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Opinion

Opinion - News Analysis

Parties should be asked to repeal impunity provisions

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Independence, when it came in 1947, marked the end of a colonial government, but it was only the beginning of the end of the colonial system of governance. This system is opaque rather than transparent, and seeks to control subjects rather than empower citizens. The accountability-seeking and empowering constitutional regime that came about in 1950 did not abolish this colonial system of governance outright. For pragmatic reasons, the constitutional design contained in Article 372 envisaged its gradual unravelling over the years.

Section 197 of the *Code of Criminal Procedure 1973* (CrPC) is a typical example of laws that sustain the colonial system of governance (the provision, although passed by independent India in 1973, was a faithful reproduction of an earlier-colonial-provision). It prohibits courts from taking cognizance of offences committed by 'public servants' without prior governmental sanction. This sanction is rare, and decisions are often motivated by partisan rather than accountability considerations. Comparable provisions exist elsewhere: section 132 of the CrPC and section 19 of the *Prevention of Corruption Act 1988* (PCA) reiterate the need for prior governmental sanction. These prior sanction provisions—better referred to as 'impunity provisions' — have shielded torturing and murderous police officers, abusive prison officials and corrupt politicians and bureaucrats for decades. As recently as last month, the Calcutta High Court was constrained to quash criminal proceedings initiated by the CBI against Mr. Jayanta Mukherjee — a sub-divisional police officer — in a custody-death case since the necessary governmental sanction was not forthcoming.

A small step towards limiting the scope of the impunity provisions was taken by the Supreme Court in the case of *Badal v. State of Punjab (2006)*, where it held that section 19 of the PCA does not protect former public servants. The recently-adjourned Parliament tried to undo even this small victory for accountability. In late 2008, Lok Sabha hurriedly passed an amendment to section 19 extending the protection of the impunity provision to former public servants, thus seeking to overturn the effect of the Badal judgment. The amending Bill has lapsed after being blocked by the opposition in the Rajya Sabha — but their reasons for doing so did not include the extension of the impunity provision.

The ostensible purpose of these impunity provisions, as mentioned in the Statement of Objects and Reasons of the lapsed Bill, is to 'provide a safeguard to public servants from vexatious litigation'. But section 170 of the CrPC already requires a police officer to send a case for judicial cognizance only when there is sufficient evidence. Further, section 190 of the Code gives discretion to the judicial Magistrate to refuse to take cognizance where it is not merited. Surely the state trusts its own prosecution and judicial agencies enough to assume that they will not pursue vexatious cases.

Even if our judicial and prosecution services are not trustworthy, there is a democratic virtue in subjecting the ruling elite — euphemistically called 'public servants'— to the same vulnerabilities of a malfunctioning system as ordinary citizens are subject to. This is the basic condition of the rule of law. If the criminal justice system is indeed broken and thereby allows vexatious litigation frequently, the ruling elite will be keener to fix it if it is subject to it

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rather than if it is exempt from it. In democracies, the state should have a higher justificatory burden for its actions in comparison with ordinary citizens, not less.

Impunity provisions ensure that accountability-seeking laws like the PCA and the proposed *Prevention of Torture Bill 2008* will never succeed. The draft Torture Bill seeks to punish public servants for acts of torture but fails to make impunity provisions inapplicable to torture cases. Comparable is the fate of an otherwise commendable judgment of the Andhra Pradesh High Court in the *Andhra Pradesh Civil Liberties* case delivered last month. The High Court made an unexceptionable order that every extra-judicial killing by a police officer must be investigated if there is a complaint. It insisted, rightly, that the final say on whether the killing was justified as an act of private defence must rest with a judicial Magistrate, rather than a police. Yet, the judgment fails to foresee the frustrating impact impunity provisions will predictably have on its noble intentions.

These well-intentioned measures will rarely bear fruit so long as the impunity provisions remain on the statute books. The electorate should not trust any party manifesto promising administrative reforms unless it includes a promise to repeal these unconstitutional impunity provisions.

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