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Deconstructing Police Powers under Criminal Procedure Code 1973

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ABSTRACT

Section 197 of Cr.PC gives public servants an assurance for protection in the eventuality of a genuine, bona fide mistake or miscarriage of law during the course of performance of official duties. This protection, is to save the public servants from vexatious and malicious cases brought against them. This section invests the competent authority of the public servant with the power to grant permission for prosecuting a public servant. No court can take cognizance of a criminal case in which a public servant is an accused, without the permission of the competent authority. The competent authority is expected to examine the case in detail before granting permission for prosecution. This paper attempts to broach the various circumstances and constraints in which Section 197 is invoked.

Keywords: *Section 197 Cr.PC, Police Immunity, Article 21, Intelligible Differentia, Public Servant.*

This essay will specifically be discussing the immunities provided to police officials under Section 197 of The Code of Criminal Procedure, 1973 (hereinafter referred as CrPC or Code). The historical context of its origin and application, aspects of it that need to be reviewed and the extent to which the government should be allowed to provide immunity to its officers under this section have been focused upon.

Borrowings in the Indian Criminal Law derived from the colonial legacy have often generated commotion. The motivations with which the 'Raj' construed rules have almost been antagonist to the purpose with which regimes attained incumbency in independent India. These requisites were inculcated in law so as to allow the imperial regime to have the final word when official actions of its 'minions' were brought to Court.² The disregard of fundamental edicts has been patent in the British Empire's approach towards its colonial subjects.³ Section 197 of the present Code bears almost the same language as that of the past with little modifications.⁴

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² A.G. Noorani. "Farce of Lokpal." Farce of Lokpal. The Hindu - Frontline Volume 29, 14 Jan. 2012. <http://www.frontline.in/static/html/fl2901/stories/20120127290101700.htm>

³ A.G. Noorani. "What Pathribal means for India." The Hindu – Newspaper 26 July 2013

⁴ s. 270 of the Government of India Act, 1935 and S. 106 of the Madras Act bear resemblance in text and practice to S. 197. *P. Arulswami vs The State Of Madras* 1967 AIR 776

Rudimentarily similar legislations have been passed by after independence in the form of Prevention of Corruption Act, 1988, TADA, POTA, and AFSPA.

Prior permission of the State is made mandatory by the virtue of the Doctrine of Sovereign Immunity that as well has been borrowed from Common Law.⁵ Its objective is to protect officials who are indulged in sovereign functions to be protected for acts done in the course of their 'official duty' from prosecution;⁶ and to only allow it with due consideration of Government⁷ so as to avoid 'vexatious lawsuits.'⁸ This protection is rendered beyond office and extends even in retirement.⁹

At the same time it is the responsibility of the State to ensure that no violation of fundamental rights is perpetrated against citizens.¹⁰ A nine Judge Bench of the Supreme Court had held that S. 197 is not violative of Article 14 being based on *intelligible differentia*.¹¹ S. 197 provide for difference between officials who can be discharged from office by *sanction* from the government and where such action can be taken by any other lesser authority.¹² CrPC does not define "public servant" thus automatically by the virtue of S. 2(y), the meaning comes from S. 21 of the IPC. The immunities must be applied according to the well-known features of administration law¹³ and are available to a narrowed down class of officer. In case of Chief Minister and other Ministers, government means the Governor¹⁴ and they as entitled for protection under this Section.¹⁵

Actions of state official include only those that are committed in pursuance or fall within the scope of his official duty.¹⁶ There is a caveat regarding narrowing this scope for otherwise it would be extremely difficult to give immunity to anyone as "*it is no part of the official duty to commit any offence, and never can it be.*"¹⁷ The embargo is not of a judicial but executive nature¹⁸ and it need not given the description of the offence as precisely as that in a charge.¹⁹

A police officer is covered under this section and it is understandable from a plain reading of

⁵ *Kasturilal Ralia Ram Jain vs The State Of Uttar Pradesh* 1965 AIR 1039

⁶ R.V. Kelkar. Criminal Procedure, Sixth Edition (246), EBC, 2014

⁷ *AD Parthasarthy v. JS Kurdukar*, 1975 Cri LJ 1290 (AP); also see 41st Law Commission Report (120)

