Corruption is one of the major challenges that India is facing today. The change in the political dynamics of the country in light of the general elections of 2014 is a clear indication that the people of India are fed up with this problem.

It is in this context that the recent judgment of the Supreme Court in the case of Dr. Subramaniam Swamy v. Director, Central Bureau of Investigation becomes important. This judgment of the constitutional bench, delivered on 6th May 2014, explores the problematic arena of prior sanctioning in case of prosecution of public servants. Moreover the judgment extensively focuses on article 14 of the Constitution of India, which ensures equality and equal protection of law to each and every citizen of this country, and delineates as to what could be called arbitrary as per this article.

This judgment by the apex court becomes important as it sets a precedent that is likely to have a substantial impact on the bureaucratic decision-making and the dangerous nexus of politicians and bureaucrats which becomes a major cause of corruption. The aim behind this case analysis is to extract the perks and follies of this decision and analyze the judgment in light of the earlier decisions of the apex court on similar subject matter.
1. BACKGROUND

A combined decision of two writ petitions, namely, *Dr Subramaniam Swamy v. Director, CBI* and *Centre for Public Interest Litigation v. Union of India* has been given through this particular judgment. The main issue of contention in these writ petitions was the constitutional validity of section 6-A of the Delhi Special Police Establishment Act, 1946. This particular section came to be inserted through section 26(c) of the Central Vigilance Commission Act, 2003.

The insertion of this section came after the controversial Single Directive No. 4.7(3) of the Government of India was struck down in the case of *Vineet Narain and Ors v. Union of India*. The single directive was a set of instructions that had been issued by various ministries and departments of the Central Government to the Central Bureau of Investigation entailing the mode in which inquiry or registration of the case was to be done with regards to certain category of civil servants. As per the directive, if the officer was of the level of Joint Secretary or above in the Central Government, then prior sanction of the Secretary of the concerned ministry or department would have to be taken before the Central Bureau of Investigation started an inquiry. Moreover officers of the Reserve Bank of India of the level equivalent of Joint Secretary and above, Executive Directors and above of SEBI, and Chairman along with Managing Director and Executive Directors and such officers who are one level below the board of Nationalized Banks also fell within the purview of this directive. The objective of this directive

---

5. *Id.*
was to protect officers who were involved in decision-making and who would otherwise be subjected to malicious and vexatious complaints.

Owing to the mandatory sanction of the government before any enquiry, the Single Directive became problematic for the effective implementation of the Prevention of Corruption Act, 1988. The Central Bureau of Investigation, as constituted through the Delhi Special Police Establishment Act, 1946 could not proceed in its actions against senior government officers owing to this single directive.

As a result of these anomalies, the constitutional validity of this directive i.e. Single Directive 7.4(3) was challenged in the case of *Vineet Narain and Ors v. Union of India*. The court tried to deconstruct the constitutional validity of the directive through the analysis of various legal postulates.

The Supreme Court emphasized on the point that the directive would be applicable if the investigation of the offences was being done by the Central Bureau of Investigation and would not have any application on the exercise of power by the state police. Thus an anomaly is prevalent in this regard. Emphasis was also paid to the word ‘superintendence’ used in section 4(1) of the Delhi Special Police Establishment Act, 1946. The Supreme Court stated that once the policing agency is empowered to carry out investigation as per section 3 of the act, the central government could not exercise any control over the investigative process and the word ‘superintendence’ could not be used to extend the control and power of the government to that limit.

The court also referred to the N.N. Vohra Committee that was constituted in 1993 and provided information related to the links between mafia organizations and government functionaries. The comments of the committee, which came out in the same year were quite shocking. They

---

emphasized on the nexus between politicians, bureaucrats and criminals and how it was resulting in a huge amount of corruption in the country.\textsuperscript{7}

The court also emphasized on the fact that the constitution of investigating agencies such as the Central Bureau of Investigation needs to be looked into as these agencies had been showing inability in prosecuting powerful people which was a dangerous sign. The case of \textit{Abhinandan Jha v. Dinesh Mishra}\textsuperscript{8} was also referred to by the court to emphasize on the aspect of separation of powers. It was stated that investigation was the domain of the police and the final step in the process of investigation needed to be taken by the police only.\textsuperscript{9} The executive influence in the domain of the police was condemned through reference to this judgment.

