ajit Singh, had abstained from voting. A criminal prosecution was initiated against the alleged bribe-giving and the bribe-taking MPs.[19] The accused MPs sought to get the charges quashed by the Delhi High Court, which, in contrast, dismissed the petition. A special leave petition was filed before the Supreme Court and the matter reached before a Constitutional Bench through a reference.[20] The question decided in P.V. Narasimha Rao, which became relevant in Sita Soren, was whether an MP can claim immunity from prosecution for a charge of bribery in a criminal court by virtue of Article 105(2) of the Constitution.[21]

The majority in P.V. Narasimha Rao, through Bharucha J.,[22] held that the alleged bribe-takers had the protection of Article 105(2) and were consequently not answerable in a court of law for the alleged conspiracy and bribe. However, showing a textualist instinct,[23] he

[18] The Constitution (Forty Fourth Amendment) Act, 1978, §15.
[19] These proceedings were initiated under Sections 7, 12, 13(1)(d), and 13(1) of the Prevention of Corruption Act, 1988 and Section 120-B of the Indian Penal Code, 1860.
[20] P.V. Narasimha, *supra* note 2, ¶¶102, 103, 104, 105, 106 (per Bharucha, J.).
[21] Another question raised in the case, although not relevant to the judgment in Sita Soren, was whether an MP came within the ambit of the Prevention of Corruption Act, 1988.
[22] The judgement of the Supreme Court consisted of three opinions: by Justice S.P. Bharucha (for himself and Justice S.R. Babu), by Justice S.C. Agarwal (for himself and Justice A.S. Anand) and by Justice G.N. Ray. On the issue of immunity under Articles 105(2) of the Constitution, Justice G.N. Ray concurred with Justice Bharucha's opinion, making it the majority opinion on the issue, and Justice Agarwal's opinion the minority view on the issue.
[23] For a brief overview of textualism, *see* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws* in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, 3 (Princeton University Press, 2018) (however, going by Scalia, Justice Bharucha's interpretation would most likely not be characterised as textualist but as "strict constructionist" or "literalist". This is because, as will be discussed later in this essay, and as also noted in the minority opinion as well as in the Court's Judgement in Sita Soren, Bharucha J's interpretation of "vote given" seems needlessly narrow and leads to paradoxical and to some extent absurd results).

held that since immunity was for a "vote given"[24] by Ajit Singh; not having cast a vote was not covered by the provision.[25] Furthermore, Bharucha J. noted:

> "It is difficult to agree with the learned Attorney General that though the words 'in respect of' must receive a broad meaning, the protection under Article 105(2) is limited to court proceedings that impugn the speech that is given or the vote that is cast or arises thereout or that the object of the protection would be fully satisfied thereby. The object of the protection is to enable Members to speak their mind in Parliament and vote in the same way, freed of the fear of being made answerable on that account in a court of law. It is not enough that Members should be protected against civil action and criminal proceedings, the cause of action of which is their speech or their vote. To enable Members to participate fearlessly in parliamentary debates, Members need the wider protection of immunity against all civil and criminal proceedings that bear a nexus to their speech or vote. It is for that reason that a Member is not "liable to any proceedings in any court in respect of anything said or any vote given by him". Article 105(2) does not say, which it would have if the learned Attorney General were right, that a Member is not liable for what he has said or how he has voted. While imputing no such motive to the present prosecution, it is not difficult to envisage a Member who has made a speech or cast a vote that is not to the liking of the powers that be being troubled by a prosecution alleging that he had been party to an agreement and conspiracy to achieve a certain result in Parliament and had been paid a bribe."[26]

According to Bharucha J., "in respect of" in Article 105(2) was to be given a wide meaning translating to anything having a nexus with any vote given due to the wide object of Article 105(2) as he read it. Therefore even an accusation of bribery would not bring the accused MP outside the protection of the said provision as "…the nexus between the alleged conspiracy and bribe and the no-confidence motion is explicit. The charge is that the alleged bribe-takers received the bribes to secure the defeat of the no-confidence motion".[27]

Agarwal J., dissenting, held that the accused MPs were not protected by Article 105(2) from being prosecuted for an offence of bribery in respect of a vote given in Parliament.[28] Justice Bharucha's interpretation of "vote given" led to a paradoxical and absurd result: those MPs who took the bribe and fulfilled the promise by voting were protected by immunity, but those who did not go through with the vote would not be protected, it essentially incentivised MPs to keep their side of the bargain. Agarwal J. conscientious of this problem, interpreted "in respect of" to mean "arising out of",[29] therefore limiting the protection to acts that follow as a consequence of the vote given or speech made. He further held that since the offence of bribery was complete before the vote was given, i.e., for the offence of bribery to be constituted, fulfilment of the act in exchange for the bribe was not required, therefore the

[24] Article 105(2) of the Constitution of India, 1950 reads "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, paper, votes or proceedings." (emphasis added).
[25] P.V Narasimha Rao, *supra* note 2, ¶143 (per Bharucha J.).
[26] *Id.*, ¶136. (per Bharucha J.) (a wide interpretation of "anything" as "everything" was also supported by Tej Kiran Jain v. N Sanjeeva Reddy, (1970) 2 SCC 272, ¶8, where the Court was in a less difficult position as the claim for immunity was not in the context of a criminal offence).
[27] P.V. Narasimha Rao, *supra* note 2, ¶134 (per Bharucha J.).
[28] *Id.*, ¶98 (per Agarwal J.).
[29] *Id.*, ¶47 (per Agarwal J.).

offence of bribery arose independently of the act of voting, and would not be protected by Article 105(2).[30]

C. THE REFERENCE

The majority opinion in P.V. Narasimha Rao was received poorly and was greatly derided.[31] About a quarter of a century later, doubting the correctness of the decision, a five-judge bench of the Supreme Court referred the case for reconsideration by a seven-judge bench of the Court.[32] The Court cited three reasons for doing so. *Firstly*, the object of Article 105(2) or Article 194(2) did not *prima facie* appear to the Court to be providing immunity against criminal proceedings for a violation of the criminal law "…which may arise independently of the exercise of the rights and duties as a Member of Parliament or of the legislature of a state". *Secondly*, the Court pointed out the anomaly in the interpretation of the majority judgement which protected a bribe-taker who fulfilled their illegal agreement while leaving the one who did not out of the ambit of the immunity in Article 105(2); and *lastly*, the majority opinion in the P.V. Narasimha Rao did not engage with Agarwal J.'s observation that the performance of the bargain made by the receiver of the bribe was not needed for them to be treated to have committed the offence.[33] The subsequent parts of the essay analyse and delve into the reasoning of the decision by the seven-judge bench of the Supreme Court to whom the matter was referred.

