Cratological Analysis Of Requirement Of Sanction For Prosecution of Judges And Public Servants In India

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Abstract: The objective of this article is to evaluate the validity of the requirement of government sanction to initiate prosecution proceedings against judges and public servants vis-a-vis the power ordering under the Constitution of India. The scope of this article is limited to analysing the propriety and constitutionality of the above provision within the present Constitutional framework. The author proceeds with the hypotheses that section 197 Criminal Procedure Code which requires sanction to prosecute judges and public servants is unconstitutional and void because it prescribes an unjust qualification to begin proceedings against the offender. It clearly stands between the litigant and the wrong-doer and puts unjust barriers in the process of access to justice. The issues examined in the paper are: Whether the provision fits in the present scheme of organization of power within the Constitution of India, whether the said provision is valid and required at all, what are the constitutionality of the provision in the light of Article 14 and the principle of parity of power? Whether the Executive is justified in restricting remedy against itself, and what has been the approach of the Courts in interpreting this provision?
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I. Introduction:

Rule of Law is a doctrine of wide import; not only does it connote equal treatment before law but also the supremacy of the power of law over the powers of individuals. Some jurists liken the rule of law with "equality under the law", others with equality in a broader political, economic and social sense and still others associate it with social order or individual freedom and/or responsibility. Literally put, Rule of Law means *"law will govern*". Since Justice is pursuing what the Law commands, Justice becomes the expectation of law, in other words, the object of law is advancement of justice. It is only a specific means towards that end that is the subjection of official power to the observance of the same legal framework that applies to everyone else so as to obviate the possibility of arbitrary exercise of official power. According to Julius Stone, "The heart of the doctrine seems rather to lie in the recognition by those in power that their power is wielded and tolerated only subject to the restraints of shared socio-ethical convictions. Similarly Prof. Freidman opines, "there is perhaps only one legal and constitutional maxims of general variety which can be deduced from this principle (rule of law) **:** that in so far as an individual is granted specific rights they should be secure from arbitrary interference. The rule of law developed in Western democracies to bridle the arbitrariness of those holding political power. It applied not only to the King but equally well to his officials, for they entail equal responsibility in administration because they are the ones in direct contact with the citizenry. The state can provide due justice to its subjects only if there is rule of law. The Indian Constitution is a modern, egalitarian arrangement embodying the rule of law, which guarantees, and not merely proclaims, that rights of all individuals are equally protected. However, a study of the working of the Indian Constitution in all these years reflects the havoc wrought on people's rights and the rule of law, which to me appears an offensive incongruity in a democracy.

II. Historical Background:

The Justice System in Ancient India was based on Supremacy of the law or Dharma. The King was only a means to protect Dharma and advance the objectives of Dharma. "*Law is the King of Kings………… Dharma aided by the Power of the King enables the Weak to prevail over the Strong.*" The King as the repository of Executive power had the obligation to protect the rights of the weak over the strong. It was the responsibility of the executive to guard against the rights of the weaker sections because they require more protection than the strong. The principle of equality was evident in: "*The King should protect and support all his subjects without any discrimination in the same manner as the earth supports all living beings"*

The integrity of character and discipline emphasized in Rajadharma applied equally to all persons who exercised political and administrative power; without this, the external checks would have had no meaning. If the Executive committed a crime or a breach of duty, he was punishable more severely than ordinary men. "The King himself is also liable