The court also took up the case of \textit{K Veeraswami v. Union of India and Ors},\textsuperscript{10} but did not go into a deep analysis of the case. The Court stated that the above mentioned case did not have relevance in the present case as it dealt with the protection of the position of the judges of the High Court and the Supreme Court and thereby dealt with the aspect of independence of judiciary, an aspect that is not relevant to the case at hand. Thus the Court did not accept the contentions relating to this case.

On the basis of the above-mentioned points, the judgment of the \textit{Vineet Narain case} was decided. It is clear from the analysis of the case that the protection for public servants, as had been created from the directive, was struck down, by interpretation of the existing act i.e. the Delhi Special Police Establishment Act, 1946 to that effect, An elaborate discussion on the constitution flaw behind this directive was not done, as was done in the

\begin{itemize}
\item \textsuperscript{7} \textit{Id.}
\item \textsuperscript{8} (1967) 3 S.C.R. 668 (India).
\item \textsuperscript{9} \textit{Id.}
\item \textsuperscript{10} (1991) 3 S.C.R. 189 (India).
\end{itemize}
present case, which would be discussed by me in the later part of my analysis.

Subsequent to the Vineet Narain judgment, an attempt was made to insert section 6-A through the Central Vigilance Commission Ordinance in 1998. But upon the intervention of the court, the ordinance was deleted by promulgation of another ordinance in the same year. Thus from the date of the passing of the Vineet Narain judgment till the insertion of section 6-A in 2003, there was no requirement of seeking of previous approval except for a period of two months.

In 2003, the Central Vigilance Commission Act came into being. A Central Vigilance Commission was constituted as per the act and the commission was given the power to conduct inquiries into offences alleged to have been committed under Prevention of Corruption Act, 1988. Section 26 of the Central Vigilance Commission Act becomes important in this respect as it provides for amendment to the Delhi Special Police Establishment Act, 1946. Clause (c) of section 26 provides for the insertion of section 6-A into the Delhi Special Police Establishment Act, 1946.

As per section 6-A of the Delhi Special Police Establishment Act, 1946, a prior approval of the central government needs to be taken for inquiry or investigation of any offence alleged to have been committed under Prevention of Corruption Act, 1988 by certain classes of officers.\footnote{Delhi Police Establishment Act, No. 25 of 1946, § 6-A, INDIA CODE.} Thus this provision takes back the law to the same position that was prevalent at the time the Single Directive 4.7(3) was applicable to offences committed under Prevention of Corruption Act, 1988.

The constitutional validity of the above-mentioned section, i.e. section 6-A was challenged in the both the writ petitions that had been filed in the Supreme Court as per article 32 of the Constitution of India, 1950.
2. THE JUDGMENT: CRITICAL ASPECTS OF REASONING

a) Section 6-A is arbitrary as per article 14 of the Constitution of India, 1950.

The Supreme Court, in its judgment, laid huge emphasis on article 14 of the Constitution of India. As per article 14, every citizen needs to be ensured equality and equal protection before law. Various case laws were referred to by the court to analyze as to whether section 6-A is outside the purview of article 14 or not.

_Bhudhan Choudhry and Ors. v. State of Bihar_ was one of the cases that were referred to by the court. It was emphasized that the above-mentioned case does not forbid reasonable classification, but for the classification to be reasonable, the following two tests would have to be satisfied:

i. The classification must be founded on reasonable differentia that distinguishes persons or things that are grouped together from others that are left out of the group.

ii. The differentia must also have a rational relation to the object sought to be achieved.

The case of _Ram Krishna Dalmia v. Justice S.R. Tendolkar and Ors_ was also referred to in this light as the above-mentioned principles were emphasized upon in that case too. Moreover the case of _Nagpur Improvement Trust and Anr v. Vithal Rao and Ors_ was also brought into the discussion to emphasize on the fact that the object sought to be achieved

---

12 _INDIA Const._ art. 14.
13 (1955) 1 S.C.R. 1045 (India).
14 _Id._
15 _Id._
16 (1959) S.C.R. 279 (India).
17 (1973) 3 S.C.R. 39 (India).
should be lawful. If the object is discriminatory, then the classification could not be called reasonable classification.

