

## Against the law

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***A Supreme Court Bench provided a "law" to protect Judges from criminal prosecution by an assertion of power that did not vest in it.***

THE reasons given by the three Supreme Court Judges in 1991, while issuing directions that the Chief Justice's permission was mandatory for the filing of even a first information report (FIR) against any Judge of the High Courts and the Supreme Court merit close analysis. Remember that it was accepted by them that the sanctioning authority for prosecution was none other than the President of India.

Justice B.C. Ray, who was one of the members of the Bench in the Veeraswami case, said: "In order to adequately protect a Judge from frivolous prosecution and unnecessary harassment the President will consult the Chief Justice of India who will consider all the materials placed before him and tender his advice to the President for giving sanction to launch prosecution or for filing an FIR against the Judge concerned after being satisfied in the matter. *The President shall act in accordance with advice given by the Chief Justice of India.* If the Chief Justice is of the opinion that it is not a fit case for grant of sanction for prosecution of the Judge concerned, *the President shall not accord sanction* to prosecute the Judge. This will save the Judge concerned from unnecessary harassment as well as from frivolous prosecution against him as suggested by my learned brother Shetty, J. [Justice K. Jagannatha Shetty, also on that Bench], in his judgment" (page 683, *K. Veeraswami vs Union of India (1991) 3 SCC 655*).

Justice Shetty, speaking for himself and Justice M.N. Venkatachaliah, another member of the Bench, remarked *a propos* the sanctions provisions: "It is only to protect the honest public servants from frivolous and vexatious prosecution. The competent authority has to examine independently and impartially the material on record to form his own opinion whether the offence alleged is frivolous or vexatious. The competent authority may refuse sanction for prosecution if the offence alleged has no material to support or it is frivolous or intended to harass the honest officer. But he cannot refuse to grant sanction if the material collected has made out the commission of the offence alleged against the public servant. Indeed he is duty bound to grant sanction if the material collected lend credence to the offence complained of. There seems to be another reason for taking away the discretion of the investigating agency to prosecute or not to prosecute a public servant. When a public servant is prosecuted for an offence which challenges his honesty and integrity, the issue in such a case is not only between the prosecutor and the offender but the state is also vitally concerned with it as it affects the morale of public servants and also the administrative interest of the state" (page 693).

*These observations destroy the raison d'être of the private "in-house mechanism" of the Supreme Court.* They apply with far greater force to the prosecution of a Judge of a High Court or of the Supreme Court. It concerns not only the state but the entire nation, whom the President represents. "The President is not an outsider so far as the judiciary is concerned. The President appoints the Judges of the High Courts and the Supreme Court in exercise of his executive powers" (page 704). They rightly hold that impeachment "is no ground for withholding criminal prosecution till the Judge is removed by

Parliament”. Further: “*The Judges are liable to be dealt with just the same way as any other person in respect of criminal offence. It is only in taking of bribes or with regard to the offence of corruption the sanction for criminal prosecution is required*” (paragraph 56, page 707).

However, two paragraphs later on that page comes this crippling directive: “There is, however, apprehension that the executive being the largest litigant is likely to misuse the power to prosecute the Judges. That apprehension in our over-litigious society seems to be not unjustified or unfounded. The [Prevention of Corruption] Act no doubt provides certain safeguards. Section 6, providing for prior sanction from the competent authority and directing that no court shall take cognizance of the offence under Section 5(1) without such prior sanction, is indeed a protection for Judges from frivolous and malicious prosecution. It is a settled law that the authority entitled to grant sanction must apply its mind to the facts of the case and all the evidence collected before forming an opinion whether to grant sanction or not. Secondly, the trial is by the court which is independent of the executive. But these safeguards may not be adequate. Any complaint against a Judge and its investigation by the CBI [Central Bureau of Investigation], if given publicity, will have a far reaching impact on the Judge and the litigant public. The need, therefore, is a judicious use of taking action under the Act. Care should be taken that honest and fearless Judges are not harassed. They should be protected.