⁸ *Kelkar* (N. 5) (406)

⁹ *Kelkar* (N. 5) (246-247)

¹⁰ *Bakshi Singh Brar v. Gurmej Kaur*, (1987) 4 SCC 663

¹¹ *Matajog Dobey vs H. C. Bhari* 1956 AIR 44

¹² *Kelkar* (N. 5) (247)

¹³ *Kelkar* (N. 5) (247)

¹⁴ *Balaksrishna Pillai v State of Kerala* (1996) 1 SSC 478

¹⁵ *Kelkar* (N. 5) (248)

¹⁶ *Pukhraj vs State of Maharashtra* 1982 (2) BomCR 235 (Division Bench)

¹⁷ *B. Saha v. M.S. Kochar* 1979 AIR 1841

¹⁸ *Kelkar* (N. 5) (251)

¹⁹ *Jehangir Cama vs Emperor* (1927) 28 Cri LJ 1012

the above mentioned features of it that he/she enjoys definite immunities, given the nature of conflicting situations that they deal with, although it acts as a cover to protect them from malicious prosecution, the probability of misuse cannot be overlooked. This has been time and again proven as cases of criminal allegations, especially those involving fake encounter and other police excesses. Justice Verma once commented upon his 2013 report – “*For anyone to think that sexual assault could in any way be associated with the performance of any official task, well needs to think again.*”²⁰ The Dehradun fake encounter in which a Delhi Court announced life imprisonment for 17 police officers for killing a 22-year-old MBA graduate brought to light how atrocious the system can become.²¹ Prior sanctions from the government was required. The story was repeated in the case of *Sohrabuddin Shiekh’s and Ishrat Jahaan’s* encounter where S. 197 was put forth as a tool to subvert litigation.²² Recently, in the state of UP we witnessed the encounter of infamous gangster Vikas Dubey, people who are stand up in defence of police never fail to pull a hoary chestnut out of the raging fire of disputation between the proponents of human rights and those of ‘law and order’.²³

It ought to be further understood that scenario gets more entangled when such *ultra vires* acts are committed in furtherance of interest or instructions of Government officials.²⁴ In the *Pathribal Shooting* incident²⁵ for example, the Judicial machinery was set in motion only after a public outcry. Further complication emerges by the effect S. 197 (4) of the Code through which the Governments power get intensified as it gets the right to decide which body and under whom the case out to be adjudicated.²⁶

In the case of *U.P vs Paras Nath Singh* the court held that “*a public servant, however, is not entitled to indulge in criminal activities*” and if found to have done so, does not deserve the

²⁰ Commenting on a question regarding S. 6 of AFSPA and like legislations and many allegations of Sexual Abuse <http://www.ndtv.com/article/india/your-call-with-justice-ret-djs-verma-full-transcript-324315>

²¹ 22-Year-Old MBA Grad. Was killed with 17 bullet injuries. *Ravinder Pal Singh vs Santosh Kumar Jaiswal* TRANSFER PETITION (CRIMINAL) NO.222 OF 2010

Ravinder Pal Singh vs Santosh Kumar Jaiswal - RC Number : 6(S)/2009 CBI/SCB/Lucknow

²² Prashant Dayal. ” Accused police officials, Shah challenge Tulsi chargesheet.” Times of India 16th October, 2012

<http://timesofindia.indiatimes.com/city/ahmedabad/Accused-police-officials-Shah-challenge-Tulsi-chargesheet/articleshow/16831109.cms>

²³ Subhasshini Ali, “Asking Questions About the Vikas Dubey Encounter Will Not Demoralise the Police Force” The Wire- 22nd July, 2020

<https://thewire.in/rights/vikas-dubey-encounter-questions-will-not-demoralise-police>

²⁴ In the *Ishrat Jahaan* case for example (hypothetically), if we assume that there was no involvement of the government, it will still refrain from giving sanction under S. 197 due to the political benefits that externalize out of such incident.

