

Sanctions for Prosecution of Public Servants: A Necessary Evil

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This article is an attempt to explain the sanctions contained in the respective pieces of legislations for the purpose of removal of public servants, its validity under the Indian Constitution and when the provisions can be considered thereto.

Sanction, when required under Section 19 Prevention of Corruption Act and when under Sec. 197 of Code of Criminal procedure(Cr.P.C.):

Central or a State Government is necessary for the prosecution of a public servant not removable from his office save with the permission of the Government¹. No sanction is required under this section to prosecute a public servant removable by an authority lower than the Government. Sanction is required of the competent authority whether the public servant² is removable by the Government or by an authority lower than the Government³. Sanction is not required under Section 19 of the P.C. Act, if the public servant is no longer in service at the time the Court takes cognizance of the offence, but is required under Section 197 Cr.P.C. even where the public servant is no longer in service at the time the Court takes cognizance of the offence. Under Section 19 of the P.C. Act, sanction for prosecution is required for an offence punishable under Sections 7, 10, 11, 13, 15 of the Act, while under Section 197(1) Cr.P.C. sanction is required for an offence committed while acting or purporting to act in the discharge of his official duty, and not otherwise.

Validity of provision :

Article 14 of the Constitution does not render Section 197, ultra vires as the discrimination is based upon a rational classification. Public servants have to be protected from harassment in the discharge of official duties, while ordinary citizens not so engaged do not require this safeguard⁴. Section 197(1) does not create any arbitrary discrimination; on the other hand, it makes a reasonable differentia: public servants not removable from their respective offices save by or with the sanction of a State Government or the Central Government, are put in one class and the public servants who are removable from their respective offices even without such sanction are put in another class. The reason for this classification quite obviously is that the public servants who hold responsible positions and who discharge important functions shall alone be afforded certain amount of protection from the harassment resulting from vexatious prosecutions, while those who discharge comparatively unimportant functions or hold less responsible positions would not be accorded such protection. Such a classification can in no sense be regarded as arbitrary or unreasonable and the section is not, therefore, inconsistent with article 14 of the Constitution⁵.

Need for sanction when to be considered?

In *Matajog Dobey v. H.C. Bhari*⁶, It is now authoritatively laid down by the Supreme Court that it is not always necessary that the need for sanction under section 197 is to be considered as soon as the complaint is lodged and on the allegations therein contained. The question may arise at any stage of the proceedings. The complaint may not disclose that the act constituting the offence was done or purported to be done in the discharge of official duty; but facts subsequently coming to light on a police or judicial inquiry or even in the course of the prosecution evidence at the trial, may establish the necessity for sanction. Whether sanction is necessary or not may have to be determined from stage to stage. The necessity may reveal itself in the course of the progress of the case⁷.

No form of sanction but application of mind necessary :

Under Section 197(1), no set form of sanction is necessary⁸. In a case under Section 6 of the Prevention of Corruption Act, it is stated by the Supreme Court that it should be clear from the form of the sanction that the sanctioning authority considered the evidence before it and after a consideration of all the circumstances of the case sanctioned the prosecution, and, therefore, unless the matter can be proved by other evidence, in the sanction itself the facts should be referred to indicate that the sanctioning authority had applied its mind to the facts and circumstances of the case⁹.

As laid down by the Supreme Court, a public servant can be said to act or purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty. A judge neither acts nor purports to act as a Judge in receiving a bribe though the judgment which he delivers may be such an act; nor does a Government Medical Officer act or purport to act as a public servant in picking the pocket of a patient whom he is examining though the examination itself may be such an act¹⁰. The acid test is as to whether the public servant can reasonably be inferred to have acted by virtue of his office. What is important is the quality of the act. The question whether an Offence was committed in the course of official duty or under colour of office depends on the facts of each case¹¹. The Supreme Court held, where the accused, Minister of Electricity, Government of Kerala, is alleged to have supplied certain Units of electricity without the consent of the Government, that the alleged criminal conspiracy has direct nexus with discharge of his official duties and that as such sanction is required for his prosecution under Section 197 Cr.P.C¹².