“In the instant case the then Chief Justice of India was requested to give his opinion whether the appellant could be proceeded under the Act. It was only after the Chief Justice expressed his views that the appellant could be proceeded under the provisions of the Act, the case was registered against him. Mr. Tulsi, learned Additional Solicitor General, submitted that he has no objection for this Court for issuing a direction against the Government of India to follow that procedure in every case. But counsel for the appellant has reservations. He maintained that it would be for the state to come forward with a separate enactment for the Judges consistent with the constitutional provisions for safeguarding the independence of the judiciary, and not for this Court to improve upon the defective law. In our opinion, there is no need for a separate legislation for the Judges. The Act is not basically defective in its application to the judiciary. All that is required is to lay down certain guidelines lest the Act may be misused. This Court being the ultimate guardian of the rights of the people and the independence of the judiciary will not deny itself the opportunity to lay down such guidelines....

“We therefore direct that no criminal case shall be registered under Section 154, Cr. P.C. [Criminal Procedure Code] against a Judge of the High Court, Chief Justice of High Court or Judge of the Supreme Court unless the Chief Justice of India is consulted in the matter. Due regard must be given by the government to the opinion expressed by the Chief Justice. If the Chief Justice is of the opinion that it is not a fit case for proceeding under the Act, the case shall not be registered. If the Chief Justice of India himself is the person against whom the allegations of criminal misconduct are received, the government shall consult any other Judge or Judges of the Supreme Court. There shall be similar consultation at the stage of examining the question of granting sanction for prosecution and it shall be necessary and appropriate that the question of sanction be guided by and in accordance with the advice of the Chief Justice of India. Accordingly, the directions shall go to the government. These directions, in our opinion, would allay the apprehension of all concerned that the Act is likely to be misused by the executive for collateral purpose” (pages 708-9).

### Bereft of reason

Note and list the grounds for the apprehension: 1. “Frivolous prosecution and unnecessary harassment” (Justice Ray, page 683). 2. “The executive being the largest litigant is likely to misuse the power to prosecute the Judges. That apprehension in our over-litigious society seems to be not unjustified or unfounded” (Justices Shetty and Venkatachaliah, page 707). Misuse “by the executive for collateral

purpose". 3. "Publicity will have a far reaching impact on the Judge and the litigant public" (Justices Shetty and Venkatachaliah, page 708).

These fears are not inspired by experience but by imagination and an imagination divorced from rationality or reason. In all the years since the High Courts were established, over a century ago, and the Supreme Court was established, on January 26, 1950, how many such prosecutions were even mooted in earnest against Judges? How many indeed. K. Santhanam, a member of the Constituent Assembly that drafted the Constitution, chaired a Committee on Prevention of Corruption. The committee's report (1964) recommended enlargement of the definition of "public servant" in respect of Judges.

A Judge unfairly prosecuted will receive his vindication from the court, like any one else, be it a Minister or the Prime Minister. The "far reaching impact on the Judge and the litigant public" is not unique to him. It can happen to any Minister, senior civil servant or public figure. But Justices Shetty and Venkatachaliah themselves point to the greater need for accountability where Judges are concerned. "The judiciary has no power of the purse or the sword. It survives only by public confidence and it is important to the stability of the society that the confidence of the public is not shaken. The Judge whose character is clouded and whose standards of morality and rectitude are in doubt may not have the judicial independence and may not command confidence of the public. He must voluntarily withdraw from judicial work and administration.

"The emphasis on this point should not appear superfluous. Prof. Jackson says, 'Misbehaviour by a Judge, whether it takes place on the bench or off the bench, undermines public confidence in the administration of justice, and also damages public respect for the law of the land; if nothing is seen to be done about it, the damage goes unrepaired. This must be so when the judge commits a serious criminal offence and remains in office.' (*Jackson's Machinery of Justice* by J.R. Spencer, eighth edition, pages 369-70)." (Pages 705-6 of the judgment.)