On analysis of the above judgments, the Supreme Court emphasized on the fact that a privileged class of officers above the level of joint secretary and above had been created through section 6-A of the Delhi Special Police Establishment Act, 1946. According to the Supreme Court, the aspect of intelligible differentia had been lacking in this section. A certain level of officers who were working with the central government were given protection as per section 6-A, but the same level of officers who were working with the state government were not given any such protection. Thus the differentiation did not sound intelligible, as officers at both the levels, i.e. the Central and the State, were involved in decision making.

The Supreme Court emphasized on the fact that a differentiation when made, should not be artificial, and two public servants cannot be treated differently just because one of them is senior to the other.

The Supreme Court also tried to link the classification that was made with the object that was sought to be achieved by the Prevention of Corruption Act, 1988. The main objective of the act is to find *prima facie* truth into the allegations of corruption. Section 6-A, as per the Supreme Court, creates a big hindrance in the achievement of this objective by preventing prosecution of certain class of officers without prior sanction. This classification, as per the court, was not fulfilling the task of eliminating the mischief, and helping in achievement of public good.

Hence, since section 6A of the Delhi Police Establishment Act, 1946 could not satisfy the two inherent dimensions of article 14, the court held that it was bad law and could not be sustained.

---

18 Id.
19 Id.
b) *Section 6-A interferes with the investigative powers of the police machinery.*

The Supreme Court laid emphasis on the fact that the the powers of investigation of the police should not and cannot be curtailed by the executive. The Supreme Court in this respect referred to the case of *State of Bihar & Anr. v. J.A.C. Saldanha & Ors.*,\(^{20}\) wherein the Supreme Court had explicitly held that investigation is the domain of the police and there should not be any interference in the process of investigation by the executive.\(^{21}\)

Section 6-A of the Delhi Special Police Establishment Act, 1946 gave sanctioning power to high-ranking bureaucrats for the start of an investigation or inquiry by the Central Bureau of Investigation into an offence under Prevention of Corruption Act, 1988. Thus, it can be inferred that the decision-making authority has been given to the same officials whose misdeeds and illegalities may have to be inquired into. The Supreme Court herein referred to the cases of *Centre for Public Interest Litigation v. Union of India*\(^{22}\) and *Manohar Lal Sharma v. Principal Secretary*,\(^{23}\) wherein the Supreme Court had repeatedly emphasized on the fact that the rule of law needs to be preserved by preventing the CBI from any kind of executive influence.\(^{24}\) Such influence, the court felt, could derail the process of investigation and result in inaction on part of the CBI.

The Court thus found the influence of the executive on the investigative process quite discomforting and felt that this structure of sanctioning goes against the very essence of rule of law.

---

\(^{20}\) (1980) 1 S.C.C. 554 (India).

\(^{21}\) *Id.*

\(^{22}\) (2012) 3 S.C.C. 1 (India).

\(^{23}\) (2014) 2 S.C.C. 532 (India).

\(^{24}\) *Id.*
c) The necessity for eradication of the evil of corruption

An elaborate discussion on the issue of corruption took place during the course of the judgment. The Supreme Court stated that corruption was the biggest menace that the country was facing and efficient policy decisions for tackling corruption were the need of the hour.

The Supreme Court reflected on the case of State of M.P. v. Ram Singh, which emphasized on the fact that a huge sum of public money had always stayed in the hands of public servants and these public servants have always had wide amount of discretion in the usage of this public money. This wide discretion had lured them to the glittering shine of wealth and property. The case of Shobha Suresh Jumanji v. Appellate Tribunal, Forfeited Property and Anr. was also taken note of and the Supreme Court emphasized on the fact that in the mad race to become rich, the moral standards of the people had declined, which had led to the growth of corruption. The Supreme Court also discussed the fact that the case of Sanjiv Kumar v. State of Haryana had brought to the forefront the rampant corruption that was prevalent in the corridors of politics and bureaucracy.

The Supreme Court stated that any policy decision that hinders the prevention of corruption couldn’t be allowed to exist. In this light, the recommendations of the N.N. Vohra committee, which was constituted in 1993, were also discussed. The committee had observed the prevalence of a strong link between criminals and senior government functionaries that was leading to huge corruption in the country.

---

26 Id.
27 Id.
29 Id.
The court emphasized on the fact that section 6-A of the Delhi Special Police Establishment Act, 1946 would act as a barrier in the prevention of corruption that is rampant in government administration. The prior sanctioning power that is given to the government would put the criminal-bureaucratic nexus in a position to block inquiry against a public servant and thus would aid in the continuation of their activities.