The disciplinary proceedings against government servants are taken under Service rules framed by Government under Article 309 of Constitution. Besides, a public servant can also be prosecuted for bribery and corruption in a criminal court. With a view to expedite such trials, the prevention of

Corruption act, 1947 (now replaced with P.C. Act) makes certain provisions. As it is in the interest of public that corruption be eradicated, so also it is in the public interest that honest public servants should be able to discharge their duties free from false, frivolous, and malicious accusations. PCA thus seeks to balance both objectives. One hand, it seeks to provide for certain safeguards against frivolous trials, other hand it seeks to provide for expeditious trial of corruption cases. One such safeguard contained in Section 17 of PCA is that before a public servant can be prosecuted for any specific offence¹³, sanction of State Government is necessary in case of a person who is employed in connection with the affairs of a state and is not removable from his office save by or with the sanction of the State Government Grant of sanction is only an administrative function. Facts collected during the course of investigation have to be brought before the sanctioning authority and the sanctioning authority has to consider the material. The grant of sanction being an administrative act, the need to provide an opportunity of hearing to the accused, does not arise¹⁴. Similar is in case of central Government. Explaining the provision Supreme Court has said that sanction of that competent authority alone is necessary which is competent to remove the public servant from the office which he is alleged to have misused or abused for corrupt motive. Further the authority, entitled to grant sanction must apply its mind to the facts of the case, evidence collected and other material before according sanction.

In Mohd. Iqbal Ahmed v. state of Andra pradesh¹⁵ SC has emphasised on two significant aspects of of sanction for prosecution. First, any case instituted without a proper sanction must fail as the entire proceedings are rendered void abinitio. Therefore the prosecution must prove that valid sanction has been granted by the sanctioning authority. Secondly, the sanctioning authority must be satisfied that a case for sanction has been made out constituting the offence. the sanctioning authority at the time of giving sanction must be aware of the facts constituting the offence and must apply its mind. The grant of sanction is not an idle formality. It is a sacrosanct act which affords protection to the Government Servants against frivolous prosecution.

In State of Maharastra v. R.S. Nayak¹⁶ it was held that protection under Section 197 is available only when alleged act done by public servant is reasonably connected with discharge of his official duty¹⁷. For the interest of democratic government and its functioning, the Governor must act in such a case on his own.

Difference between sanction under Section 195 and sanction under Sections 96 and 197: A court granting sanction under Section 195(1)(b) in connection with offences in a judicial proceeding in such court, acts in its judicial capacity in granting the sanction upon legal evidence, whereas the Government granting sanctions under Sections 196 and 197 acts purely in its executive capacity, and the sanction need not be based on legal evidence¹⁸.

Acts to fall within scope and range of official duty for availing of protection :

This section requires that the concerned public servant is not removable from his office except by the Central Government or State Government or with the sanction of the concerned Governments; he has committed the alleged offence while he was performing his official duty or purporting to act in the discharge of the official duty. Then if the public servant is employed in connection with the affairs of the union sanction from the Central Government and if employed in connection with the affairs of the State sanction from the State Government is needed¹⁹. The connection between the complained act and the official duty must be such that accused can say that the act was done in the course of the performance of his duty, but such claim must not be a pretended or fanciful claim²⁰.

Sanction not necessary for bribery :

It has been settled by the Privy Council that sanction under Section 197, is not necessary before a public servant could be prosecuted for an offence under Section 161, I.P.C. A public servant can only be said to act or to purport to act in the discharge of his official duty, if his act is such as to be within the scope of his official duty²¹. The test as to the necessity for sanction is whether the public servant, if challenged, can reasonably claim that what he does; he does in virtue of his office. A public servant charged with an offence under Section 120-B read with Section 161, I.P.C., cannot justify his act of receiving bribe as an act done by him by virtue of the office that he held²². However, it was held by Karnataka High Court that where the investigating officer had called an accused for interrogation and the accused alleged that the investigating officer had demanded money, the act complained of having been done while discharging official duties, this provision will apply²³.

Discretionary powers of the Governor in relation to granting sanction for the prosecution of Public Servants :

For the prosecution of public servants for offences which are fundamentally criminal in nature, a grant of sanction under Section 197 of the Code of Criminal Procedure is necessary. This grant of sanction has been accorded to Judges, Magistrates, and Public servants, so that they can be prevented from frivolous prosecution and in cases where the prosecution of these persons is not in public interest²⁴.