On August 1, during the hearing of the Ghaziabad case in the Supreme Court, one of the Judges exclaimed: "There is a need to maintain the independence of the judiciary because otherwise everyday complaints would be filed against them and judges would be in the dock. No judge will be able to pass any order as he does." No such misfortune befell the Judges before July 25, 1991, when the Veeraswami ruling was handed down. Section 77 of the Penal Code clearly says: "Nothing is an offence which is done by a Judge when acting judicially in the exercise of any power which is, or which *in good faith he believes to be*, given to him by law." It is shocking to find a Judge of the Supreme Court hold that added protection is needed because "no judge will be able to pass any order as he does". The prosecution is for conduct *outside the court or conduct wholly unrelated to performance of judicial functions*. Even so, sanction is required under the Prevention of Corruption Act, for corruption, and under Section 197 of the Criminal Procedure Code for "any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty".

That sanction will come only from the President. The Supreme Court ruled in A.R. Antulay's case, as far back as in 1982, that the Governor will "act in his own discretion and not on the advice of the Council of Ministers" when deciding whether to sanction the Chief Minister's prosecution or not (*State of Maharashtra vs R.S. Nayak (1982) 2 SCC 463*). In regard to High Court and Supreme Court Judges, that discretion belongs solely to the President of India. And it is a wanton aspersion on that high office for three Judges of the Supreme Court to hold that but for their direction the Judges could be subjected to "frivolous prosecution and unnecessary harassment" and the executive would "misuse" the power for "collateral purpose". The power to sanction does not belong to the government but to the President.

It is not only the President's office on which the slur is cast. It is cast also on our entire legal and constitutional system and, indeed, our democracy itself. Obviously, the Judges have a poor opinion of the power of popular outrage if Judges are subjected to such harassment.

Ask yourself a few questions. To begin with, which police officer would even contemplate investigating a Judge's conduct unless there were good grounds for it? Which government would be willing to incur the odium and censure of the media and the public if it connived at, let alone fostered, a motivated prosecution? Would the magistrate, the sessions judge, the High Court and the Supreme Court Judges, who would, in turn, hear the case, be powerless to do justice and censure the prosecution? Who would dare to incur these obvious risks?

The very scent, stink rather, of a malicious investigation would launch the media, the opposition, independent public figures and the Bar into action in defence of the Judge. Above all, no President would countenance such a prosecution. He or she would quietly call the concerned Minister or official to order even before the request for sanction reached his or her office. In short, the entire system must collapse before our Judges' fears can possibly come true.

One is reminded of Leslie Stephen's remarks in his *Science of Ethics*, which A.V. Dicey made famous by quoting them in his classic modestly entitled *An Introduction to the Study of the Law of the Constitution*: "Lawyers are apt to speak as though the legislature were omnipotent.... If a legislature decided that all blue-eyed babies should be murdered, the prosecution of blue-eyed babies would be illegal; but legislators must go mad before they could pass such a law, and subjects be idiotic before they could submit to it."

It is on the basis of fears as wild as these that the three Judges issued their "guidelines". Justices Shetty and Venkatachaliah acknowledge that "we know of no law providing protection [*sic.*] for Judges from criminal prosecution" (page 706). They proceed to provide it by a conscious, deliberate assertion of power that simply does not vest in them. They justify this in a passage as erroneous intellectually as it is harmful in its consequences – as we know by now – and menacing to democratic government according to the rule of law: "We must never forget that this Court is not a court of limited jurisdiction of only dispute settling. Almost from the beginning, this Court has been a lawmaker, albeit, in [Oliver Wendell] Holmes's expression, 'interstitial' lawmaker. Indeed, the Court's role today is much more. It is expanding beyond dispute settling and interstitial lawmaking. It is a problem solver in the nebulous areas."

