

Chapter 1

Introduction – Rationale and Role of the Prosecution

In independent India, it goes without saying that the criminal justice system (hereafter CJS) must function within the framework of the principles enunciated by the Constitution. Broadly speaking, these are as follows:

- The guarantee of equality before the law
- Equal protection of the laws
- Prohibition of discrimination imposed upon the State
- Deprivation of life /personal liberty only in accordance with procedure established by law
- Presumption of innocence of the accused
- The requirement of proof beyond reasonable doubt
- The right of the accused to remain silent
- Arrest and detention in accordance with law and judicial guidelines
- Protection against double jeopardy
- Non-retrospective punishment

No appraisal of the criminal justice system can suggest derogation from these principles. Rather, it is these very principles that are the indicators on the basis of which any evaluation of the criminal justice system may be made. The independence of the judicial system is a key element of the basic structure of Indian constitutional democracy via the separation of powers between the Legislature, Executive and Judiciary. Over the last fifty years there has been much debate and discussion on the independence of the Indian judicial system, with varying opinions depending upon the political, social and economic location of the discussants.

This report examines and probes one specific component of the CJS, viz. the office of the Public Prosecutor in India. It questions whether the above-mentioned constitutional principles and guarantees translate into reality during the course of criminal proceedings in an Indian court.

1.1 The Rationale of Public Prosecution

The underlying principle governing the CJS is that all crime (offences which have been codified as such in statutes) committed by an individual or groups against others are deemed to have been committed against society. Consequently the State takes action to prosecute the accused on behalf of, and in the interest of society. The Supreme Court has discussed this thus; “Barring a few exceptions, in criminal matters the party who is treated as aggrieved party is the State which is the custodian of the social interests of the community at large and so it is for the State to take all steps necessary for bringing the person who has acted against the social interests of the community to book.”¹

The rationale behind the State undertaking prosecutions appears to be that no private person uses the legal apparatus to wreak private vengeance on anyone. The same was also noted by the Supreme Court in too noted in *Thakur Ram vs. State of Bihar*.² The State arrogating to itself the task of prosecuting the offender is thus viewed as a progression towards a more modern and civilized society where members do not indulge in private feuds to settle scores.

In the CJS this role is performed by the Public Prosecutor on behalf of the State. Section 225 of the Criminal Procedure Code (hereafter Cr.P.C) provides that in every trial before a Court of Session the prosecution shall be conducted by a Public Prosecutor. Section 226 Cr.P.C provides that a trial shall commence with the Prosecutor describing the charge/s against the accused. The other statutory

¹ *Thakur Ram vs. State of Bihar* AIR 1996 SC 911

² *Ibid.*

role performed by the prosecutor at different stages in the trial are detailed in the accompanying box – ‘stages of a criminal trial’. The discharge of these legal obligations has been the subject of several judicial interpretations and a catena of judgments outline not only the distinct and unique position of the prosecutor but also the manner in which s/he must discharge this role in a criminal trial.

The challenge before the Public Prosecutor is to maintain impartiality and neutrality while prosecuting *any and all* persons facing criminal prosecution. The assumption here is that the State is committed to safeguarding and promoting the interests and rights of *all* constituents of society. This premise ignores the segregated and hierarchical nature of Indian society. The bland notion of the State as a completely neutral instrument of a consensual popular will, upholding 'national interest' raises several issues. One is the tendency of state institutions and personnel to coagulate and emerge as an interest in themselves. The phenomenon of corruption is symptomatic of this tendency, especially if we define corruption broadly as manifest not merely in financial defalcation, but also in the perversion from fidelity of state institutions. The question of equal access to justice by aggrieved citizens, regardless of their social and financial status is another. Furthermore, when entrenched interests within the State feel threatened, perverse motives can influence the decisions and procedures of the CJS. 'National' and 'social' ideals may be cited in order to quell protest and criticism, and the instruments meant to protect citizens may become the instruments of oppression. This is why the ideal of separation of powers, and the autonomy of the judicial system is crucial to the very legitimacy of the State.

The character of the State does not remain static. Over the last 20 years political and economic forces (internal and external) have dramatically altered and refashioned the Indian State and the CJS. It is at this historical juncture that there is need to examine and review the working of the office of the Public Prosecutor.

