SHIELD OR SWORD? REVISITING THE DOCTRINE OF PRIOR SANCTION FOR PUBLIC SERVANTS IN INDIA'S NEW CRIMINAL JUSTICE FRAMEWORK

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ABSTRACT

The requirement of prior sanction for prosecuting public servants has long operated as a procedural filter within Indian criminal law, intended to protect officials from frivolous and vexatious prosecutions while allowing accountability for genuine misconduct. With the enactment of the Bharatiya Nagarik Suraksha Sanhita, 2023, this doctrine has been retained under Section 218, but with a significant structural reform through the introduction of a time-bound and deemed sanction mechanism. This paper critically examines the evolution, rationale, and scope of the sanction requirement under the new criminal justice framework. It analyses the conditions triggering the need for sanction, the functional nexus test, and the distinction between acts done in official capacity and those falling outside it. The paper further evaluates judicial interpretations governing competence of sanctioning authorities, application of mind, exceptions to the requirement, and the extent of permissible judicial intervention. By situating Section 218 within constitutional principles of equality and administrative accountability, the paper argues that the provision functions as both a shield for honest officials and a calibrated sword against executive inaction. Ultimately, it highlights how the BNSS seeks to rebalance procedural protection with timely access to justice.

Keywords: Prior Sanction, Public Servants, Official Duty Nexus, Sec 218 BNSS, Cognizance.

- **Introduction:**

The Bharatiya Nagarik Suraksha Sanhita, 2023 **(BNSS)** establishes the procedural framework governing the prosecution and punishment of individuals accused of offences under the Bharatiya Nyaya Sanhita, 2023 **(BNS)**. A critical aspect of this framework is the requirement of prior sanction to prosecute public servants, a provision previously governed by Section 197 of the Code of Criminal Procedure, 1973 (**CrPC)** and now addressed under Section 218 of the Bhartiya Nagarik Suraksha Sanhita. Public authorities and judicial officers, as custodians of justice, are expected to function impartially in accordance with due process. To safeguard these officials from malicious or frivolous litigation, the law grants them immunity from prosecution for acts performed in their official capacity, ensuring they can discharge their duties without fear of undue harassment. The scope of who qualifies as a 'public servant' under this legal regime is defined in Section 2(28) of the Bhartiya Nyaya Sanhita, which delineates the extent of such protections in Indian criminal jurisprudence. This paper examines the necessity of sanction for prosecuting public servants, analyzing its rationale, implications, and judicial interpretations under the new legal framework.

- **Section 218 of BNSS:**

Like its predecessor[1], Section 218 BNSS mandates that no court shall take cognizance of an offence alleged to have been committed by a public servant in the discharge of official duties unless prior sanction is obtained from:

1) The Central Government (for persons employed in connection with Union affairs).

2) The State Government (for other public servants in connection with State affairs).

- **Section 218 of Bhartiya Nagarik Suraksha Sanhita, 2023 v. Section 197 of Code of Criminal Procedure, 1973:**

Section 218 of the BNSS, corresponds to Section 197 of the CrPC, retaining much of its original wording. However, a key modification has been introduced under the first proviso to Section 218(1) of the BNSS, which mandates that the competent authority must decide on a sanction request within 120 days of its receipt. If no decision is made within this stipulated

[1] Code of Criminal Procedure, 1973, Section 197.

period, the sanction will be deemed granted. This amendment seeks to balance the interests of both the prosecution and the accused by preventing undue delays in the sanctioning process, thereby ensuring judicial efficiency. Apart from this time-bound requirement, Section 218 of the BNSS remains substantively unchanged from its predecessor under the CrPC.

The newly introduced concept of deemed sanction under Section 218 of the BNSS marks a significant advancement in protecting the rights of private citizens seeking to initiate legal action against public servants. Previously, complainants faced considerable challenges in obtaining prosecution sanctions, often encountering bureaucratic delays and governmental inaction when submitting their requests. The amended provision now ensures that if the concerned authority fails to decide on a sanction application within 120 days, approval is automatically deemed granted. This reform effectively eliminates the need for complainants to endure prolonged and often futile efforts to secure a response from the government. Historical experience demonstrates that sanction requests for prosecuting public servants frequently met with administrative indifference or deliberate procrastination. This change represents a much-needed improvement in the legal framework, promoting greater accountability and efficiency in the sanctioning process.