That is not a nebulous area at all. It is governed by law. It is another matter that, possessed with fears, the Judges consider the law to be inadequate. In this, they stand out for their uniqueness in the entire wide world. Nor is the Supreme Court a "problem solver" or "lawmaker" except according to recognised judicial norms. One must not question Justice Shetty's learning. For aught we know, it was Holmes who spoke of the "interstitial" lawmaker. But we have another great judge's warning, in which he used the same metaphor. Benjamin N. Cardozo said in his lectures on *The Nature of the Judicial Process*: "Judges have, of course, the power, though not the right, to ignore the mandate of a statute, and render judgment in despite of it. They have the power, though not the right, to travel beyond the walls of the interstices, the bounds set to judicial innovation by precedent and custom. None the less, by the abuse of power, they violate the law" (pages 129 and 135).

Certainly the great Oliver Wendell Holmes would have strongly disapproved of the three Judges' approach. In *Evans vs Gore* 253 U.S. 264 (1920), a federal judge contended that the levy of income tax on his salary amounted to unconstitutional diminution of his salary. The Supreme Court upheld his plea. Holmes dissented, with Louis D. Brandeis. He wrote: "To require a man to pay the taxes that all other men have to pay cannot possibly be made an instrument to attack his independence as a judge. I see nothing in the purpose of this clause of the Constitution (Article III, S. 1) to indicate that the judges were to be a *privileged class free from bearing their share of the cost of the institutions upon which their well-*

*being, if not their life, depends.*” Likewise, men who as lawyers and judges lived by the law must not seek privileged treatment in accountability to law. Is there a single Judge or jurist who has ever made such claims to judicial power as Justice Shetty did? And as some other Judges do, less explicitly?

The law is not ambiguous. Under Section 157 of the Criminal Procedure Code, if “an officer in charge of a police station has reason to suspect the commission” of a cognizable offence, he *shall* “investigate the facts and circumstances of the case” and “if necessary” arrest the offender. The law makes no exceptions. Sanction is necessary when the prosecution is launched, not for an inquiry. Speed is essential. Delays risk escape of the offender and tampering with the evidence.

The National Police Commission said in its Second Report (1979; page 30, paragraph 15.40) that it is a “fundamental principle governing police work that the investigative tasks of the police are beyond any kind of intervention by the executive or *non-executive*”. It would be “illegal”. The Supreme Court has directed the States to implement the commission’s recommendations. Annexed to the report is the text of the Supreme Court’s judgment (*AIR 1968 117*) in which the court approvingly quoted Lord Porter’s words in a famous case in 1945 (71 Indian Appeals 203) that “it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes on them the duty of inquiry”.

The settled fundamentals of jurisprudence are wiped out by an assertion of judicial power, improper and unconstitutional, on the basis of fears utterly groundless and an appreciation of the constitutional system that is grossly unjust, not least to the President. All of this, not for the citizen, but for establishing a protective moat that our Judges do not need. The ruling merits speedy reversal, either by the court itself or by parliamentary legislation.

Justice L.M. Sharma, who was also on the Bench in the Veeraswami case, concurred with the three Judges on the definition of “public servant”, the applicability of the Prevention of Corruption Act, and the provision for sanctions. He saw the Judges’ point but disagreed. “In my view such a binding direction cannot be issued by this Court on the basis of the provisions of the Constitution and the Act. Before proceeding further I would again state that having answered the question as to whether a Judge of the superior court can be removed by some authority whoever he or they may be, in the affirmative, it is not necessary to decide the further controversy as mentioned above. I would, therefore, be content merely by indicating some of the aspects which may be relevant for the issue, to be decided later in a case when it directly arises. If the President is held to be the appropriate authority to grant the sanction without reference to Parliament, he will be bound by the advice he receives from the Council of Ministers. This will seriously jeopardise the independence of the judiciary, which is undoubtedly a basic feature of the Constitution. Realising the serious implication, it was suggested on behalf of the Union of India that this Court may lay down suitable conditions by way of prior approval of the Chief Justice of India for launching a prosecution. I fully appreciate the concern of all of us, including the Union of India, for arriving at a satisfactory solution of the different problems which are arising, but if we start supplementing the law as it stands now, *we will be encroaching upon the legislative field.*”