Supreme Court in some cases have considered it to be the Council of Ministers and that even in cases in which the Statutes use the expression 'Governor' , by way of process of interpretation the Apex Court has held the expression to be interpreted as the 'State Government'²⁵.

"The power to sanction is nothing but an executive action of the Government. This is not a matter with respect to which the Governor is required under the Constitution to act in his discretion²⁶. Also, it was held that even though Article 243(g) of the Constitution uses the word 'Governor', it

was interpreted to be the State Government²⁷.

"Where functions entrusted to a Minister are performed by an official employed in the Minister's Department there is in law no delegation because constitutionally the act or decision of the official is that of the, Minister. The official is merely the machinery for the discharge of the functions entrusted to a Minister"²⁸.

It is very necessary to mention the relevant Articles in order to determine whether the Governor would have discretion in such matters. Executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officer's sub-ordinate to him in accordance to the Constitution²⁹.

Wherever the Constitution requires the satisfaction of the Governor for the exercise of any power vested upon him by the mandate of the Constitution, the satisfaction required by the Constitution is not to be construed as the personal satisfaction of the Governor but is the satisfaction of the Governor in the constitutional sense under the Cabinet system of Government³⁰. This essentially implies that it is the satisfaction of the Council of Ministers as conveyed to the Governor, on the basis of which the Governor acts. The legal position has been unambiguously expostulated in this regard by the apex Court ³¹. "It is an elementary principle of democratic Government prevailing in England and adopted in our Constitution that the Rajpramukh or the Governor as head of the State is in such matters merely a constitutional head and is bound to accept the advice of his Ministers".

Issue in Kashmir:

Indian troops and agencies are killing innocent Kashmiri people with impunity .Killing of Villagers in fake encounter, teenager Tufail Ahmad Matoo was killed allegedly by police. The killings have again put Kashmir on boil and could trigger widespread protests across the Muslim majority region where rebel violence is waning but anti-Indian sentiment still runs deep³².

Armed Forces (Special Powers) Act (AFSPA) :

Act was passed on September 11, 1958 by the Parliament of India. Due to following reasons :

1. Failure of the administration and the local police to tackle local issues.
2. Maintenance of Peace and Tranquility.

It gives Army officers legal immunity for their actions. There can be no prosecution, suit or any other legal proceeding against anyone acting under that law. Nor is the government's judgment on why an area is found to be "disturbed" subject to judicial review. Enforced in Jammu and Kashmir in 1990, the law provides army officers legal immunity for their

actions. The law also gives security forces the power to arrest people and search their homes without any warrant, as well as to use deadly force against people.

Questions that arise, In Case of fake encounter of 17-year-old Tufail Mattoo, was killed by a tear gas canister which struck his head during a protest in Srinagar in June, 2010³³. Tear gas, rubber bullets and water cannon are used all over the world in situations where protests turn violent but in India, live ammunition seems to be the first and only line of defence. Even tear gas canisters are so poorly designed here that they lead to fatalities.

Though the Army has arrested the soldiers responsible for the fake encounter, the only reason they had the nerve to commit such a heinous crime was because they were confident they would get away with it. The army officers involved in the kidnapping and murder of five Kashmiri civilians there continue to be at liberty despite being charge-sheeted by the CBI. The Ministry of Defence has refused to grant sanction for their prosecution and has taken the matter all the way to the Supreme Court in an effort to ensure its men do not face trial. Even a non-commissioned officer can shoot to kill based on the mere suspicion that it is necessary to do so to "maintain public order"³⁴. Question that is pertinent is What was the message that went out as a result? Probably we need to think to get a proper answer.

On 13th September 2010, Cabinet Committee on Security is set to decide on the J&K government's demand for partial withdrawal of the Armed Forces Special Powers Act. But still J&K is facing the problem till date. We at times wonder what could be done in order to avoid such things in future and Hope Peace return backs to Jammu & Kashmir. This is one such instance among the number of instances which is happening on day to day basis in different parts of our country. We must always remember and use the power given by the statute or Acts by our legislation judiciously in order to make this place a wonderful place in the world to live in.