to be punished for an offence, with one thousand times more penalty than that would be inflicted on an ordinary citizen" It was an important principle of Rajdharma that the king affords full protection to individual against injustice inflicted by anyone as articulated in: "*the subjects require protection against wicked officers of the King, ...royal favourites, and more than all, against the King himself.*" Thus in ancient Indian criminal jurisprudence, there was no preferential treatment for executive officers, nor could there be any hindrance in approaching the King against any officer of the King. No officer could hush up a suit brought before him by any other person. The ancient Indian legal system was based on the concept of Duty as against the western systems based on the concept of Rights. ***"Karmanyevadhikaraste ma phaleshu kadachana"*** That there is only one right that is the right to perform one's duty. The rights accorded to the executive were only for the performance of their duties and no further. In the Mughal period also, similar principles were followed. Criminal law emerged from the religion and crime was an offence against the State. Emperor was the fountainhead of justice and was bound by Islamic law. The State was considered as belonging to God, therefore the ruler was bound by his duties of religion to maintain law and order. Offences against the individuals were also punishable as they infringed private rights. Akbar was known to have high regard "for rights and justice in the affairs of the government." In the famous Akbar Birbal stories, evidence can be found of Akbar taking affirmative action for redressal of grievances of his subjects. Access to justice was not cumbersome; there was no requirement of any sanction against any official of the Emperor. Jehangir is known to have a bell hung outside his palace. An aggrieved individual could initiate the process of justice by simply ringing the bell. India then became a British colony for nearly two hundred years. Colonialism necessarily implies exploitation of the colony; economic, political and social. The colonial rule was autocratic in that there was no constitutional institutionalization of power; social control and political power were monopolized by a single power holder, subordinating the individual to the ideological requirements of the group dominating the State. The power was centralized and personalized in the British Crown which had the authority to say what the purpose of power was. The political power was gained by accession of Indian territories to the Crown; implying it was a Defence State. The power was exercised in the interest of the British in an arbitrary manner to facilitate their exploitation of the colony and suppression of the subjects and there were no controls on power of the Crown. The laws were passed by the British Parliament for India and were applied in India. The purpose of rule was preservation of the ruling race i.e. the British and suppression of the enemy i.e. the Indian subjects. There was incapacity in the ruled to make full use of the law and its institutions. Whether there was justice done in an individual case, or whether there was justice done at all, was not the concern of the State. The British criminal laws and institutions were such as only to serve their interests, and if there was actually justice done in any case, it was a mere coincidence. There was no concept of equal access to justice. The object of a provision in Section 197 of Code of Criminal Procedure 1898 for requirement of a sanction of the British Government before prosecuting a public servant or a judge was to give an unfair advantage to the British officials and safeguard them from prosecution when they inflicted injuries on the subjects. Thus the provision was justified in that context of power arrangement.

III. The Present Constitutional Framework:

The concept of access to justice has undergone an important change after the British rule ended in India. With the coming into force of Indian Constitution on 26 January 1950, there is a new form of power arrangement in the State: there is an institutionalization of political power within the Constitution which is the Fundamental law of Superior obligations. The Constitution also lays down the goals in its Preamble which this new power ordering aspires to achieve. Political power denotes, within the State society, the exercise of effective social control of the power holders over power addressees. There is no single power holder under the Indian Constitution, rather political power is distributed and shared by several independent power-holders. There is the Legislature entrusted with the task of Policy Making; Executive entrusted with Policy Execution; and the Judiciary with Policy Control. There is a check on arbitrary exercise of power by the State and its officials through denial of power to the State under Part III of the Constitution dealing with Fundamental Rights as also to act in contravention of the Constitution or any laws applicable in the state of India. There is division of power, which means no single organ has absolute power, it is divided among three power-holders, and each has been provided with a domain and has to function within it. No organ is allowed to cross over its domain and usurp the powers of another. The Executive power of the Union is vested in the President and shall be exercised by him either directly or through officers subordinates to him in accordance with the Constitution. The system of checks and balances ensures that each organ can

