IMMUNITY TO PUBLIC OFFICIALS UNDER BNSS: UNFATHOMABLE SCOPE, EXCESSIVE AMBIGUITY AND EXECUTIVE OVERREACH

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ABSTRACT

A significant change in the criminal procedure framework can be observed in the new criminal code, namely the Bharatiya Nagrik Suraksha Sanhita, 2023 ("BNSS"), which replaced the Code of Criminal Procedure, 1973 ("CrPC"). Among the various provisions the BNSS entails, Section 175(4) of the said Act introduces a procedure that conditions a Magistrate's power to order an investigation into complaints against public servants on two pre-conditions: (A) receipt of a report from the superior of the accused public servant describing the facts and circumstances; and (B) consideration of assertions made by the public servant on his own behalf about the incident. At first glance, this arrangement may seem to have been instituted to insulate honest public servants from vexatious litigation. However, upon closer scrutiny and analysis in light of the legislative history and judicial doctrine under Section 197 CrPC and allied authorities, Section 175(4) raises significant concerns. Its breadth, scope and ambit generate an ambiguity about who qualifies as a "public servant" for these protections, what qualifies as a conduct "in discharge of official duties", and how the Magistrate should evaluate the superior's report and the official's assertions before initiating investigation. This provision compels us to ponder upon the risks surrounding institutionalisation of executive control over criminal investigations into official conduct, which results in a diluted judicial oversight and restricted access to justice for victims. This paper analyses Section 175(4) doctrinally, compares it with the established jurisprudence on sanction provisions, examines practical and policy implications, and proposes workable reform to restore proportionality, clarity and accountability.

Keywords: Bharatiya Nagrik Suraksha Sanhita, Section 175(4), Public servant Immunity, Judicial Oversight, Criminal Procedure, Executive Overreach

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INTRODUCTION

The pressing need for a more comprehensive, elaborate, and contemporary legislation governing procedures relating to arrest, bail, prosecution, and related matters led to the foundation and enactment of the *Bharatiya Nagrik Suraksha Sanhita, 2023* ("BNSS"), marking a landmark shift in India's criminal procedure framework by replacing the *Code of Criminal Procedure, 1973* ("CrPC"). Among the numerous provisions it embodies, Section 175(4) reflects a significant flaw, rendering the purpose of its incorporation highly dubious. This section requires a Magistrate to take into consideration a public servants' explanation and a report from their superior officer before ordering a probe against them, upon receiving a complaint alleging the commission of an offence by them while acting, or purporting to act, in discharge of their official duties.[3]

The discussed procedure may, at first glance, appear to have been formulated with an objective of providing protection against false and frivolous cases against public servants discharging their official duties.[4] Provisions along similar lines, whereby prior sanction was mandated, previously existed under Sections 197[5] and 132[6] of the CrPC. But, the ambit of Section 175(4) is excessively broad and more ambiguously worded, providing for a room for potential misuse of the provision.

This paper contends that Section 175(4): (a) expands the scope for public servants far beyond the contours articulated by the Supreme Court under Section 197 CrPC; (b) highlights the ambiguity on standards and procedures; and (c) risks executive overreach by vesting structural advantages for the executive to initiate or stall investigations. The critique proceeds in a three-fold manner: doctrinal exposition and textual analysis of Section 175(4); comparative and jurisprudential background tracing Section 197 CrPC doctrine; and reform proposals. While legitimate claims may have been made by the BNSS, this paper suggests thoughtful alternatives that not only preserve administrative efficiency but also ensure accountability.

[3] Bharatiya Nagarik Suraksha Sanhita, 2023, s 175(4).
[4] Universal's Bare Act, *The Bharatiya Nagrik Suraksha Sanhita 2023* (Universal Law Publishing 2025) point 36 ('Spirit of New Criminal Acts'), IV.
[5] Code of Criminal Procedure, 1973, s 197.
[6] Code of Criminal Procedure, 1973, s 132.