III. THE REASONING AND ITS CRITIQUE

The Court's stated endeavour in Sita Soren was to "stay true to what the 'Constitution itself' fathomed as the remit of Articles 105(2) and 194(2) even if it may be at the cost of moving away from 'what we have said about it' in P.V. Narasimha Rao" (emphasis added),[34] this made it clear that it was anxious about the broad interpretation given to the immunity under Article 105(2) and wanted to move away from it. To do so, the first thing the Court hoped to do was to show that these privileges were still green and did not enjoy heightened legitimacy due to the thrust of history, the Court went on to explore the development of parliamentary privilege in India from the colonial period,[35] and concluded, that:

> "Notably, unlike the House of Commons in the UK, India does not have 'ancient and undoubted' rights which were vested after a struggle between Parliament and the King. On the contrary, privileges were always governed by statute in India. The statutory privilege transitioned to a constitutional privilege after the commencement of the Constitution…"[36]

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[30] *Id.,* ¶52 (per Agarwal J.) (the argument essentially reiterated the reasoning of the majority in United States v. Brewster, 408 U.S. 501 (1972) (United States Supreme Court)).
[31] *See* A.G. Noorani, CONSTITUTIONAL QUESTIONS IN INDIA: THE PRESIDENT, PARLIAMENT AND THE STATES, 222 (Oxford University Press, 2002) (Noorani notes that "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 on 17 April 1998 in the Jharkhand Mukti Morcha case."); *see* Report of the National Commission to Review the Working of the Constitution, Vol. 2, Book 1, ¶8, 543 (2001); *see also* Shubhankar Dam, *Parliamentary Privileges As Façade: Political Reforms And The Indian Supreme Court*, Vol. 49(1), SINGAPORE JOURNAL OF LEGAL STUDIES, 179 (2007).
[32] Sita Soren 5J, *supra* note 17, ¶26.
[33] *Id.,* ¶24.
[34] *Id.,* ¶44.
[35] *Id.,* ¶¶49–58.
[36] *Id.,* ¶66.

This excavation of history by the Supreme Court to impeach the antiquity of parliamentary privileges in India does little to aid the interpretation of a very specific immunity under Article 105(2) in question before the Court. If prolixity was not the object, the Court's endeavour remains unprofitable as whether these privileges and immunities are ancient or not, is a question that holds no bearing on their legitimacy once they are spelt out clearly as a provision in the Constitution, that fact in itself makes it worthwhile for the courts to enforce the said provision.

In the subsequent parts, the author shall elaborate on the qualitative difference between Articles 105(2) and 105(3) and the consequent effect on the scope of judicial review, which the author argues that the Court erroneously ignored;[37] The essay then delves into the nature of immunity granted by the provision and its misinterpretation;[38] The author will also engage with the Court's decision to strip an accused MP of a presumption of immunity;[39] and lastly, the essay looks at the Court's misplaced reliance on foreign precedents,[40] while also discussing some upsides of the Judgement.[41]

A. THE QUALITATIVE DIFFERENCE BETWEEN ARTICLES 105(2) AND 105(3)

The scope and extent of judicial review of a claimed privilege is a major flashpoint regarding the interpretation of Article 105. This debate boils down to the question of who has the final say in deciding whether a parliamentary privilege as claimed exists.[42] In Sita Soren the Court upheld its authority of deciding ultimately whether an immunity claimed under Article 105(2) exists, this section argues against this conclusion by showing that there is a very limited scope of judicial interference with the immunity under Article 105(2).

The Court in Sita Soren stated that the Parliament was not the sole judge to decide its own privileges and the courts have the jurisdiction to determine whether the privileges as claimed exist or have been correctly exercised.[43] The Court did so by holding that in a "consistent line of precedent this Court has held that — *firstly*, Parliament or the state legislature is not the sole judge of what privileges it enjoys and *secondly*, Parliament or legislature may only claim privileges which are essential and necessary for the functioning of the House".[44] Further, the Court went on to construct a general test applicable when reviewing any claim of privilege stating that:

> "…the assertion of a privilege by an individual member of Parliament or Legislature would be governed by a twofold test. First, the privilege claimed has to be tethered to the collective functioning of the House, and second, its

[37] *See infra* Part III.A on "The Qualitative Difference Between Articles 105(2) and 105(3)".
[38] *See infra* Part III.B on "Reading The Immunity: The Shift From The "Factual Relation" Standard To The "Legal Relation" Standard".
[39] *See infra* Part III.C on "Ignoring The Drift And Gaze Of The Provision".
[40] *See infra* Part III.D on "Comparison Is The Thief of Joy".
[41] *See infra* Part III.E on "Certain Bright Spots".
[42] For an overview of some important decisions in this regard, *see* H.M. Seervai, CONSTITUTIONAL LAW OF INDIA: A CRITICAL COMMENTARY, Vol. II, 1170–1184 (N.M. Tripathi Private Ltd. Bombay, 2nd edn., 1976).
[43] Sita Soren, *supra* note 1, ¶69 (Holding that: "…The extent of privileges in India has to be within the confines of the Constitution. Within this scheme, the Courts have jurisdiction to determine whether the privilege claimed by the House of Parliament or Legislature in fact exists and whether they have been exercised correctly. In a steady line of precedent, this Court has held that in the absence of legislation on privileges, the Parliament or Legislature may only claim such privilege which belonged to the House of Commons at the time of the commencement of the Constitution and that the House is not the sole judge to decide its own privilege.")
[44] *Id.*, ¶75.