check arbitrary exercise of power by another. The Parliament can remove the Executive by a vote of no-confidence and the Executive order can dissolve the Parliament, leaving the choice of new power holders to the electorate. The Judiciary exercises Policy Control by controlling the arbitrary exercise of power by the Executive and declaring a law passed by the Legislature to be invalid if it violates the Basic structure of the Constitution. The power is accorded by the Constitution and is directed to be used only for the purposes or the functions enumerated and not any further. Thus it can be asserted that Indian Constitution is a controlling one. Being a modern democratic Constitutional State, there is equilibrium envisaged between the plural powers, the essential characteristic of the power mechanism is contained in the control on political power through the processes of Denial, Division and Direction and Limitation of power. There has been recognition of the ancient value of equality of status and opportunity and denial of power to the State in the form of Fundamental Rights, Human Rights, and Socio-Legal Rights. The right of effective access to justice has gained importance because we adopted the model of a 'Welfare State' which means that it is the duty of the State to see that rights of all individuals are protected, justice is done and is delivered at the doorstep of every individual. Indeed, the right of effective access is increasingly recognized as being of paramount importance among the new individual and social rights, since the possession of the rights is meaningless without mechanism for their effective vindication. Thus the right to get justice when one has been wronged by an exercise of power without any legal justifications is the basic human right which is contemplated by Article 14 of the Constitution. ***Article 14*** of the Constitution incorporates ***Rule of Law*** and declares that every person is equal in the eyes of Law. The Article reads:

"The State shall not deny to any person equality before the law or equal protection of the laws within the territory of India."

Article 14 forms part of the basic structure of the Indian Constitution. It is the most fundamental of all fundamental rights and in my opinion; it forms the very basis of a democratic State. How else can we envisage democracy without the guarantee of equality? The principle of equity implicit in this article is the foundation stone of Welfare State. When it is the duty of the State to see that rights of individuals are protected, it is not the rights of a select few, but the rights of 'all treated as equals'. Any legislation, violative of Article 14 is of null and void constitutionality. Article 14 lays down the policy and the procedure for realization of the right is contemplated in Article 256. It is not upon the individual, but primarily upon the State, to advance remedy in the event of violation of a right under Article 14. It connotes an affirmative action by the executive to ensure compliance of the laws by the State officials, and any deviance be punished in accordance with the constitution and the laws, vide Article 256 which says that: "The executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament any existing laws which apply in that State, and the executive power of the Union shall extend to the giving of such directions to a State as may, appear to the Government of India to be necessary for this purpose." In fact, this article is the repository of the executive function to ensure that justice is being done. It imposes a duty on the senior executive officers including the President to supervise the working of the subordinates to ensure compliance with the laws. In case of any deviance by any individual official, the senior has the authority to question and straighten up the facts and if necessary to institute disciplinary proceedings against the erring official who injures a citizen by illegitimate or ultra-vires exercise of his power.

Article 257 (1) debars the State executive from impeding or prejudicing the exercise of power by the Union executive and in case this happens, the latter may give directions and take corrective steps. This power also extends to giving of direction for national and military purposes. In case there is failure to comply with the directions of the Union executive, Article 365 empowers the President to hold that a situation has arisen in which the government of the State cannot be carried out in accordance with the Constitution. Thus there are inbuilt mechanisms and inter-organ and intra-organ controls envisaged in the Constitution to check unauthorized use of power by the public officials as well as the instruments of the State, similar to the situation in ancient India, when the king used to move around incognito to assess the administration of justice in his kingdom and supervise over the functioning of executive officials. These provisions cannot be disregarded except in the case of emergency or a defence situation as enunciated by the latin maxim: - '*Inter Armes Silent Lege'*. The erring officials entail liability under section 166 of the Indian Penal Code which relates to offences by Public Servants. It reads: "whoever being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending to cause or knowing it to be likely that he will, by such disobedience cause injury to any person shall be punished with an imprisonment for a term which may extend to one year or with fine or both." Therefore on cognizance by a senior official, the erring official is

liable to be punished under the above section. However, this section has not been invoked since the enforcement of the Constitution. Section 166 is the substantive provision and its procedural aspect is Section 197. Then how can a procedural provision create a barrier which is not contemplated by the substantive provision?