CONCLUSION:

Globalisation has brought many changes, which has also positively affected our country. We possess extraordinary resources as well as talent pools to bring changes in our system. i.e. the system which is corrupt. Every citizen of our country now takes interest in playing vital roles for better governance of our country. They have become more vigilant and more protective about themselves as well as our country. Now they ask questions, they criticise, they protest against any unhealthy activity which prevails in our system. Apart from doing these, they also make sure that the Government is taking steps or measures in order to improve the situation of our country in every perspective. When we speak about our government and system, a public servant plays a very pivotal role in governing our country, because they are one of the most important organs of our system, i.e. Executive. So the burden of executing every act of the system depends upon them. So considering the importance of the role they play in our system, it is very much necessary that

public servant should inculcate the spirit of commitment within them and do excellence at the grass-roots level, without which it will be impossible to create an environment of positive growth and development in true sense. Although as a citizen of our country, even though I understand the difficulty, which they undergo while performing their duty, but it should be always remembered that, being such an important part of our system and governance, each and every public servant should make sure that utmost quality of our administration is maintained. They should be innovative enough to look for new opportunities. They must be sensitive enough to contribute to creating a just and humane society. They must be in a position to accept challenges in every step and should take every idealistic step in order to make our country India, free from fear of war, want and exploitation and make our country a better place in this world to live in.

* Section 197 of Cr.P.C read along with section 21 of IPC.

1. Biplab Kumar Lenin, Scholar 2nd yr RGSOIPL, IIT Kharagpur.
2. Definition of public servant as defined under sec. 2(c) P.C. Act
3. Section 19 of prevention of Corruption Act.
4. AIR 1956 SC 44
5. AIR 1954 Nag 265.
6. MANU/SC/0071/1955
7. AIR 1956 SC 44.
8. 27 Mad 54 (58).
9. Jaswant Singh v. The State of Punjab, AIR 1958 SC 124.
10. S.B. Saha vs. M.S. Kochar, AIR 1979 SC 1841:1979 Cr.L.J. 1367 (S.C.).
11. Bajinath vs. State of Madhya Pradesh, AIR 1966 SC 220.
12. R. Balakrishna Pillai vs. State of Kerala, AIR 1996 SC 901.
13. The offences are those punishable under s.161 or s. 164 or s.165, IPC or s. 5(2) or 5(3A) of the PCA.
14. Superintendent of Police (CAI) v. Deepak Chowdhary. AIR 1996 SC 186.
15. AIR 1979 SC677

16. AIR 1982 SC 1249
17. Centre for public interest litigation v. Union Of India, AIR 2005 SC 4413.
18. 27 Mad 54 (57).
19. Benoy Chakravarti v. State, 1972 Cr LJ 680 (Cal).
20. In re, Ramchandran, 1980 Cr LJ 349 (Mad) ; Manhar Nath Kaul v. State, 1981 Cr LJ 1771 (J&K).
21. Critical Analysis of The JMM Bribery Case-P.V. Narsimha Rao V. State.
22. AIR 1947 Cal 162, which held that a prosecution of a public servant under section 161, I.P.C., required sanction, must be deemed to have been overruled by the Privy Council. Even prior to the decisions of the Privy Council, it was held in several cases that sanction was not necessary to prosecute a public servant accepting illegal gratification.
23. R. Ninge Gowda v. A.N. Gopal, 1999 Cr LJ 884 (Kant).
24. Article on Prosecution of Public Servants by , Chahat Chawl, in legalserviceindia.
25. Section 197 of Cr.P.C, uses the expression 'State Government'.
26. State of Madhya Pradesh v. Dr Yashwant Trimbak, AIR 1996 SC 765
27. State of Uttar Pradesh v. Pradhan Sang Kshetra Samiti, A.I.R. 1995 SC 1512.
28. The Halsubry's laws of England (4th Ed. Vol. I 748 at p. 170).
29. Article 154(1), Constitution of India.
30. Article 163 & Article 166, Constitution of India.
31. P. Joseph John v. State of Travancore-Cochin., A.I.R. 1955 S.C. 160.
32. <http://blogs.reuters.com/india/2010/06/17/killing-of-civilians-fuels-kashmir-anger/>, Reuters blog, reported on June 17, 2010. Visited the site on 11th February 2011.
33. The Hindu, Dated 5Th August 2010. As reportred by Siddharth Varadarajan.
34. Section 4 of AFSPA Act.