TEXTUAL AND DOCTRINAL OVERVIEW OF SECTION 175(4)

A. Text of the Section

Section 175 of the *Bharatiya Nagarik Suraksha Sanhita, 2023* deals with the power of a police officer to investigate cognizable cases. Sub- section (4) of the said provision reads as follows:

"Any Magistrate empowered under section 210, may, upon receiving a complaint against a public servant arising in course of the discharge of his official duties, order investigation, subject to—

(a) receiving a report containing facts and circumstances of the incident from the officer superior to him; and

(b) after consideration of the assertions made by the public servant as to the situation that led to the incident so alleged."[7]

The abovementioned provision has been enshrined under Chapter XIII, titled "*Information to the Police and their powers to investigate*". A literal understanding of this provision highlights the inability, or impotency, of the Magistrate to act even when a cognizable complaint is made unless certain prerequisites are fulfilled. This operates as a statutory bar on the power of the Court to take cognizance unless the procedural precondition of prior sanction is fulfilled.

B. Doctrinal Problems

Three immediate doctrinal questions arise thereby:

- **Who can be regarded as a "public servant"?**

The BNSS does not, by itself, define the term "public servant". Instead, it relies on the BNS for the same, wherein uncertainty persists as to whether all categories of officials- such as temporary appointees, contract employees, quasi-officials, and regulatory commissioners- fall within the protective ambit of the discussed section because the scope of coverage under the term "public servant" is exceedingly wide, encompassing officials across various domains.[8]

[7] Bharatiya Nagarik Suraksha Sanhita, 2023, s 175(4).
[8] Bharatiya Nyaya Sanhita 2023, s 2(28).

This is significant as safeguards against removal and hierarchical structures vary considerably across different offices.

- **What incidents can qualify as "arising in course of discharge of official duties"?**

The Supreme Court, in the context of Section 197 of the CrPC, constricted and calibrated this phrase by developing the "reasonable connection" test, which requires courts to determine whether the act complained of bears a rational nexus with the official duty. Section 175(4) of the BNSS, however, in a manner, clones this phrase but doesn't import the judicial gloss or set out any test akin to the "reasonable connection" doctrine; it simply makes the consideration of assertions by the public servant and receival of his superior's report essential for commencement of investigation.[9] This difference in procedural mechanics has doctrinally significant consequences as it potentially alters the balance between protecting bonafide official action and enabling accountability for abuse of power.

- **What legal status has been attached with the superior's report and the assertions of the public servant?**

The provision doesn't clearly mention whether the superior's report constitutes an executive clearance or whether it merely serves as a fact-finding input to assist the Magistrate. Further, the text is silent as to the evidentiary weight attached to such reports, the standards of admissibility to be followed, and the timelines within which such reports must be submitted. It could be illustrated through the *BNSS handbook issued by the Maharaja Ranjit Singh Punjab Police Academy, Phillaur (2024)* that doesn't specify any admissibility standards or timelines for the superior report, treating it only as a part of the procedural framework without clarifying the legal weight.[10] In the absence of a clear layout of such standards, there is a tangible risk that, in practice, the superior's report may acquire the character of a *de facto veto* over independent criminal inquiry, effectively placing a substantive bar on judicial oversight.

Such ambiguities and loopholes collectively carry sufficient potential for discretionary, arbitrary, and inconsistent application across States thus, insulating officials from scrutiny and

[9] *G C Manjunath v Seetaram* [2025] INSC 439 (SC).
[10] Nibber, Simrit Pal Singh, Harpreet Singh, Inderdeep Singh Gill, Shallinderpreet Kaur and Sonia Taank, *A Handbook for Police Officers on Bharatiya Nagarik Suraksha Sanhita, 2023 (highlighting key provisions and changes vis-à-vis CrPC)* (Maharaja Ranjit Singh Punjab Police Academy, Phillaur 2024).

undermining the accountability that the criminal process is expected to secure.

LEGISLATIVE LINEAGE OF SECTION 197 CRPC: JUDICIAL DOCTRINE AND PROTECTIVE RATIONALE

For a comprehensive evaluation of the BNSS, one must try to read and analyse its provisions alongside the long lineage of sanction jurisprudence under Section 197 of the CrPC and allied statutory protections, such as Section 170 of the Karnataka Police Act. The foremost aim of these provisions has historically been to safeguard public servants from vindictive or vexatious prosecutions that might otherwise paralyse the functioning of the public administration. However, the Supreme Court has, over decades, spawned several important doctrinal limits on the scope of this protection.