IV. Cratological Analysis of Section 197 of Criminal Procedure Code 1973

The cratological analysis of the section is done in two respects. First, the source of power is examined; from where does the power flow to enact such a provision. Second the exercise of power under this section is analyzed. For this purpose, various spectral bands are used. Section 197 of Criminal Procedure Code 1973 corresponds to Section 197 of Criminal Procedure Code 1898 and provides that before instituting proceedings against a government servant, a prior sanction of the Central or State Government, as the case may be, is required; in effect the authority competent to remove him.

- **Source, purpose and limitation of Power:**

Analyzing the validity and propriety of Section 197 of Criminal Procedure Code 1973, in accordance with the power arrangement within the Constitution, we find that the Legislature has no power to enact such a provision under the Constitution. There is no equal protection of laws for the two which implies that it is violative of Article 14. The provision keeps a public servant on a higher pedestal than a common man, which means there is no parity of power among the two parties, a situation not contemplated by Article 14. Power is the ability to affect another by its exercise and if one person has greater power, he can affect other's rights by the exercise of such power. This power holder thus assumes a superior position in respect of the person on whom the power is exercised. On one side is the litigant who has to wait for a permission to initiate action and bring to book an officer violating his right, while on the other side is the wrong-doer, who can claim immunity from prosecution because he is a part of the State machinery. There is no parity in terms of litigant capacity; a common man is not on the same plane of redressal of his grievances against an official of State as he is against another individual. A minister, a bureaucrat and all subordinates, though carrying out the commands of their official superiors should be as responsible for any act which the law does not authorize, in a similar manner as any private person. Article 14 also mandates the classification should be based on an intelligible differential and should be rationally related to the purpose of such classification. This principle stands violated because the classification made between public servants and common citizens under this section is not commensurate with the purpose of the classification. The provision is void owing to repugnancy with a fundamental right. It is a well established rule that any law repugnant to or in derogation rights conferred by Part III of the Constitution is void and unenforceable. Article 13 (1) invalidates all such laws in force in the territory of India immediately before the commencement of the Constitution. Section 197 of the old code was thus invalidated and could not be enforced to the disadvantage of the citizens. Post its amendment in 1973, the Criminal Procedure Code kept the same provision, rather expanding its scope to offer immunity even after retirement. Thus it is struck by Article 13(2) which invalidates post Constitutional laws, if they are violative of any of the Fundamental rights. Since Rule of Law is implicit in Article 14 and the part of basic structure of the Indian Constitution, no person can be above the Law. Any legal system, based on the rule of law, must enable any citizen to set in motion the machinery of the law, civil and criminal, without any impediment and regardless of the wishes of the men in power. In Britain, for instance, any citizen can prosecute even the highest official except in cases of breaches of the Official Secrets Act where the Attorney-General's consent is required, as reflected in Sir A.V. Dicey's comment "With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with case in which officials have been brought before the courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority." In contrast, in India, we are still continuing with the requirement of sanction. A common man has to await an order of the Executive to initiate an action against the public servant; who has violated his right. The executive, in this case takes upon itself the power to decide in its own cause, a patent violation of the principle of 'nemo judex causa sua', a principle of Natural Justice. In a controlling Constitution as ours, the executive cannot don the function of controlling the initiation of proceedings. It provides the scope of arbitrariness, which is anathema to the principle of equality under Article 14. The Supreme Court has held in *Shri Sita Ram Sugar Company Ltd V. Union of India* that "*any act of the repository of power, whether legislative or administrative or quasi judicial is open to challenge, if it is conflict with the Constitution or the Governing Act or the general principles of the law of the land, or if it is so arbitrary or unreasonable that no fair minded authority could have ever made it.*" There is