> necessity must bear a functional relationship to the discharge of the essential duties of a legislator."[45]

The consistent line of precedent that the Court referred to for cementing its authority to scrutinize the claimed immunity largely concerns itself with Article 105(3).[46] The application of these cases to a claim of immunity under Article 105(2) is misconceived because the two clauses of Article 105, as discussed previously, are not similar provisions—the second clause is a declaration of immunity, while the third clause is a power to define such immunities or privileges. Importantly, the privilege claimed by the Legislature under the third clause has to be done so through a "law",[47] i.e., it requires a legislative action by the Parliament. Since the courts are competent to review any legislation for its constitutionality or the Parliament's competence to enact such law, the requirement of legislation to exercise the power under Article 105(3) would place a claimed privilege within the purview of judicial review like any other legislation. Even if a privilege under Article 105(3) is claimed owing to the same being enjoyed by the House of Commons of the Parliament of the United Kingdom at the commencement of the Constitution of India, such a claim would still require the Court to ascertain whether such a privilege did actually exist. Thus, these precedents cited by the Court that make the judiciary the final arbiter of the existence of a privilege are sequitur in the context of Article 105(3) because the provision leaves scope for the courts to intervene. Contrast this with Article 105(2), which does not confer power to define a privilege nor does it refer to existing unwritten privileges, rather the text of the provision unequivocally states an immunity that the Members of the Legislature enjoy. Unlike Article 105(3), the text of Article 105(2) leaves no room for the Court to interpret whether an immunity as claimed ought to exist. The relevant part of the provision states that "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". Therefore, the limited scope of interpretation that the provision leaves is whether the immunity operates in the context of a particular proceeding by virtue of it being "in respect of" anything said or any vote given.[48] To state briefly, the question that the Court can pose under Article 105(3) is whether a privilege or immunity as claimed by the legislator actually exists, but the only question that the Court can ask under Article 105(2) is not that about the existence of a privilege but only whether the immunity operates in a particular case due to the proceeding being "in respect of" a vote or speech given. Thus, the Court's self-confessed application of the jurisprudence concerning Article 105(3), to Article 105(2)[49] is

[45] *Id.*, ¶91.

[46] These precedents included MSM Sharma v. Sri Krishna Sinha, (1959) Suppl. 1 SCR 806; Special Reference No. 1 of 1964, (1965) 1 SCR 413; Karnataka v. Union of India, (1978) 2 SCR 1; Raja Ram Pal v. Hon'ble Speaker Lok Sabha, (2007) 1 SCR 317; Amarinder Singh v. Punjab Vidhan Sabha, (2010) 4 SCR 1105; Lokayukta, Justice Ripusudan Dayal v. State of MP, (2014) 3 SCR 242; In State of Kerala v. K. Ajith, (2021) 6 SCR 774, the Court largely dealt with the question of freedom of speech in the context of Articles 105 and 194 and it did discuss 194(2) briefly however, the decision there also hinged on the application of interpretation of the first and the third clauses of the Articles.

[47] Article 105(3) states that "In other respects, 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 that House and of its members and committees immediately before the coming into force of section 15 of the Constitution (Forty-fourth Amendment) Act, 1978." (emphasis added).

[48] The full breadth of this aspect is discussed in the subsequent sub-part, *see infra* Part III.B on "Reading The Immunity: The Shift From The "Factual Relation" Standard To The "Legal Relation" Standard".

[49] Sita Soren, *supra* note 1, ¶92 (the Court realises that the test is evolved in the context of Articles 105(3) and 194(3) but without appreciating the qualitative difference between the two clauses it also applies it wholesale to Articles 105(2) and 194(2) stating: "…The test of intrinsic relation to the functioning of the House and the necessity test evolved by this Court in the context of determining the remit of privileges under Articles 105(3) and 194(3) must weigh while delineating the privileges under Clauses (1) and (2) of the provisions as well").

erroneous. On the contrary, the precedents which do concern Article 105(2), have held against such judicial interference, stating that the courts should have no say about the immunity granted by Article 105(2) because the article proscribes any such interference in a language which "could not be plainer".[50] The essay will inspect the language of the provision in greater detail in the subsequent sections, however at this stage it is germane to mention that the aforementioned argument against the Court's tempering of the immunity under Article 105(2) via judicial review is not inspired by the conception of parliamentary supremacy as in other jurisdictions like the United Kingdom, rather there is no gainsaying that in India's case, all the branches are co-equal, with the Constitution being supreme.[51] Therefore, the aforementioned argument against judicial interference is based on a conception of legislative independence i.e., where the Constitution itself commands that the courts must give way to the Parliament,[52] the courts must do so, and as argued, this is the case with the provisions granting immunity to legislators.[53]

B. READING THE IMMUNITY: THE SHIFT FROM THE "FACTUAL-RELATION" STANDARD TO THE "LEGAL-RELATION" STANDARD

The relevant part of Article 105(2) which came into question states that "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…". There are two aspects of this immunity, the *first* is that it does not operate to shield or absolve a guilty legislator from any criminal liability, rather it only protects an accused legislator from proceedings before a court, the guilty legislator and the bribe-giver would still be answerable to the Parliament[54] and the regular judicial proceedings respectively. The *second* aspect is that to claim the immunity, the impugned act must be "in respect of" anything said or any vote given in Parliament or any committee thereof. Therefore, whether a proceeding on the charges of bribery, where the alleged bribe is given to the MP for a vote given in Parliament, is proscribed under Article 105(2), is a question which hinges on whether the said proceeding is "in respect of" the vote given.