A. The "Reasonable Connection" Test

The Court has consistently held that the protective bar applies only to acts done "in discharge of official duty" or those "reasonably connected" thereto. In "*Matajog Dobey v HC Bhari*", the Court observed that protection is not meant to shield every act of a public servant, but only those which are reasonably related to the official function being discharged.[11] A reaffirmation of the same principle was observed in the case of "*State of Orissa v Ganesh Chandra Jew*", where the Court held that even acts done in excess of duty require sanction if they are reasonably connected to the performance of official duty.[12]

B. Excess of Authority

The Court has further clarified that sanction may still be necessary in cases where the official has exceeded authority or abused power, provided that the act was nonetheless integrally connected with the discharge of his official duty. In "*B. Saha v M.S. Kochar*", the Court explained that the quality of the act is determinative, and excess of authority doesn't by itself remove the protection of Section 197 if a nexus with duty exists.[13]

C. Absolute Limits of Protection

However, the protection provided is not absolute. The Court has framed a clear exception for

[11] *Matajog Dobey v HC Bhari* AIR 1956 SC 44.
[12] *State of Orissa v Ganesh Chandra Jew* (2004) 8 SCC 40.
[13] *B. Saha v M.S. Kochar* (1979) 4 SCC 177.

actions that are committed wholly outside the scope of one's official duty. For example, in "*Prakash Singh Badal v State of Punjab*", it was decided that private acts, such as bribery, personal assaults, or conduct not connected to official work, fall outside the ambit of Section 197, and hence, no sanction is required.[14] This ensures that the provision is not misused as a cloak for impunity.

D. Stage of Cognizance

Another important doctrinal development is that the necessity of sanction must be decided at the stage of cogniznace itself, based on the material then available. In "*Matajog Dobey v HC Bhari*" and later in "*Rakesh Kumar Mishra v State of Bihar",* the Court emphasized that sanction is a procedural safeguard, not a substantive defence, and must be evaluated preliminarily to prevent harassment of officials through unwarranted prosecutions.[15]

E. Reaffirmation in Recent Jurisprudence

Several judgements in recent times have reiterated this rationale. In "*D Devaraja v Owais Sabeer Hussain*" the Court held that even when a police officer had exceeded his authority, prior sanction remained mandatory as long as there was a reasonable nexus with official duty.[16] Similarly, in "G*urmeet Kaur v Devender Gupta*", the Cort clarified that the aim of Section 197 is to prevent unnecessary prosecutions but that the protection ceases where acts are wholly disconnected from official functions.[17] In "*Amod Kumar Kanth v Association of Victims of Uphaar Tragedy*", the Court underscored that public servants must act in good faith, and sanction provisions exist to ensure they do so without fear of vexatious litigation.[18]

F. Contemporary Reaffirmation

Recent reporting also demonstrates this protective rationale, as the Supreme Court has reiterated again that prior sanction is needed even where public servants have exceeded their authority, so long as the actions are connected to their official role. This shows that while the judiciary ensures that sanction provisions exist to protect the *bonafide* official action from

[14] *Prakash Singh Badal v State of Punjab* (2007) 1 SCC 1.
[15] *Rakesh Kumar Mishra v State of Bihar* (2006) 1 SCC 557.
[16] *D Devaraja v Owais Sabeer Hussain* (2020) 7 SCC 695.
[17] *Gurmeet Kaur v Devender Gupta* 2024 SCC OnLine SC 3761.
[18] *Amod Kumar Kanth v Association of Victims of Uphaar Tragedy* (2023) 16 SCC 239.

vindictive litigation, it also prevents the officials from using them as a shield for immunity from accountability.

In a nutshell, the judicial doctrine surrounding Section 197 CrPC reveals a nuanced balance: it protects public servants from unnecessary litigation while ensuring that they cannot avail this protection when their actions are not connected with their official functions. The jurisprudential balance forms the backdrop against which Section 175(4) of the BNSS must be assessed.

PRACTICAL CONSEQUENCES AND RISKS OF EXECUTIVE OVERREACH

A. Delay, Dilution and De Facto Veto

Superior officers, in practice, may be motivated by institutional incentives to protect their juniors or preserve the reputation of their department. In cases where the investigation into an offence depends on a superior's factual report, there is a foreseeable risk of delay, selective reporting, or minimalist statements that weaken the factual basis for inquiry, thereby increasing the chances of fabrication of facts and circumstances. The report might be framed in such a manner that it appears exculpatory in nature, thereby discouraging the Magistrate from proceeding further with the investigation. This mechanism can operate as a *de facto veto*. Legal commentary has noted that prior-sanction regimes often result in procedural bottlenecks and weakened accountability.[19] Empirical reports have similarly noted instances where proceedings were delayed or quashed, particularly in corruption and police-excess cases.[20]