no right with the executive to restrict remedy against itself, probably at whose behest the offence was committed. Such preponderance of power in one organ of the State is not possible within the Constitution. The provision was enacted to save public servants from harassment, vexatious and frivolous suits in a defence State, but their continuation within the framework of the present constitutional arrangement defeats the objects of justice. No other democracy contains such provisions. Article 74 provides that there shall be a Council of Ministers to aid and advise the President in exercise of his executive functions. This Council of Ministers is a collective body and a minister has no power in his individual capacity to stop the initiation of proceedings. However, this has been happening to shield the officers from accountability for their crimes. The Home Minister, Secretaries in the States and Army Chiefs collude with the erring police officers, army personnel and the bureaucrats to restrain sanctions violating the norms. There existed the notorious Single Directive which required the CBI to obtain "the prior sanction of the Secretary to the Ministry" even before embarking on an "enquiry", a stage preliminary to investigation proper. The process of accountability was thus aborted at its birth. The National Human Rights Commission has supported the recommendation of the Law Commission in 1985 to do away with the necessity of a sanction. In fact, when a state official is involved, there should be a speedier remedy for redressal, because it is a duty upon that official to act according to the provisions of the constitution and to serve the interest of the citizens. He should not be in such a privileged capacity as to impede remedy against him if he acts against the Constitution or in an arbitrary manner, misusing the power of discretion allowed only as much as to fulfill his duties, discharge his functions, not an iota beyond that as was the case in Ancient India. It was also the duty of the King to protect his subjects against all eventualities more against his officials, wife children and even Himself, wherever there could be misuse of power by the visible or invisible power holders. Such an equivalent can be found in the oath of President in Article 60 when he promises to faithfully execute the office of the President and to the best of his ability, preserve, protect and defend the Constitution and the Law, and devote himself to the well-being of the people of India. This Article enjoins upon the executive to protect the rights of the citizens against their encroachment and violation even by the functionaries of the government. There is no scope of requirement of a permission to seek remedy against them.

- **To check the legality of Exercise of Power:**

Testing section 197 across the various bands of power spectrum suggested by Prof. Julius Stone, it can be said that the provision violates the ***Time Count*** because the institution of proceedings is delayed by requirement of prior authorization; justice is not delivered in time. The right conferred by Right to Information Act 2005, is merely to know what transpired in the administrative lanes of power disallowing the sanction. Actual information regarding non-grant of sanction in a particular case may be known, but the aggrieved again has to approach the Court to enforce his right to proceed against the offender. The time taken in this exercise apparently negates justice delivery on time.

The *ethical band* is adversely affected because the convictions for enacting this provision are not identifiable with the convictions of the persons subject to these provisions. The provision was enacted to allow preponderance of power in the executive to safeguard themselves from the process of law. One party is placed on a higher pane than another the provision is coercive; compels obedience without justification. The obedience to the law is obtained by coercing the individuals to follow an unjust and unconstitutional provision. There is coercion by the State to follow a procedure which is not justified and unconstitutional. The influence on the Legislature is a policy which is rendered obsolete and unconstitutional in the new power arrangement. The range of interest affected is the interest of all citizens governed by this law. The head count affected is the number of persons whose rights are violated by the public servants or who are awaiting sanctions from the authorities. The provision does not answer any of these spectral bands in the positive and is thus highly unjust. There is a natural law right to prosecute any person or body of persons by whom one has been injured, when such injury gives rise to an offence recognizable by the Indian Penal Code or other laws recognizing such an offence.

- **It is a rule of Natural Justice that Procedure cannot defeat substance:**

In the case of this provision, the procedure is set to defeat the substantive right guaranteed by Article 14, which says that 'The State shall not deny to any person equality before law or equal protection of laws'. Law has two components: Substantive and Procedural. The substantive gives a right and the punishment of its violation, meaning thereby that there can be no violation of that right, except as qualified by a law, again of a substantive character. Procedure is just meant to fill the gap in the violation of that right and the grant of remedy. It is only for the enforcement of the substantive right. This implies