- **Applicability & Scope:**

For Section 218 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (**BNSS**) to apply, the alleged act or omission by a public servant must meet two essential criteria:

1) Functional Nexus with Official Duties -

The conduct in question must be intrinsically linked to the lawful discharge of the public servant's official functions. Mere status as a public servant is insufficient; the alleged offence must directly arise from or be intertwined with the performance of duty.

2) Removability and Government Sanction Requirement

The public servant must hold a position from which they can be removed only by or with the sanction of:

i) The Central Government (if serving in Union-related functions).

ii) The State Government (if serving in State-related functions).

The alleged act must have been committed while acting or purporting to act in an official capacity. Only upon satisfying these conditions does the mandate for prior governmental sanction under Section 218 BNSS become operative. This ensures that the provision safeguards only those acts genuinely tied to official functions, balancing accountability with protection against frivolous prosecutions.

- **What is a sanction?**

Sanction means an official permission or an approval of the competent authority to the institution of prosecution for the public servant. The main objective of the sanction is to protect the public servants from malicious prosecution for the offences that happened during the course of their official duty.

A sanction is an order directing the prosecution of a certain person, and in the ordinary way that order is conveyed to the authorities who are responsible for initiating prosecution in the locality in question.[2]

- **Take cognizance:**

Section 218 of the BNSS establishes a crucial procedural requirement that courts cannot assume jurisdiction over offences allegedly committed by public servants or judges in their official capacity without obtaining proper sanction from the competent authority. This sanction serves as a jurisdictional prerequisite, without which the court lacks legal authority to initiate proceedings against the accused official.

The procedural framework permits certain preliminary actions:

1) The complainant may be examined prior to obtaining sanction

2) However, the court is expressly prohibited from:

- Issuing summons to the accused public servant
- Recording evidence against the official
- Proceeding with trial proceedings

[2] Rudra Dutt Bhatt v. Emperor, (1933) 55 All 798.

This statutory safeguard ensures that allegations against public functionaries undergo proper governmental scrutiny before subjecting them to the rigors of criminal process, thereby protecting them from potentially frivolous or vexatious litigation while maintaining accountability for genuine misconduct.

- **Not Removable from his office:**

'Not removable from his office' these words prefer to public servant not to judge or magistrate. Sanction of the Government is necessary for prosecution of a Judge, but in the case of a public servant, he must come within the category of public servants not removable from their office without the sanction of Government. The section doesn't apply to public servant whose some lower authority has by law or rule been empowered to remove. It clearly intends to draw a line between public servants and to provide that only in the case of the higher ranks should the sanction of the State or Central Government to their prosecution be necessary.

In *Bhikaji Vaghaji v. LK Barot*[3], it was held that, A police inspector is removable from office without the sanction of the State Government. Hence, he cannot have protection from prosecution under section 197 of the Code of Criminal Procedure, 1973.

- **While acting or purporting to act in the discharge of his official duty:**

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 duty. Thus, 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 act.[4]

The Supreme Court in *State of Maharashtra v. Atma Ram*[5] observed that, the provisions of sec 161 and 163 of CrPC emphasise the fact that a police officer is prohibited from beating or confining person with a view to induce them to make statements. In the course of the investigation of a case of an alleged murder, the investigating police officers assaulted four persons, kept them under wrongful confinement and kept him hanging from a tree. Here SC

[3] (1981) GLR 956.
[4] K.N. Chandrasekharan Pillai, R V Kelkar's Criminal Procedure, (7th Edition 2021).
[5] AIR 1966 SC 1786.

held that acts done by police officers under the colour of their duty are not having any nexus with their duty hence the sanction is not necessary.

- **Sanction by incompetent authority:**

In *CBI v. Ashok Kumar Aggarwal*[6], it was held that Sanction accorded by an authority not competent to do so is no sanction in the eye of law, and such defect vitiates the proceedings. The power to grant sanction cannot be delegated. Also sanction cannot be granted on the basis of report given by some other officer or authority.

- **When there is no need of Sanction:**

The Bharatiya Nagarik Suraksha Sanhita, 2023 incorporates specific exceptions to the sanction requirement in its proviso to Section 218(1). These exceptions apply when a public servant is accused of committing certain enumerated offences under the BNS, including but not limited to:

1) Offences against the state (Sections 64-71)

2) Offences relating to elections (Sections 74-79)

3) Specific offences against public justice (Sections 143, 199-200)

This statutory scheme reflects a deliberate legislative intent to exclude certain serious offences from the protection of prior sanction. The exceptions balance the need to protect public servants from frivolous litigation while ensuring accountability for serious misconduct that fundamentally undermines public trust in government institutions.