B. Chilling Effects on Whistle-blowers and Victims

The presence of impartial investigative avenues encourages whistle-blowers and victims to make complaints and have them heard. However, when the law mandates that a complaint made against a public servant must be first checked by the officer's own seniors, it generates a genuine problem. If the senior officer wishes to protect his junior, preserve the reputation of the department, or is himself a part of the wrongdoing, he may try to delay the process or present falsified reports. Individuals who are aware of misconduct by their peers or superiors but who themselves suffer from such misconduct may be afraid to complain for fear of

[19] *Nishith Desai Associates*, 'Review of the Bharatiya Nagarik Suraksha Sanhita – Part II' (NDA Insights, 31 January 2024) https://www.nishithdesai.com accessed 1 September 2025.
[20] *Times of India*, 'Was prior sanction obtained for proceedings against ADGP in assets case? asks Kerala HC' *Times of India* (Kerala, 5 August 2025) https://timesofindia.indiatimes.com accessed 1 September 2025.

retaliation. As a result, this rule discourages whistle-blowers and victims from reporting wrongdoing, since the first review is done by the very people who might themselves be responsible for the problem. Practical studies on sanction regimes have highlighted under-reporting in contexts where procedural obstacles protect officials.[21]

C. Fragmented State Practice

The BNSS will be implemented by the Centre. However, the police and prosecution are State subjects. This results in a diversity of administrative cultures across States, producing an uneven application of procedures in different jurisdictions. Some States might attach enormous importance to the superior's report, whereas others might treat it as a mere formality. Such fragmentation undercuts uniformity and predictability in criminal justice, which policy commentators have already warned about.[22]

DEFENDING SECTION 175(4): LEGITIMATE AIMS AND NARROW JUSTIFICATIONS

The principal justifications for the incorporation of the provision in the Criminal Code are legitimate:

A. Protection for Honest Public Servants from Malicious Prosecutions

The State has an obligation and an interest in protecting public servants from false and frivolous litigation. This rationale has long been recognised in sanction jurisprudence. In "*Matajog Dobey v HC Bhari*", the Supreme Court emphasised that the object of Section 197 CrPC is to protect officials from "frivolous, malicious or vexatious" proceedings.[23] The same principle was reiterated in "*State of Orissa v Ganesh Chandra Jew",* where the court held that sanction provisions exist to prevent harassment of public officials while discharging their duties.[24]

B. Preservation of Institutional Expertise

The operational context within which the alleged act occured could best be explained by

[21] *IJLSSS*, 'Re-Evaluating Access to Justice: A Critical Analysis of FIR Registration under the BNSS' (IJLSSS, 7 March 2025) https://ijlsss.com accessed 1 September 2025.
[22] *Nishith Desai Associates*, 'Review of the Bharatiya Nagarik Suraksha Sanhita – Part II' (NDA Insights, 31 January 2024) https://www.nishithdesai.com accessed 1 September 2025.
[23] *Matajog Dobey v HC Bhari* AIR 1956 SC 44.
[24] *State of Orissa v Ganesh Chandra Jew* (2004) 8 SCC 40.

superior officers. In "*D Devaraja v Owais Sabeer Hussain*", the Court recognised that in cases involving police operations, superior officers' perpectives may help distinguish *bonafide* action from excesses.[25]

C. Ensurance of Administrative Clarity

Providing superior officers with an opportunity to present the facts and circumstances of the case may help determine whether the alleged act was committed by a subordinate officer in the course of discharging his official duties. This in turn may save public resources and judicial time. Similar views could be observed in the *Law Commission of India, 41st Report on the Code of Criminal Procedure (1969)*, which noted that sanction requirements act as "filter" to prevent unnecessary trials.[26]

However, these reasons alone cannot justify a rule that makes it difficult for the Courts to even start a probe into a case, especially when it restricts access to an independent investigation. The doctrine of proportionality requires that any safeguard of this nature should be narrowly tailored, subject to a clear timeframe, and remain under judicial supervision. As the Supreme Court explained in *"Modern Dental College v State of Madhya Pradesh"*, proportionality requires balancing the States's interest against the fundamental right to access justice.[27]

PROPOSALS FOR REFORAMATION: AIM TO RESTORE BALANCE

To create a balance between the legitimate aim of the Legislature to protect honest officials from malicious litigations with the equally important need for accountability, certain reforms to Section 175(4) are necessary. These reforms should operate at both the legislative and procedural levels.