In P.V. Narasimha Rao, as discussed previously, the answer to this question per the majority was that the provision must be given a wide meaning and since the alleged bribe was for the vote, this direct factual link was enough to construe the proceeding to be "in respect

[50] Tej Kiran Jain v. N Sanjeeva Reddy, (1970) 2 SCC 272, ¶8 (per Hidayatullah CJ).
[51] *See*, *e.g.*, Minerva Mills v. Union of India, (1980) 3 SCC 625 ¶86 (per Bhagwati J).
[52] There is enough in the Constitution to infer that in certain regards Parliamentary independence from the Judiciary is envisaged, *see*, *e.g.*, The Constitution of India, 1950, Art. 122 ("(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."); *see also,* REPORT OF COMMITTEE OF SPEAKERS, First Lok Sabha, *Report on the Procedure to be Adopted When a Member of Parliament or a State Legislature Commits a Breach of Privilege in Respect of the Other House or Another Legislature or its Members or Committees Thereof*, ¶16 (June, 1956) (noting independence of the House and its Members as a foundation on which parliamentary privileges rest).
[53] Specifically in the context of the United States, whose jurisprudence the Court in Sita Soren heavily relies on, Burger CJ noted "We should bear in mind that the English system differs from ours in that their Parliament is the supreme authority, not a co-ordinate branch. Our speech or debate privilege was designed to preserve legislative independence, not supremacy.", *see* United States v. Brewster, 408 U.S. 501 (1972) 508 (United States Supreme Court) ('Brewster').
[54] For an overview of the Parliament's power to punish for breach of privilege and contempt, *see* M.N. Kaul & S.L. Shakdher, PRACTICE AND PROCEDURE OF PARLIAMENT, 278–293 (Anoop Mishra ed., Metropolitan Book Co. Pvt. Ltd., 7th edn., 2016).

of" the vote. The majority opinion in P.V. Narasimha Rao being satisfied by the "factual relation" between the alleged bribe and the vote cast by the legislator, found it irrelevant whether the legal consequences in the form of the proceeding were due to the vote given by the legislator. The Court in Sita Soren, like the minority opinion in that case, demurred against the majority in P.V. Narasimha Rao. It held:

> "…The words "in respect of" means arising out of or bearing a clear relation to. This may not be overbroad or be interpreted to mean anything which may have even a remote connection with the speech or vote given. We, therefore, cannot concur with the majority judgment in PV Narasimha Rao."[55]

Therefore, in line with the reasoning of the minority opinion in P.V. Narasimha Rao, the Court held that since "…the offence of bribery crystallises on the exchange of the bribe and does not require the actual performance of the act"[56] this "…pushes the offence outside the ambit of Articles 105(2) and 194(2)."[57] This "legal relation" standard applied by the Court in Sita Soren requires the vote or speech given, to be the direct legal reason for the proceedings before the Court. Since a proceeding before the Court for the offence of bribery does not require the Court to look into whether the vote was cast according to the bribe, or cast at all, under the "legal relation" standard, the vote was of no significance to the proceeding and consequently the proceeding would not be "in respect of" the vote as per Article 105(2). Contrast the case of bribery with an example of a proceeding for the offence of defamation due to a speech made by a legislator in Parliament. To ascertain whether the offence is committed, the law would necessitate that the speech be examined. Such a proceeding would then fulfil the "legal relation" standard as the speech in Parliament would be the direct legal reason for the proceeding for defamation and consequently, the immunity against such a proceeding under Article 105(2) will follow (notice that the speech is also factually related to the alleged offence of defamation, thus the "factual relation" standard would also be qualified by such a proceeding). Another illustration can be that of a legislator causing physical hurt to a person in the course of proceeding towards the ballot to cast their vote. Even though in that case the vote would be factually related to the physical hurt caused, the vote would not be the direct legal reason for the proceedings against the legislator, therefore failing the "legal relation" standard while still fulfilling the "factual relation" standard rejected by Sita Soren. The Court's acceptance of the "legal relation" standard in Sita Soren in place of the "factual relation" standard set in P.V. Narasimha Rao marked the Court's stricter reading of Article 105(2). However, both these standards suffer from their own failings which will be discussed at greater length in the subsequent sections.

C. IGNORING THE DRIFT AND GAZE OF THE PROVISION

The problems with the Court's interpretation become starkly clear when one examines the concerned provisions in the context of their object and purpose. The Court in Sita Soren identified the purpose of the privileges to be the fortification of the legislator's exercise of free will and conscience, for this the Court held the legislator requires a twin protection—from "fear" and "favour":

> "…members and persons who have a right to speak before the House or any committee must be free from fear or favour induced into them by a third party. Members of the legislature and persons involved in the work of the Committees

[55] Sita Soren, *supra* note 1, ¶103.
[56] *Id.*, ¶118.
[57] *Id.*, ¶123.

> of the legislature must be able to exercise their free will and conscience to enrich the functions of the House…"[58]

These twin concepts, "fear" and "favour", as recognised in Sita Soren are greatly useful for understanding the function of a provision granting immunity to legislators. The Court in P.V. Narasimha Rao had read Article 105(2) in a way in which it prioritised protection from "fear" of coercive action in the form of prosecution, over protection from persuasion using "favour" in the form of bribery. To this end, it held that "The object of the protection is to enable Members to speak their mind in Parliament and vote in the same way, freed of the fear of being made answerable on that account in a court of law" (emphasis added).[59] On the contrary, in Sita Soren, the Court reads Article 105(2) in a way that prioritises protection from "favour" in the form of bribery over the protection from "fear" of prosecution. The Court noted that corruption and bribery of members eroded the foundation of Indian Parliamentary democracy and hindered the independent decision-making of the legislators by unlawfully swaying them, and thus could not be protected.[60] Therefore between the two protections that the Court recognised as necessary for the legislator to function independently, it chose not to protect from "fear" of prosecution for the charges of bribery if it meant for the Court that, in doing so, it was potentially endangering the protection from "favour", thus making clear the Court's prioritisation of protection from "favour" over the protection from "fear".