In *Lumbhardar Zutshi v. State*[7], the court established an important principle that prosecution for offences involving corruption (specifically bribery under Section 161 of the erstwhile Indian Penal Code) does not require prior sanction under Section 197 of CrPC. This precedent remains relevant under the new legal framework.

- **No form of sanction but the application of mind is necessary:**

[6] AIR 2014 SC 827.
[7] 1949 SCC OnLine PC 64.

While Section 218 of the BNSS, 2023 does not prescribe any specific format for granting sanction, the Supreme Court in *R.D. Aherwar v. Special Police Establishment*[8] has established essential judicial requirements for a valid sanction order. The Court emphasised that the sanctioning authority must demonstrate:

1) **Application of Mind**: The sanction order must reflect that the authority thoroughly examined the available evidence before granting approval for prosecution.

2) **Consideration of Circumstances**: The document should indicate that the sanctioning body evaluated all relevant facts and circumstances of the case.

This judicial interpretation ensures that the sanction process is not merely a procedural formality, but a substantive safeguard that prevents arbitrary prosecution of public servants. The absence of a prescribed format does not diminish the requirement for a reasoned decision

In *Mohd. Iqbal Ahmed v. State of Andhra Pradesh*[9], the Supreme Court laid down two fundamental principles governing sanction for prosecution under Section 197 CrPC:

1) Mandatory Nature of Sanction: The Court held that any prosecution initiated without proper sanction is legally invalid *ab initio* (from inception). The burden rests on the prosecution to establish that a competent authority granted valid sanction in accordance with statutory requirements.

2) Application of Mind by Sanctioning Authority: The sanctioning authority must -

i) Be fully apprised of the material facts constituting the alleged offence

ii) Apply independent judicial consideration to the evidence

iii) Reach a *prima facie* satisfaction that the case warrants prosecution.

The Court emphasised that sanctioning prosecution is not a mere bureaucratic formality, but a substantive safeguard that:

[8] 2002 SCC OnLine MP 341.
[9] 1979 SCC OnLine SC 43.

i) Protects public servants from baseless or malicious legal actions

ii) Ensures only meritorious cases proceed to trial

iii) Maintains the integrity of public administration by preventing unwarranted harassment of officials.

In *Rekha Kakkar v. State of NCT of Delhi*[10], The Delhi High Court has observed that the sanction to prosecute under Section 197 of CrPC obtained after cognizance is taken will not cure the initial defect in cognizance.

- **Once a sanction to prosecute a public servant has been denied, it cannot be granted again:**

The Supreme Court has recently in *The State of Telangana v. C. Shobha Rani*[11], established an important legal principle regarding the reconsideration of denied prosecution sanctions. The Court ruled that when the competent authority rejects a request for sanction to prosecute a public servant, such denial attains finality and cannot be subsequently revisited unless, the sanctioning authority must be presented with substantially new material facts. These must be of such nature as to materially alter the original basis for rejection.

- **Is Sanction necessary to prosecute MPs and MLAs:**

In *R.S. Nayak v. A.R. Antulay*[12], the Supreme Court examined the case of a former Chief Minister facing corruption charges while serving as an MLA, establishing key principles: sanction is required only if the accused holds public office when cognizance is taken; legislators are excluded from the Indian Penal Code's definition of public servants since their remuneration comes from legislative funds rather than the executive, and they function as a separate constitutional organ. The Court further distinguished between ministers (who qualify as public servants due to their executive role) and ordinary legislators. In *M. Karunanidhi v. Union of India*[13], which clarified that while ministers operate within government frameworks, MLAs serve as representatives rather than employees, hence no sanction needed.

[10] 2025 LiveLaw (Del) 77.
[11] 2024 LiveLaw (SC) 955.
[12] AIR 1984 SC 684.
[13] 1979 3 SCC 431.

- **Can Court direct the sanctioning authority to grant sanction ?**

The judicial approach towards mandating sanctioning authorities to approve prosecution requests against public officials has evolved through several landmark rulings, establishing a carefully balanced legal framework. Courts have adopted a differentiated stance on this matter, recognizing that the appropriate judicial response varies based on the factual matrix and legal principles involved. The jurisprudence in this domain reflects a calibrated perspective that considers both the need for executive autonomy in sanction decisions and the imperative of preventing abuse of discretionary powers. This judicial balancing act has resulted in a sophisticated legal doctrine that neither grants absolute immunity to sanctioning authorities nor permits unwarranted judicial overreach into executive functions. The evolving case law demonstrates how courts have navigated this complex terrain by developing context-specific remedies while respecting constitutional separation of powers.