A. Clarification of Meaning and Scope

Section 175(4) should be amended to clarify who exactly qualifies as a "public servant", since the present drafting creates ambiguity regarding its ambit. Similarly, the phrase "arising in course of discharge of official duties" should be expressly defined by adopting the Supreme

[25] *D Devaraja v Owais Sabeer Hussain* (2020) 7 SCC 695.
[26] Law Commission of India, *41st Report on the Code of Criminal Procedure, 1898* (1969).
[27] *Modern Dental College and Research Centre v State of Madhya Pradesh* (2016) 7 SCC 353.

Court's "reasonable connection" test from sanction jurisprudence.[28] It is also essential to fix strict timelines for a superior officer's report (say 7-14 days) and to mandate that a copy of the report be disclosed to the complainant.

B. Non-Determinative, Time-Bound Report

The report provided by the superior official shouldn't be having a binding precondition. Instead, it should be serving only as an input. The Magistrate should be provided with sufficient powers so as to be able to investigate into the alleged offence even if there's a delay in the submission of report by the superior official, particularly where there is an associated risk of the evidence being destroyed or tampered with, or where immediate protection of the complainant is necessary. If a report is available, the Magistrate must consider it, but should not be bound by its conclusions.[29]

C. Standard of Judicial Oversight

There should be a clear statutory provision empowering the Magistrate to apply an objective prima facie standard, just as courts do under Section 197 CrPC.[30] There should be a recognition of the existence of a judicial discretion to proceed with investigation without reports from senior officials where there is sufficient material to show that the alleged act falls outside the protective ambit provided to public officials.

D. Transparency and the Rights of The Victims

The report by the superior officer should be placed on record and shared with the complainant. If the report is not received within the statutory time frame, it shouldn't automatically result in the dismissal of an investigation. This would curb the misuse of secrecy and delays, which often shiels misconduct from scrutiny.[31]

E. Independent Oversight for Sensitive Cases

Where allegations involve complaints regarding serious human rights violations or corruption, the law should mandate automatic referral to an independent oversight body, such as a State

[28] *Matajog Dobey v HC Bhari* AIR 1956 SC 44.
[29] Abhinav Sekhri, 'The Myth of Sanction for Prosecution' (2018) 10(2) *National Law School of India Review* 45.
[30] *State of Maharashtra v Budhikota Subbarao* (1993) 3 SCC 339.
[31] Amnesty International India, *Denied: Failures in Accountability for Police Violence* (Amnesty 2015).

anti-corruption bureau or independent police complaints authority. Such mechanisms have been recommended by the Supreme Court in "*Prakash Singh v Union of India*" for ensuring accountability in policing.[32]

F. Reformation in Sanction Procedures

If senior officials are to grant sanctions, then their reports must undergo thorough judicial review. The sanctioning authority shall also be required to mention detailed reasons for the assertion they make, supported by concrete and conclusive evidence, rather than offering vague or blanket approvals. This would prevent "rubber-stamp" sanctions and ensure a measure of accountability.[33]

The implementation of these proposals would provide protection against frivolous proceedings while ensuring that the Magistrates continue to discharge their lawful function of dispensing justice by acting as independent gatekeepers of the criminal process.

CONCLUSION

Section 175(4) of the BNSS represents a genuine legislative attempt to strike a balance between shielding public servants from unnecessary litigation and maintaining administrative efficiency. But, the way it has been formulated and is present in the Code at present, the provision risks tilting the scale too far towards executive control, limiting the role of the Courts in the process of administration of justice by curtailing their power through creating dependence on internal reports from superiors without putting in place strong safeguards to ensure transparency. This stands a stark contrast to the Supreme Court's reading of Section 197 CrPC, where protection is allowed only if there is a reasonable link to official duty, and where courts still play an active role in checking misuse.

A fairer framework would require the superior's report to be treated as just as a piece of input and not the deciding factor. Strict timelines, mandatory disclosure, and robust judicial oversight must remain at the heart of the process. Only then can the BNSS achieve its stated aim- protecting honest officials- while avoiding the pitfall of becoming yet another tool for executive overreach.

[32] *Prakash Singh v Union of India* (2006) 8 SCC 1.
[33] Bibek Debroy and others, *Rethinking the Sanction Regime in India* (Centre for Policy Research 2017).