Hence the court stated that the said section goes against the very objective for which The Prevention of Corruption Act, 1988 came into existence and thus should be struck down.

Thus the above-mentioned aspects were the major themes on the lines of which the decision in the case was given. From the analysis of the judgment, it becomes amply clear that the major theme throughout the course of the judgment remained article 14, and the arbitrariness that was caused as a result of the section. A long and engaging discussion on the constitutional doctrine of article 14 took place, through which, the protection given under section 6-A was declared unconstitutional.

3. FLAWS IN THE JUDGMENT AND THE UNATTENDED LANDSCAPE

The judgment in this particular case dealt with a subject that was being constantly debated since a long period of time. This judgment would become highly important in terms of the precedent that it would set for the future judgments. Thus the emphasis on the judgment should have been on covering all aspects of law that affects prior sanctioning in case of prosecution of public servants. However the judgment has not dealt with certain crucial aspects that it could have easily covered during the course of its discussion on the prior sanctioning power of the government. The judgment also appears to be shallow in certain aspects, where the Supreme Court could have easily taken a different stand that appears more logical.
Since the facts mostly revolved around prior sanctioning by the government, the court, apart from section 6-A of the Delhi Special Police Establishment Act, 1946, could have also concentrated and cleared its position on section 197 of The Code of Criminal Procedure, 1973. Section 197 creates a bar with respect to prosecution inasmuch as it talks about a prior sanction of the government, while prosecuting officers who cannot be removed without sanction from the government, if the offence was committed while the person was employed in connection with the affairs of the state and while acting or purporting to act in the discharge of his/her official duty.\footnote{CODE CRIM. PROC. § 197.}

Certain cases become important in this respect such as the case of \textit{B. Saha v. M.S. Kochhar};\footnote{A.I.R. 1979 S.C. 1841 (India).} where it was emphasized that any offence committed by a public servant during the discharge of his/her official duties would be covered by this section.\footnote{\textit{Id}.} The case of \textit{Baijnath v. State of Madhya Pradesh}\footnote{A.I.R. 1966 S.C. 220 (India).} reiterated the same principle and held that the acid test for attraction of section 197 of The Code of Criminal Procedure, 1973 is whether the act was done by the virtue of the office of the public servant or not. Further it was also held that this inference would vary with the facts and circumstances of each and every case.\footnote{\textit{Id}.} The inseparability of the act from the official duty was also emphasized in the case of \textit{Centre for Public Interest Litigation v. Union of India}.\footnote{A.I.R. 2005 S.C. 4413 (India).}

Thus two questions arise in the context of section 197 in this particular case:

\begin{enumerate}
\item Whether sanctioning provision as provided in section 197 of The Code of Criminal Procedure, 1973 extents to corruption cases.
\end{enumerate}

It appears to be clear from the reading of the Prevention of Corruption Act, 1988 that a check on frivolous complaints against government officials has already been put in the form of section 19 of The Prevention of Corruption Act, 1988. This section is similar to section 197 of The Code of Criminal Procedure, 1973 and provides for a prior sanction while prosecuting a person who cannot be removed from his/her office without the sanction of the government.\textsuperscript{37} While section 19 of the Prevention of Corruption Act, 1988 only deals with sections 7,10,11,13 and 15 of the Prevention of Corruption Act, 1988,\textsuperscript{38} section 197 deals with any act that is done in discharge of the official duty.\textsuperscript{39} Thus in this context, section 6-A becomes quite redundant. Hence the Supreme Court should have discussed the irrelevance of section 6-A of the Delhi Special Police Establishment Act, 1946 vis-à-vis section 197 of The Code of Criminal Procedure, 1973 and should have made the law clear on that aspect.