The prioritisation of protection from "favour" over "fear" that guides the Court's interpretation of Article 105(2) in Sita Soren turns the constitutional priority on its head. The Constitution makes its prioritisation clear through Article 105(2), which grants immunity against a proceeding before the courts. The protects the legislator from the fear of being harassed through vindictive accusations. The discussion on Article 105(2) in the Constituent Assembly highlights this priority of protecting the legislators from fear of adverse action.[61] M. Ananthasayanam Ayyangar noted in the Assembly that Members must be able to function freely in the House "without constant fear of any one dragging them into a court of law…It is for that purpose that this privilege is given".[62] Furthermore, embedded in any provision for granting immunity from proceedings before the courts is the fear of abuse of judicial process, because if it is expected that proceedings will never be initiated against legislators on *mala fide* grounds, then there is no need to protect the legislators from any proceedings. The Court in Sita Soren, similar to the minority view in P.V. Narasimha Rao relies heavily on US precedents to reach its conclusions[63] therefore, it is important to note that even in the American context Burger J. noted that the central role of legislative immunity is to "prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary".[64] Therefore, unlike what the Court held in Sita Soren, the object and purpose of the immunity provision i.e. Article 105(2),

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[58] *Id.*, ¶104.
[59] P.V. Narasimha Rao, *supra* note 2, ¶136.
[60] Sita Soren, *supra* note 1, ¶104.
[61] The reference to constituent Assembly debates is to illustrate the lines on which the article was discussed, that said, reliance on the debates in the assembly to interpret a constitutional provision remains contentious, *see* Sudhir Krishnaswamy, DEMOCRACY AND CONSTITUTIONALISM IN INDIA, 33–37 (Oxford University Press, 2009).
[62] CONSTITUENT ASSEMBLY DEBATES, Book No. 3, May 19, 1949, *speech by* M. ANANTHASAYANAM AYYANGAR, 155 (2014).
[63] The Court accepts largely what is the view of the minority in P.V. Narasimha Rao, the minority borrows its reasoning from the Burger CJ's opinion in United States v. Brewster, 408 U.S. 501 (1972) (United States Supreme Court).
[64] Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975) 502 (United States Supreme Court).

remains to ensure the protection of the legislators from fear of harassment through the abuse of the judicial process and not protection from favours in the form of bribes.

The repugnancy of the Court's interpretation with the text and context of Article 105(2) becomes even clearer on the examination of the "gaze" of Article 105(2). When a provision protects a legislator from any proceeding, it means that the provision's gaze is such that it sees the accused legislator and their speech or vote with a benefit of the doubt, while the charge against them with scepticism. When the Court in Sita Soren interprets the protection of a legislator from proceedings for the alleged offence of bribery as protecting "corruption and bribery",[65] its gaze is such that it sees the legislator claiming immunity with scepticism, but the charge against them with the benefit of the doubt. This turns the gaze of the provision upside down. So much is the scepticism against an accused legislator, that the Court rules out any presumption of privilege as it is claimed, and puts the burden to prove that a privilege exists and is necessary for the collective functioning of the house, on the Members themselves.[66]

The danger of the Court's reversal of priorities of Article 105(2) is that in protecting from "favour" the Court completely leaves the doors open for the application of "fear"; in excluding criminal proceedings from the purview of Article 105(2),[67] it excludes one of the most coercive methods of harassing legislators.[68] The Court does so even when Article 105(2) provides immunity from "any proceedings" without distinguishing between criminal or civil. Therefore, the Court's interpretation militates against its own stated objective of staying "true to what the 'Constitution itself' fathomed as the remit of Articles 105(2) and 194(2)".[69]

A counter-argument which can be raised against the protection of legislators from proceedings against allegations of bribery, as raised in *United States* v. *Brewster*, is that an adverse executive's "…power to harass is not greatly enhanced if it can prosecute for a promise relating to a legislative act in return for a bribe."[70] Now it is true that a determined ill-intentioned executive or authority's ability to harass a legislator is limited only by its

[65] Sita Soren, *supra* note 1, ¶104.
[66] *Id.,* ¶90.
[67] *Id.*, ¶111.
[68] Investigative agencies like the Enforcement Directorate or the Central Bureau of Investigation are often the agencies involved in such proceedings, they have been accused of being misused against political opposition to the powers that be *see* P. Raman, *Given the Devious Track Record of the ED and CBI, the Opposition Has to Be Ready*, THE WIRE, March 05, 2024, available at https://thewire.in/politics/ed-cbi-devious-track-record/?mid_related_new (Last visited on December 10, 2024); *see also* Ajay K. Mehra, *The Uses (and Abuses) of Investigative Agencies*, THE WIRE, November 12, 2022, available at https://thewire.in/government/cbi-nia-enforcement-directorate-use-abuse (Last visited on December 10, 2024); The Supreme Court has noted that there is a need for a "pan-India mechanism" to determine if the Enforcement directorate was investigating based on political vendetta or vindictiveness *see* Krishnadas Rajagopal, *Need a 'mechanism' to Detect Vendetta in ED-States Cases: Supreme Court*, THE HINDU, January 25, 2024, available at https://www.thehindu.com/news/national/sc-wants-mechanism-to-detect-when-ed-state-are-playing-a-vindictive-game-of-oneupmanship/article67776019.ece (Last visited on December 10, 2024); The Bengal Legislative Assembly passed a resolution against the selective use of investigative agencies, *see* Sreyashi Dey, *Bengal Assembly Passes Resolution against CBI & ED, says TMC Leaders 'selectively targeted'*, THE PRINT, September 19, 2022, available at https://theprint.in/india/bengal-assembly-passes-resolution-against-cbi-ed-says-tmc-leaders-selectively-targeted/1134385/ (Last visited on December 10, 2024); A similar resolution was also passed by the Delhi Legislative Assembly, *see* HINDUSTAN TIMES, *Delhi Assembly Passes Resolution Against 'misuse' of CBI, ED*, September 19, 2022, available at https://www.hindustantimes.com/cities/delhi-news/delhi-assembly-passes-resolution-against-misuse-of-federal-agencies-to-destabilize-delhi-government-bjp-walks-out-in-protest-101681758197695.html (Last visited on December 10, 2024).
[69] Sita Soren, *supra* note 1, ¶44.
[70] Brewster, *supra* note 52, 524 (per Burger CJ).

willingness and ingenuity, but when a provision does provide some protection, even if not exhaustive, the fact that other ways to achieve the same result which the immunity protects against exists, is no convincing reason to make the said immunity inoperative.