STAGES OF A CRIMINAL TRIAL

1. **Registration of FIR**
2. **Commencement of investigation** and collection of evidence by investigating agency. During this time, at any stage decided by investigating agency, accused persons can be arrested.
3. **Production of accused** before Magistrate (within 24 hours)
 - Remanded to police custody for further investigation; or
 - Remanded to judicial custody.
4. **Bail hearing** before appropriate court – Arguments of the defence are rebutted by the public prosecutor.
5. **After investigation** is completed:
 - If investigating agency feels prima facie case is made out, chargesheet is filed in Court through public prosecutor.
 - If police feels that no prima facie case is made out, final report filed in Court.
6. **Decision is taken by the Court** after hearing the public prosecutor and the counsel for defence:
On question of Charge:
 - Court can reject chargesheet, in which case the accused is discharged.
 - Court can accept that a prima facie case is made out, frame the charges, and post the case for trial. Case goes to next stage (7).
On Final Report:
 - Court can accept the final report- case is closed and accused is discharged.
 - Court can reject the final report, and:
 - direct the police to further investigate the case. Case goes back to Stage 2.
 - Direct the case be posted for trial. Case goes to next stage (7).
7. **Framing of Charge by Court**
 - Accused pleads guilty to the Charge. Depending on the seriousness of the crime, the Court may either convict on the basis of plea or post the case for trial.
 - Accused pleads not guilty. Case is posted for trial.
8. **Trial commences** – examination of witnesses and other evidence
 - examination of prosecution witnesses by public prosecutor, marking of exhibits, and cross examination by defence counsel.
9. **Statement of Accused** under section 313, Cr.P.C
10. **Defence Evidence:** if defence wants to, it examines defence witnesses, who are cross examined by the public prosecutor, and exhibits defence evidence.
11. **Final Arguments** – Public Prosecutor and the defence counsel present their arguments.
12. **Judgment** and sentence by the Court:
 - (i) Acquittal of accused, or
 - (ii) Conviction, in which case:
 - arguments of public prosecutor and defence counsel on sentence.
 - Judgment of Court passing sentence.
11. **Appeal** (within specified period of limitation) - Can be filed by party aggrieved by judgment on acquittal/ conviction/ reduction of sentence.
12. On notice being issued to the opposite parties, **arguments** are placed before Appeal court of defence counsel and the public prosecutor.
13. **Judgment** of Appeal Court.
Note:
 - a. At any stage during the trial either party can also file a Revision Petition challenging an interim order of the Trial Court, or a procedure adopted by it.
 - b. Either party can also file petitions under section 482, Cr.P.C (inherent powers of the High Court)

In any of these situations, the Appeal Court can direct a stay of the trial proceedings.

1.2 Role of Public Prosecution in India

The Public Prosecutor has been described as a Minister of Justice who plays a critical role in maintaining purity and impartiality in the field of administration of criminal justice.³ As far back as 1928 the Patna High Court observed; “the purpose of a criminal trial is not to support at all costs a theory but to investigate the offence and to determine the fault or innocence of the accused and the duty of the Public Prosecutor is to represent not the police but the Crown and his duty should be discharged by him fairly and fearlessly and with full sense of responsibility that attaches to his position.”⁴

In the same vein, a Division Bench of the Oudh Chief Court examining an appeal in a murder case, recorded its strong disapproval of the conduct of the government pleader who prosecuted the case at the trial court and failed to bring material evidence on record. The court observed: “His duty as a public prosecutor is not merely to secure the conviction of the accused at all costs but to place before the Court whatever evidence is in the possession of the prosecution, whether it be in favour of or against the accused and to leave the court to decide upon all such evidence, whether the accused had or had not committed the offence with which he stood charged.”⁵

The Rangoon High Court too held that it is the duty of the prosecutor to prosecute and not to persecute the accused. The Court noted that the prosecutor had the responsibility to ensure that the Judge did not unwittingly rely upon the evidence of a witness who, to the prosecutor’s knowledge has made a contradictory statement – even if this meant that the prosecutor had to advise the accused to seek the police record. The clear duty of the Public Prosecutor to remain impartial has been similarly reiterated on several occasions.

³ *Jitendra Kumar@ Aju vs. State (NCT of Delhi)* CrI. W.P. 216/99, Delhi High Court.

⁴ *Kunja Subidhi and anr. vs. Emperor* 30 Cr.L.J 1929

⁵ *Ghirro and ors. vs. Emperor* 34 Cr.L.J.1933

There is no uniformity in India with respect to the occupant of the office of Public Prosecutor. Law and Justice being a state subject, the position varies from state to state. Despite explicit legislative mandate and judicial pronouncements, in many states the Police exert control over prosecution. In others, police officers are themselves Directors of Prosecution. This does not just blur, but collapses the boundaries between investigation and prosecution. Refuge is taken in arguments of administrative efficacy and coordination, but as this report shows, such moves strike at the very notion of an impartial prosecution and render the varied constitutional guarantees meaningless. Efficacy and administration cannot be allowed to subvert constitutional safeguards and standards.

1.3 The need for change

The last two decades have seen communal and fascist entities gain large support. Often their respective agendas contravene the avowed goals of the Indian Constitution. These forces repeatedly assert the interests of caste and communal elites. The imperatives of fair trial and justice demand that the prosecution be insulated from such regimes and interests. Similarly the dictates of globalization and structural adjustment are propelling a transition within State policy from general welfare to the facilitation of finance capital and private business. This requires the legal system to respond in a particular manner. In circumstances wherein public interest and the public good are being redefined, it is unlikely that the Prosecutors office will remain unaffected. Outside these developments, other pressures such as patriarchal prejudices and caste/class biases impinge upon the functioning of the State and its agencies.