1) General Rule: Courts Cannot Direct Grant of Sanction

In *Mansukhlal Vithaldas Chauhan v. State of Gujarat*[14], the Supreme Court articulated a foundational principle of administrative law: the grant or denial of prosecution sanction is an *exclusive executive function*, and courts cannot ordinarily interfere with this discretionary power.

In *State of Bihar v. P.P. Sharma*[15], it was held that Courts may examine whether the authority considered irrelevant factors or ignored material evidence, the decision-making process was tainted by *malafide* or arbitrariness, Proper procedural norms were followed or not However, they cannot Re-evaluate the evidence like an appellate body or direct a particular outcome (grant/refusal of sanction) or impose their own interpretation of the facts

2) Exception: Courts Can Intervene if Sanction is Arbitrarily Withheld

The Supreme Court in *Subramanian Swamy v. Dr. Manmohan Singh*[16] established an important exception to the general rule of non-interference in sanction matters. While courts typically refrain from directing the grant or denial of sanction, they retain the power to intervene when the sanctioning authority either unreasonably delays its decision without

[14] 1997 7 SCC 622.
[15] AIR 1991 SC 1260.
[16] 2012 3 SCC 64.

justification, or refuses sanction *malafide* (in bad faith) or based on extraneous considerations. In such exceptional cases, courts may Direct the authority to reconsider the matter within a specified timeframe.

- **Validity of the Provision:**

Article 14 of the Constitution of India doesn't render section 218 of BNSS, 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 safeguard.[17] Section 218, BNSS doesn't create any arbitrary discrimination, on the other hand, it makes a reasonable differentia. Public servants not removable from their respective offices even by or with the sanction of a State Government or 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.[18]

- **Need for sanction when to be considered?**

In the landmark case of *Matajog Dobey v. H.C. Bhari*[19], the Supreme Court laid down crucial principles governing the temporal application of sanction requirements in criminal proceedings, establishing that the necessity for sanction under Section 197 CrPC (now Section 218 BNSS) need not be determined solely at the complaint stage but may emerge during subsequent proceedings. The Court emphasized a progressive determination principle, recognizing that the connection between alleged offences and official duties might only become apparent through investigative processes, judicial examinations, or trial proceedings, thereby requiring courts to remain open to evaluating sanction requirements at any procedural stage. This approach accounts for evidentiary development, acknowledging that initial

[17] Matajog Dobey v. H.C.Bhari, AIR 1956 SC 44.
[18] Ghanairam Pachhuram v. State, AIR 1954 Nag 265.
[19] 1955 SCC OnLine SC 44.

complaints often lack sufficient detail regarding the nexus with official duties, while subsequent revelations may establish the need for sanction.

Section 19 of the Prevention of Corruption Act, 1988, introduces a significant exception to the general rule requiring sanction for prosecuting public servants. The provision stipulates that no prior sanction is necessary if the accused public servant has ceased to hold office by the time the court takes cognizance of the offence.

Conclusion:

The requirement of prior sanction under Section 218 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (**BNSS**) embodies a delicate balance between ensuring accountability for public servants and protecting them from vexatious litigation. Rooted in the principles of administrative autonomy and judicial restraint, this procedural safeguard prevents frivolous prosecutions while maintaining avenues for legitimate legal action. The introduction of a 120 day deemed sanction clause marks a progressive reform, addressing bureaucratic delays that previously hindered justice. Judicial precedents have consistently upheld that sanction is mandatory only when the alleged act bears a direct nexus to official duties, excluding *malafide* or wholly unrelated misconduct. The distinction between public servants and elected legislators further refines this framework, ensuring that only those discharging executive functions enjoy such protection. Courts, while respecting the executive's discretionary domain, retain the authority to intervene in cases of arbitrary refusal, *malafide* intent, or undue delay, thereby preventing abuse of power.

Ultimately, Section 218 BNSS serves as a necessary shield for honest officials, fostering fearless discharge of duties, while its built-in checks ensure that immunity does not morph into impunity. As India's criminal justice system evolves, this provision will continue to be tested on the anvil of judicial scrutiny, striving to harmonize individual rights, administrative efficacy, and public interest.