D. COMPARISON IS THE THIEF OF JOY

The Supreme Court in Sita Soren does a voluminous survey of precedents from the United Kingdom,[71] Canada,[72] Australia,[73] and the United States[74] to support its conclusions. However, the essay has deliberately up until this point steered clear of a thorough appraisal of these. This has been primarily for two reasons. The *first* being that the Court tends to mechanically and copiously quote these decisions in cases concerning legislative privileges, and after surveying the very same cases, always ends up finding support for whatever end they sought to achieve.[75] Therefore in the interest of theoretical parsimony, critiquing directly the Court's reasoning in itself forms a more profitable endeavour. *Secondly*, if the conclusions the Court reaches by relying on foreign decisions are repugnant to the text, context, and purpose of the provision itself, it *a fortiori* rules out the need to critique the Court's reliance on these judgments. Even so, since the Court both in P.V. Narasimha Rao and in Sita Soren put great reliance on the decisions of these jurisdictions, it might still be fruitful to consider them.

In *Raja Ram Pal* v. *Hon'ble Speaker, Lok Sabha* ('Raja Ram Pal')[76] Raveendran J. strikes a cautionary note against the majority opinion's tourism of foreign precedents; in that case, the Court was considering precedents from the same jurisdictions as in Sita Soren. He notes that "Decisions of foreign courts, though useful to understand the different constitutional philosophies…are of limited or no assistance in interpreting the special provisions of the Indian Constitution, dissimilar to the provisions of foreign constitutions".[77] Professor Dam highlights another trouble exacerbated by such abrupt comparative analysis without awareness of the nuanced distinctions between the provisions of different constitutions: the lack of explanation provided by the courts for choosing particular jurisdictions to be studied — why does the court choose American, Australian, Canadian and English law, and why not other jurisdictions like Pakistan, Sri Lanka or Bangladesh?[78]

Among the jurisdictions surveyed by the Court, precedents from Australia, and Canada are of little utility in interpreting Articles 105(2) and 194(2) of the Constitution of India. This is because the textual basis from which their interpretation germinates is fundamentally different from that of the provisions Sita Soren was concerned with.[79] Their better use is in the

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[71] Sita Soren, *supra* note 1, ¶¶128-145.
[72] *Id.,* ¶¶157-163.
[73] *Id.,* ¶¶164-167.
[74] *Id.,* ¶¶146-156.
[75] Shubhankar Dam, *Parliamentary Privileges As Façade: Political Reforms And The Indian Supreme Court*, July 2007, Singapore Journal of Legal Studies, 179 (2007) (Dam comparing the approach in P.V. Narasimha Rao with Raja Ram Pal notes: "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 member…").
[76] Raja Ram Pal v. Hon'ble Speaker, Lok Sabha, (2007) 3 SCC 184.
[77] *Id.*, ¶730.
[78] Dam, *supra* note 74, 172.
[79] The privilege defined in the Commonwealth of Australia Constitution Act 1900, §49 reads, "The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of

context of Article 105(3) with whom they bear their resemblance. Relying on these provisions would mean, perpetuating the same errors as those in applying precedents concerning Article 105(3) to the interpretation of Article 105(2).[80] It is the American and British precedents, therefore, which demand closer scrutiny.

The privileges interpreted by the British and American precedents differ from Article 105(2) of the Constitution of India, although these distinctions are finer than those in the Canadian or Australian context, they remain fundamental enough that the line of reasoning emanating from them do not translate well to the Indian provisions. The privilege under British law reads, "…the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament",[81] the relevant portion of the American Speech or Debate Clause reads, "The Senators and Representatives…for any Speech or Debate in either House,…shall not be questioned in any other Place".[82] The fundamental difference between them and Article 105(2) of the Constitution of India is that while the British and American provisions bar a proceeding from impugning or questioning a legislative act, such as speech or vote; the Indian provision bars the proceeding itself provided that it is in respect of a vote or speech given. *Ex facie*, this difference may seem like literalist hair-splitting, but this is the reason why both the American and British precedents have evolved the way they did. For example, in *United States* v. *Johnson*,[83] the Court allowed the proceeding for the charges of criminal conspiracy against a legislator to continue granted they do not impugn the protected legislative act.[84] Similarly, a case illustrative of this in the British context is *Prebble* v. *TV New Zealand*,[85] where the Court held:

> "…parties to litigation, by whomsoever commenced, cannot bring into question anything said or done in the House by suggesting (whether by direct evidence, cross-examination, inference or submission) that the actions or words were inspired by improper motives or were untrue or misleading. Such matters lie entirely within the jurisdiction of the House…"[86]

Therefore, it is clear that the immunities as per the American and British provisions are already narrow, and a narrow and restricted evidentiary immunity interpreted in that context is thematic to the drift of those provisions.[87] Contrast this narrow evidentiary immunity to the Indian provision. Whether it be the minority or majority opinion in P.V.

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the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth"; The legislative privileges in Canada as defined in The Constitution Acts 1867 to 1982, §18 reads, "The privileges, immunities, and powers to be held, enjoyed, and exercised by the Senate and by the House of Commons, and by the members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities, and powers shall not confer any privileges, immunities, or powers exceeding those at the passing of such Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof".

[80] *See supra* Part III.A on "The Qualitative Difference Between Articles 105(2) and 105(3)".

[81] The Bill of Rights, 1689, Art. IX (United Kingdom).

[82] The Constitution of the United States, 1787, Art. I §6 Cl. 1.

[83] United States v. Johnson, 383 US 169 (1966) (United States Supreme Court).

[84] *Id.,* 185 (The Court noted that: "… making of the speech, however was only a part of the conspiracy charge. With all references to this aspect of the conspiracy eliminated, we think the Government should not be precluded from a new trial on this count, thus wholly purged of elements offensive to the Speech or Debate Clause.").

[85] Prebble v. TV New Zealand, [1994] 3 All ER 407 (Judicial Committee of the Privy Council)

[86] *Id.,* ¶417–418.

[87] Some argue that the Speech or Debate Clause allows for an even narrower interpretation and criticize this kind of evidentiary immunity, *see, e.g.,* Wells Harrell, *The Speech or Debate Clause Should Not Confer Evidentiary or Non-disclosure Privileges*, Vol. 98(2), VA. L. REV., 385 (2012).