that procedure derives its authority from the substantive statute and is not superior to it. It is just a means to set the legal process in motion. It can in no way, vary the substantive right. Thus, procedural formalities restricting the substantive right automatically become invalid. In the present case, they are violating the provision of right to initiate proceedings granted by Section 190 of the Code which says that any offence can be taken cognizance of by the Magistrates enumerated therein upon information received by any person. Supreme Court has also held in *A.R. Antulay V. Ramdas S. Nayak and Others* that *"It is a well recognised principle of criminal jurisprudence that anyone can set or put the criminal law into motion except where the statute enacting or creating an offence indicates to the contrary."* Following this observation, it can be proposed that a qualification cannot be prescribed by a procedural statute. This proposition also derives its validity from Article 14 under which equal protection of laws is ensured for every person. Laws will be equally protected only when both substantive and procedural aspects are same for individuals. Once a State declares certain rights under its Constitution, it also undertakes an obligation not to hinder its effective exercise by individuals. The hindrance to justice through the requirement of a prior permission of the government itself is violative of the constitutional guarantee of Justice, because the right of Access to Justice is not a qualified, but an absolute right.

V. Judicial Approach:

The approach of the Courts has not been uniform in this respect. Sometimes the courts have allowed proceedings against public officials even without a prior sanction and in some cases, have refused to acknowledge such cases. However, the courts have not invalidated the section as being ultra-vires the Constitution when it is clearly unconstitutional under Aritcle 13 of the Constitution. Rather in *Matajog Dobey V. H. C. Bhari* the Supreme Court held that the provision is not violative of Article 14. The Court said, "Article 14 does not render Section 197 ultra-vires as the discrimination is based on a rational classification." Supreme Court has no power to declare something not envisaged by the Constitution. The judgment fails to understand the Constitutional scheme and has a great bearing on how the later cases were decided. In *Devendra SinghRai V. Khokan Rohit* the Court held that proceedings initiated under a private complaint in absence of sanction of the State Government deserved to be quashed. This judgement is flawed because the court as guardian of the Constitution must have realized that sanction is violative of Article 14 and thus have advanced a remedy in keeping with the principle of Article 14. In similar vein is the decision in *S.K. Jaiswal V. Gulab Chand* where the Madhya Pradesh High Court upheld the requirement of a sanction before prosecution. The court *P.V. Narasimha Rao Vs State* though the Supreme Court held the Members of Parliament to be public servants, it still upheld the validity of the plea of immunity under Section 197. The Supreme Court is overlooking the essential directive of Article 14 and Section 166 of Indian Penal Code which punishes the public servants and where no plea of immunity is applicable. The alleged bribe takers were thus saved. This judgment violates the Constitution. In *Vineet Narain and Others V. Union of India*, the Supreme Court has struck down the Single Directive as invalid. Here the court has at least removed the difficulties at the investigation stage, but a more radical step is needed to advance justice. In a recent case, the Central Bureau of Investigation lodged a First Information Report against a civil servant Ravi Shanker Srivastava, under the Prevention of Corruption Act who filed a petition before the Rajasthan High Court to quash the proceedings on the ground that a prior sanction has not been obtained. The High Court quashed the proceedings. However, on an appeal by the Central Bureau of Investigation, the Supreme Court set aside the impugned judgment saying that "when information is lodged at the police station and an offence is registered, then the malafide of the informant would be of secondary importance. It is the material collected during the investigation and evidence led in the court, which decided the fate of the accused person." Thus, the requirement of sanction is only for prosecuting a public servant, and cannot be invoked for investigating against him to validate the charge.

Conclusion and Suggestions:

As an inference of the foregoing discussion, it can be concluded that the hypotheses is verified that Section 197 is unconstitutional and void and needs to be struck down to ensure equality in law as well as in practice. The courts have ample powers to punish vexatious or frivolous complaints in case of honest public servants, vide section 193 of Indian Penal Code. As against this are the impediments created by the continuance of the section and the violation of the fundamental right. The Supreme Court in exercise of its power of policy control under the Constitution must institute these reforms by striking down this provision.

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