²⁵ A.G. Noorani. “Law and its Potency” The Hindu - Frontline Volume 29, 28 Nov. 2012

<http://www.frontline.in/static/html/fl1722/17220990.htm>

²⁶ S. 197 (4) of CrPC – “*The Central Government or the State Government, as the case may be, may determine the person by whom, the manner in which, and the offence or offences for which, the prosecution of such Judge, Magis- trate or public servant is to be conducted, and may specify the Court before which the trial is to be held.*”

protection of S. 197.²⁷ Yet another Criminal appeal, a bench which included J. Altamas Kabir refrained from prosecuting senior police officials under MCOCA without sanction.²⁸ The definition of “official duty” is also needs clarity to which the Supreme Court has only added more chaos.²⁹ “While acting or purporting to act in the discharge of official duty”³⁰ are the words in which this duty is defines. But the ambit is not clear. There are exceptions for open shut cases and acts which do not have remotest resemblance to state action (*see Verma’s comments above; also footnote*),³¹ but the grey area is where such acts are done in furtherance of the official duty but ‘exceeds authorization.’ In *Indira Gandhi vs. Raj Narain*³² (inferring from *Matajog Dobey*), the court ruled that there ought to be “reasonable connection between the act and the discharge of duty (and that) the act must bear such relation to the duty that the person could lay a reasonable claim, but not a pretended fanciful claim.” But for example, in encounter cases, these lines get elusive.³³ Thereafter, a lot gets surrendered to the discretion of the government.

Interesting and ironic to note, from a comparative historical perspective, is that the English themselves have done away with most of such rules. For example, a British Citizen can file charges against anyone from a police constable to those at the pinnacle of political echelons.³⁴ A.V. Dicey (British Jurist and Constitutional Theorist, 1835-1922) stated – “*With us every official, from the Prime Minister down to a constable ... a colonial governor, a Secretary of State, a military officer, and all subordinates, though carrying out the commands of their official superiors are as responsible for any act which the law does not authorize as is any private and unofficial person.*”³⁵ American law is also similar.³⁶ Yet they had a completely contrasting system in India. In fact, AFSPA is modelled on the ‘Armed Forces (Special Powers) Ordinance’ of 1942 that the British construed to subdue Gandhi’s ‘Quit India Movement’³⁷

²⁷ *State Of U.P vs Paras Nath Singh* 2009 (8) SCR 85

²⁸ *Jamiruddin Ansari vs Central Bureau Of Investigation*, Criminal Appeal Nos.1085, 1088 & 1089 of 2006

²⁹ <http://www.niticentral.com/2013/10/26/an-action-plan-for-narendra-modi-part-2-150745.html>

³⁰ Interpretation Of Statutes By Kafaltiya A.B. 356; also see *Matajog Dobey* (Supra N. 10)

³¹ Read Exceptions to S. 197 CrPC; also refer to R.V. Kelkar (Supra N. 5 (246))

³² *Indira Nehru Gandhi vs Shri Raj Narain* 1975 AIR 2299

³³ See above (N. 2)

³⁴ Text to (N. 23)

³⁵ Full quote “*With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same legal responsibility for every act done without legal justification as any other citizen. The Law Reports abound with cases 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. A colonial governor, a Secretary of State, a military officer, and all subordinates, though carrying out the commands of their official superiors are as responsible for any act which the law does not authorize as is any private and unofficial person.*”

Dicey, A V, Introduction to the Study of the Law of the Constitution (1886, 10th edn. by E C S Wade, 1959) at 193-194.

³⁶ Text to (N. 23)

³⁷ AFSPA (Armed Forces Special Powers Act, 1958) A Review by Human Rights Initiative, Compiled By: Indian

(and S. 197 is a reincarnation of the older law). Therefore, the Indian standard (rule) is the British ‘double standard.’

Yet the conversation should not get lost within the criticism. The police perform critical civil administrations and criminal deterrence functions. Their area of occupational indulgence demands that reasonable protection from serial prosecution. But giving discretion in this regard to the government gives the State overpowering authority over fundamental rights of the people. The option to put forth a grievance affront the Court is a rudimentary liberty in a Republic. Making it conditional on the State, which often has interest in the matter is a matter of great concern. The Colonists drafted such rules to protect their agents to protect their empire. India is no more an autocratic state. An ‘independent’ judiciary is a better forum to decide on this question.

It needs to be realized that under the garb of expediency in State Practice, basic human dignities and freedoms should not be abridged and the section needs to be renewed in the backdrop of this understanding along with the intricacies mentioned herein.