Narasimha Rao or the decision in Sita Soren, it remains uncontested that once the immunity is operative, irrespective of the test for recognising the claimed immunity, it bars the proceeding itself and not just the questioning or impeachment of the protected acts in that proceeding. It is this difference between the provisions which allows for the narrow "legal relation" standard[88] to be adopted in the American context[89] for it only protects against direct questioning of the act, while not being ripe for translation in the Indian one because the Indian provisions act as an immunity against the proceeding itself which confers a wider ambit of protection. Therefore, the Court's reliance on these precedents, without much thought to the fundamental differences in their textual origins, makes for a tenuous basis to root their decision in.

E. CERTAIN BRIGHT SPOTS

An absurdity that had emerged in the majority opinion in P.V. Narasimha Rao was that the Court held that since the immunity arises in the context of anything said or any "vote given" those, like Ajit Singh in that case, who did not cast their vote would not be protected by the immunity since the vote was not "given".[90] This was uncharacteristic of the Court's otherwise broad interpretation of the provision, and without much reason but basis purely on an unreasonably literal interpretation. This was extrapolated further by the High Court in Sita Soren to mean that since the accused Member had not cast her vote in accordance with the promise made in exchange for the alleged bribe, she was not protected. The Court remedies this in Sita Soren, stating the following:

> "Indeed, to read Articles 105(2) and 194(2) in the manner proposed in the majority judgment results in a paradoxical outcome. Such an interpretation results in a situation where a legislator is rewarded with immunity when they accept a bribe and follow through by voting in the agreed direction. On the other hand, a legislator who agrees to accept a bribe, but may eventually decide to vote independently will be prosecuted. Such an interpretation belies not only the text of Articles 105 and 194 but also the purpose of conferring parliamentary privilege on members of the legislature."[91]

Therefore, Sita Soren offers the correct interpretation in this regard, which furthers the purpose of the provision as already culled out, by stating that a Member is within the ambit of the protection not only when they give a vote but also when they actively choose not to do so, or when they do so against what is that they are allegedly supposed to do in exchange for the bribe; this ultimately protects the freedom of the Member to cast their vote, and also remedies the artificial distinction pointed out by the minority in P.V. Narasimha Rao.[92]

IV. CONSTRUCTING A NEXUS TEST BASIS "MATERIAL INFLUENCE"

As has been discussed previously, the scope of judicial interference under Article 105(2) is limited to the extent of interpreting whether a proceeding is adequately related to the vote or speech to be considered as being "in respect of" the said acts.[93] To answer this

[88] *See supra* Part III.B on "Reading The Immunity: The Shift From The "Factual Relation" Standard To The "Legal Relation" Standard".
[89] *See* Brewster, *supra* note 52.
[90] P.V Narasimha Rao, *supra* note 2, ¶143 (per Bharucha J.).
[91] Sita Soren, *supra* note 1, ¶126.
[92] P.V. Narasimha Rao, *supra* note 2, ¶47.
[93] *See supra* Part III.B on "Reading The Immunity: The Shift From The "Factual Relation" Standard To The "Legal Relation" Standard".

the Court in P.V. Narasimha Rao chose to apply the "factual relation" standard, while in Sita Soren the Court applied a stricter "legal relation" standard.[94] The limitation of the legal relation standard is its under-inclusiveness owing to an extremely narrow reading of Article 105(2) that restricts its application only to proceedings whose direct legal cause is the vote or speech given by the legislator. Therefore, even if the threat of a proceeding acts as a deterrent to the legislator's exercise of their free will and conscience but the proceeding's direct legal cause is not the vote or speech given, then such a proceeding would not be covered by Article 105(2) under the said standard, defeating the very purpose of the provision.[95] Furthermore, any proceedings such as those for the offence of bribery or corruption—even if not connected to the vote or speech under the legal relation standard—do not just have the capacity to harass the legislator but can also serve to undermine the integrity of the vote or speech which is alleged to be influenced by such acts. Therefore, any proper standard for ascertaining whether an act is adequately related to the protected acts, i.e., speech made or vote given, must not be so narrow that it allows for compromising the integrity of a vote or speech given in Parliament or allows the threat of wanton prosecution, even if the proceeding is not strictly legally impugning the vote or speech itself. However, for all the failings of the narrow legal relation standard, there is a danger to a wider standard like the "factual relation" standard as well, this danger lies in its over-inclusiveness, as was also highlighted before the Court through the course of the oral arguments in Sita Soren:

> "…you can't take something so tenuous and remote and say that, we will link it now, it is connected to the vote. Because if that was so, every criminal activity, that an MP or an MLA indulges in, he can say, 'Oh, it was meant for the vote. I was just on my way to vote. I ran over somebody on the road, but I was on my way to go and vote'."[96]

A similar argument was presented by M.H. Beg CJ against opting for an overbroad interpretation, he took the example of a murder committed in the House.[97] These examples highlight that the "factual relation" standard can be stretched to extremes to cover cases that go well beyond the purpose of Article 105(2).[98] A balance needs to be struck between the over-inclusive factual relation standard and the under-inclusive legal relation standard giving full effect to Article 105(2), i.e. fully protecting a legislator against the threat of any legal proceeding acting as a deterrent to the free exercise of their vote or speech. This must be done without giving the provision an overbroad interpretation covering even those proceedings which do not serve as a deterrence against such free exercise. Therefore, the appropriate standard to assess whether a vote is related to a proceeding before a court would be to determine whether the act in question in the proceedings, if assumed to be true, would reveal in itself the intention and the ability to materially influence the substance of the vote or the speech given. If the answer is in the affirmative, then the legislator should be protected from the proceeding because questioning the act would mean questioning the considerations behind the vote or speech given. Therefore, allowing such acts to be questioned in a proceeding before the Court would defeat the purpose espoused by Article 105(2), *viz.* ensuring that legislators exercise

[94] *Id.*
[95] *See supra* Part III.C on "Ignoring The Drift And Gaze Of The Provision".
[96] SUPREME COURT OF INDIA, Transcript of Crl. A. No. 451 of 2019 Hearing dated 04.10.2023, 70, ¶¶5–9, available at https://cdnbbsr.s3waas.gov.in/s3ec0490f1f4972d133619a60c30f3559e/uploads/2024/01/2024012574.pdf (Last visited on December 13, 2024).
[97] Karnataka v. Union of India, (1978) 2 SCR 1, ¶63.
[98] *See supra* Part III.C on "Ignoring The Drift And Gaze Of The Provision".

their free will and conscience without the fear of malicious allegations, and maintaining the integrity of the vote or speech.