When he spoke thus, the court’s ruling in Antulay’s case was available to allay his fears, quite apart from the implied aspersion of abuse of power by the Council of Ministers. On November 5, 2004, a Bench of five Judges of the Supreme Court upheld unanimously the Governor’s decision to grant sanction overruling the refusal of the Council of Ministers (*M.P. Special Police Establishment vs State of M.P. (2004) 8 SCC 788*).

Justice Sharma emphasised that “the approval of the Chief Justice of India can be introduced as a condition for prosecution only by Parliament and not by this Court.... I would again repeat that this issue

is not arising in the present case and will have to be considered and finally decided only when it directly arises” (pages 722-3).

Justice J.S. Verma, who, too, was on the Bench, was also of the opinion that “making the law applicable, with the aid of the suggested guidelines, is not in the domain of judicial craftsmanship, but a naked usurpation of legislative power in a virgin field”.

### Appointment & accountability

There is a certain irony in his emphasis on the links between the process of appointing judges and accountability to the law. “The working of the appointment process is a matter connected with this question and not divorced from it. Most often, it is only a bad appointment which could have been averted that gives rise to a situation raising the question of the need of such a law. Due emphasis must, therefore, be laid on prevention even while taking curative measures. It is a sad commentary on the working of the appointment process and the behaviour of some of the appointees which has led to this situation. The confidence reposed in them by the framers of the Constitution has been betrayed to this extent.”

That is true all the more so of successive Chief Justices of India and their collegiums. Justice Verma himself delivered the majority judgment in the Second Judges case, which H.M. Seervai tore to shreds ((1993) 4 SCC 441). Justice Verma went so far as to hold that the Chief Justice’s order transferring a High Court Judge was not open to judicial review. An affidavit filed by the Law Minister recently disclosed that “a total number of 351 additional judges have been appointed permanent judges during the period 1.1.1999 and 31.7.2007. In these cases, successive CJIs [Chief Justices of India] have not consulted the collegiums while considering the cases of appointment of additional judges as permanent judges of the High Courts and have advised appointments on their own consideration. There has been no case where an additional judge has been appointed a permanent judge after consultation with the collegium.”

For nine years, the 1993 judgment, gravely flawed as it was, was rendered irrelevant by the Chief Justices to whom it gave primacy. This was in violation of the clear intent of the framers of the Constitution. B.R. Ambedkar told the Constituent Assembly on May 24, 1949: “To allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief Justice of India which we are not prepared to vest in the President or the government of the day.”

The entire appointment system set up by the Supreme Court is a total wreck. Ever since Dinesh Goswami, the best Law Minister we have had, proposed the establishment of a National Judicial Commission in 1990, successive Chief Justices have opposed it.

The rulings in the Judges case and the Veeraswami case are twins born in a certain clime reflected in the trend in the court’s judgments. As Lord Bingham noted, “the courts tend to be most assertive, active and creative when political organs of the state are least effective”. Since 1990 we have had governments with precarious majorities or coalitions. Both rulings are an affront to democracy and must be reversed.

That is no reason for Judges of the Supreme Court, especially the Chief Justices, to act in a manner more appropriate to trade unionists. *The Times* (London) had, on March 10, 2004, sharp words for Lord Woolf, an outstanding and truly erudite judge who has served as Master of the Rolls as well as Lord Chief Justice. *The Times* remarked that he “cannot quite make up his mind whether he is a liberal reformer or the shop steward for the only trade union in the country whose members wear wigs and not hard hats or cloth caps”.