The Supreme Court in its judgment did pay emphasis to the fact that a screening mechanism is required to ensure that government servants do not get harassed by frivolous complaints, but it did not make it clear as to what and who could constitute this screening mechanism. In the case of \textit{Vineet Narain v. Union of India}\textsuperscript{40} also, the Supreme Court had emphasized on the fact that in cases where corrupt motive cannot be proved from direct evidence, the help of people who are experts in the same field as the accused need to be taken to ascertain the motive.\textsuperscript{41} It stated that the Central Bureau of Investigation should have people having expertise in analyzing and

\textsuperscript{37} Prevention of Corruption Act, No. 46 of 1988, §19, INDIA CODE.
\textsuperscript{38} Id.
\textsuperscript{39} A.I.R. 1979 S.C. 1841 (India).
\textsuperscript{40} A.I.R. 1998 S.C. 889 (India).
\textsuperscript{41} Id.
ascertaining the motive behind bureaucratic decision-making.\textsuperscript{42} If such an infrastructure is absent, then independent experts of such fields need to be consulted but the final word would be that of the Central Bureau of Investigation.\textsuperscript{43}

Moreover the case of \textit{R.S. Nayak v. A.R. Antulay}\textsuperscript{44} also becomes important in this light as it emphasized on the fact that the authority competent to remove a public servant should be higher in the vertical hierarchy to the person as such authority would only have the information about the nature and work of the public servant and would be able to judge whether the public servant has abused his/her position or not.\textsuperscript{45}

A problematic situation is created in relation to this aspect as a result of the judgment delivered on 6\textsuperscript{th} May 2014, as the only screening mechanism that is now left after the judgment is that of the Central Bureau of Investigation, which does not have the required expertise to screen such complaints. Thus this can result in a huge number of frivolous complaints against the government employees and subsequent harassment. Thus the Court should have taken note of this aspect and should have given the judgment accordingly.

More amount of emphasis should have also been paid on the case of \textit{K Veeraswami v. Union of India and Ors.}\textsuperscript{46} This case was one of the first cases to emphasize on the aspect of requirement of sanctions for prosecution in certain cases but mostly dealt with such sanctioning required for the prosecution of judges. It was clearly held in this case that for prosecution of judges of the High Courts and the Supreme Court, the sanctioning authority would be the President, but the President could only give such sanction after

\textsuperscript{42}Id.
\textsuperscript{43}Id.
\textsuperscript{44}(1984) 2 S.C.R. 495(India).
\textsuperscript{45}Id.
\textsuperscript{46}(1991) 3 S.C.R. 189 (India).
consultation with the Chief Justice of India.\textsuperscript{47} The main reason given for such a stand taken by the Supreme Court was the protection of harassment of constitutional authorities, in this case being the judges, and for the protection of the independence of judiciary, which could be hampered if unabated prosecution power is given to the executive.

There are various sanctioning protections that have been constitutionally available to the judges such as section 77 of the Indian Penal Code, 1860, which prevents prosecution of the judges when the judge is acting judicially in the exercise of any power, which he believes in good faith to have been given to him.\textsuperscript{48} Judiciary, since long, has been seen as a moral and sanctified institution in India. I think it’s time we depart from this notion, especially in light of recent events such as the sexual harassment cases against two prominent judges of the Supreme Court. Moreover, the allegations of corruption and subsequent impeachment proceedings against judges such as Justice Soumitra Sen and Justice P.D. Dinakaran have further diluted the ethical fiber of judiciary.

The Supreme Court had a good opportunity in the present case to analyze the sanctioning criteria in matters relating to the judiciary also, as in my opinion, the excessive protective layer formed around the judiciary needs to be relaxed a bit, while at the same time giving due regard to the independence of judiciary.

The Supreme Court should have also paid attention to the master-servant relationship that was highlighted in the \textit{K Veeraswami case}. As per the contentions that were raised in that case, the relationship between the superior authority and the accused public servant was that of that of master and servant, as the superior authority’s order could not be disobeyed at any cost.\textsuperscript{49}

\textsuperscript{47} Id.

\textsuperscript{48} Pen. Code. § 77.

\textsuperscript{49} Id.
The above-mentioned point becomes quite important in terms of the various pressures, which the bureaucrats face from officers who are superior to them as well as their political masters. Thus, many a time their actions are unintended and due to the irresistible pressure mounted on them by their seniors.

Although at the stage of trial or inquiry, such pressure can be taken note of, there needs to be appropriate changes in laws so that explicit provisions can be made for the protection of government officers against such pressures.

Although the judgment elaborately elucidates on an important and contentious point of law, certain changes in its scope and ambit along with the fixation of certain anomalies could have made it better and could have given more clarity to the stand of the constitutional bench.