If the "material influence" standard is applied in the context of a proceeding in respect of the allegations of bribery (as was the case in Sita Soren), it becomes clear that irrespective of whether a Member votes or abstains from voting, when the alleged bribe is offered to them, it reveals in itself an intention to materially influence the vote or the speech given by the legislator, and it certainly has the ability to materially influence the said vote. Therefore, it has the potential to be a key factor in deciding how the vote is cast; calling into question such an act would be equivalent to impugning the vote or the speech itself. Thus, the protection under Article 105(2) would be operative in such a case under the material influence standard, unlike the legal relation standard. This would be the case irrespective of whether the accused legislator has carried out the alleged *quid pro quo*; this is because the material influence standard does not require the Court to ascertain the actual influence of the act in question but only its potential to materially influence the vote or speech.[99] Contrast this to the aforementioned case of a legislator alleged to have run over someone on their way to vote, the alleged action neither reveals in itself the intention nor the ability to materially influence the substance of the vote that the legislator casts, therefore such a case would not enjoy the immunity under Article 105(2) as per the material influence standard, unlike the broad factual relation standard which would cover it. Another illustration, as taken earlier in the essay, can be of the legislator causing physical hurt to a person in the course of approaching the ballot to cast their vote, the act of causing physical hurt does not reveal in itself an intention or capacity to materially influence the substance of the vote cast by the accused legislator, thus failing to qualify the material influence standard consequently being denied of the immunity under Article 105(2). Therefore, the material influence standard effectuates the immunity under Article 105(2) by attempting a balance between being wide enough to cover the gaps of the legal relation standard and being just restrictive enough to eliminate extreme outcomes of the factual relation standard.

V. CONCLUSION

When the courts decide a case loaded with moral and ethical tangents, such as legislative immunity against proceedings concerning allegations of bribery, it faces what can be characterized as a form of Euthyphro's dilemma,[100] i.e., whether something ought to be a certain way because the Constitution says so, or the Constitution says so because something ought to be a certain way. If you accept the former, you are likely to adopt the tenor of Bharucha J. in P.V. Narasimha Rao, but if you accept the latter, then like Chandrachud CJ. in Sita Soren you will resort to speaking over the Constitution. This essay argues for the former. Even if the Constitution says something which goes against the popular conception of how things ought to be, it is improper to silence the text of that provision, the Parliament can always as a curative measure amend the problem provision; this is exactly what the National Commission to Review

[99] This is because ascertaining whether the *quid pro quo* has been performed would require the Court to decide whether the bribe was in fact offered, whether it was accepted, and whether it influenced the vote. Such an extensive inquiry into the alleged offence would frustrate the purpose of protecting the legislator from the proceedings in the first place.

[100] The Euthyphro Dilemma is based on an exchange between Socrates and Euthyphro, where Socrates asks Euthyphro, "Whether the pious or holy is beloved by the gods because it is holy, or holy because it is beloved of the gods.", *see* Plato, EUTHYPHRO (*translated by* Benjamin Jowett, Project Gutenberg, 2008), available at https://www.gutenberg.org/files/1642/1642-h/1642-h.htm#link2H_4_0002 (Last visited on December 13, 2024).

the Working of the Constitution had recommended.[101] However, even then the Commission was conscious of the dangers of allowing such proceedings, and giving a nod to Parliamentary independence and as a *via media* between "fear" and "favour", it suggested safeguard provisions for such proceedings to only be initiated after a sanction of a special committee consisting of members chosen from the Lok Sabha and Rajya Sabha.[102] The argument for protecting legislators from proceedings before the Court remains not just a jejune argument operating *in terrorem*, but it reflects the reality of executive aggrandizement, where anti-corruption and investigative agencies continue their backsliding.[103] The Court's reading of Articles 105(2) and 194(2) in Sita Soren renders these provisions so porous that to subvert them all it takes is an allegation of corruption or bribery by an adverse executive, it both serves to then harass the legislator and also delegitimize their act of speech or vote, therefore if protection from excesses of power and abuse of process was what animated Articles 105(2) and 194(2), then its vitality and verve all stripped, it remains a cadaver in the Constitution.

[101] Report of the National Commission to Review the Working of the Constitution, Vol. 2, Book 1, ¶29, 550 (2001) (It had recommended adding Clause 3A whose first clause stated: "Nothing in clauses (1), (2) or (3) shall bar the prosecution of a Member of Parliament, in any court of law, for an offence involving receiving or accepting, whether directly or indirectly, and whether for his own benefit or for the benefit of any other person in whom he is interested, any kind of monetary or other valuable consideration for voting in a particular manner or for not voting, as the case may be, in a House of Parliament.").

[102] *Id.* (The relevant clauses of proposed Article 105(3A) stated: "(ii) No court shall take cognizance of the offence mentioned in subclause (i) of this clause, except with the previous sanction of the committee constituted under sub-clause (iii) of this clause. (iii) The committee referred to in sub-clause (ii) shall be a permanent committee constituted by the President. It shall comprise five Members of Parliament drawn from the Lok Sabha and Rajya Sabha (in the proportion of 3:2) nominated by the President in consultation with the Speaker of the Lok Sabha and the Chairman of the Rajya Sabha. The term of the members of the committee and other incidental matters may be such as may be notified by the President in the order constituting the committee.").

[103] *See* Tarunabh Khaitan, *Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-state Fusion in India*, Vol. 14(1), LAW & ETHICS OF HUMAN RIGHTS, 49–95 (2020); The Central Bureau of Investigation, a key investigative agency has been referred to as a "caged parrot" by a Supreme Court Justice, *see* Ross Colvin & Satarupa Bhattacharjya, *A "caged parrot" – Supreme Court describes CBI*, REUTERS, May 10, 2013, available at https://www.reuters.com/article/world/a-caged-parrot-supreme-court-describes-cbi-idUSDEE94901X/ (Last visited on December 10, 2024).