These questions assume greater significance in situations where those arraigned for trial are functionaries and agents of the State itself. Evidences related to the 1984 anti Sikh massacre in Delhi, the 1992 anti-Muslim violence in Mumbai and the 2002 state-sponsored genocide in Gujarat have all convincingly named and shown public servants in the role of perpetrators, conspirators and abettors in

serious crimes including murder, rape and arson. Can a Public Prosecutor functioning within the present system discharge the onerous burden of bringing such persons to book? Does this not make the case for greater autonomy for the prosecution to enable it to act freely and outside the executive?

This report examines institutional and statutory checks and balances in the present legal system that enable the prosecutor to function independently uninfluenced by politics. The adequacy of these checks and the need for increased autonomy are key concerns of the report. This Report also looks at the pathetic state of infrastructure and facilities available to Public Prosecutors. It is paradoxical that although the rhetoric of a 'hard' state is propounded by parties of all hues, not even rudimentary facilities are provided to Public Prosecutors, entrusted with the task of ensuring that the guilty are brought to book.

It is clear that the office of the Public Prosecutor needs more attention and more autonomy to ensure greater success. However, success cannot be measured in numbers of convictions. All too often the rate of convictions becomes the sole indicator of the health of the Indian CJS. Concerns about its condition are valid, but the prognosis and diagnosis has to be accurate to avoid further deterioration.

The *Malimath Committee Report* (2003) correctly acknowledged that there is a crisis in the Indian CJS. But its analysis of the crisis is disturbing. Rather than focusing on key issues that plague the CJS, the Committee recommended changes that amounted to a complete departure from jurisprudential norms. It cannot be overemphasized that the health of the criminal justice system cannot be gauged from statistics of convictions or death sentences. Such analysis is not only faulty and misleading but also often contrary to legal and constitutional safeguards, with dangerous implications for citizens. This report is a starting point of a fresh debate on what ails India's prosecution mechanisms and why the office of the Public Prosecutor needs greater autonomy.

Chapter 2

An Overview of the Prosecution System in India

2.1 The Present law governing appointment of Public Prosecutors

Since 1974, the Cr.P.C has regulated the appointment of prosecutors. Section 2 (u) defines a Public Prosecutor as “any person appointed under section 24 and includes any person acting under the direction of a Public Prosecutor”. Sections 24 and 25 of the Cr.P.C describe the fundamental principles for appointment of Public Prosecutors, including Additional Public Prosecutors and Assistant Public Prosecutors, both at the High Courts and at the subordinate courts.

At the High Courts the appointing authority is the central government or the state government. However consultation with the High Court is a preliminary requirement. At the Sessions Court the appointing authority for Public Prosecutor and Additional Public Prosecutors is the state government.

Two alternative methods of appointment are provided. Either the District Magistrate, in consultation with the Sessions Judge prepares a panel of names of eligible persons. The state government must choose from this list, there being an embargo on appointment of persons whose names are not included in this panel. Alternatively, a regular cadre of prosecuting officers for the

Key Reports which considered the Prosecution System

1958: Law Commission of India 14th Report: Reform of Judicial Administration (Ministry of Law, Government of India)

1969: Law Commission of India 41st report: on the Code of Criminal Procedure, 1898

1980: Fourth Police Commission Report

1996: Law Commission of India, 154th report on the Code of Criminal Procedure, 1973

2000: *Functioning of Prosecution Department in Delhi* by Jagmohan and P.S. Bawa, Home Department, Government of NCT Delhi.

2003: Committee on Reforms of Criminal Justice System (Malimath Committee), Ministry of Home Affairs, Government of India.

state is created. Where such a cadre exists, the state government is under an obligation to appoint prosecuting officers only from this cadre. Only if no suitable person is found, can a person from outside the cadre be appointed, and then only from the panel prepared by the District Magistrate referred to above. The central government also has power to appoint Public Prosecutors for conducting a case or a class of cases.

The Cr.P.C also lays down minimum eligibility criteria for Public Prosecutors and Additional Public Prosecutors at the High Courts and District Courts – the person should have been in practice as an advocate for not less than seven years. This would include the time spent working as a pleader, or as a Public Prosecutor or Additional Public Prosecutor.

At the Magistrates Courts, the appointing authority for Assistant Public Prosecutors is the state government which makes general appointments for the district. However once again the central government also has the power to appoint Assistant Public Prosecutors for the prosecution of a case or a class of cases. No eligibility criteria for appointment in terms of legal qualification or age limit is provided, except that they shall not be police officers. In exceptional cases, where no Assistant Public Prosecutor is available for a particular case, the District Magistrate can appoint any person as an Assistant Public Prosecutor for that particular case, which could also be a police officer as long as he has not taken part in the investigation of that case and is of the rank of Inspector or above. Thus the basic principle of separation of roles – the distinction between the investigation and prosecution has been maintained.

As will be seen later on this report, these skeletal provisions set out some of the basic non-negotiables insofar as appointment of prosecutors is concerned. Gaps have often been filled by judicial interpretation and courts have deprecated any kind of deviation from the norms of appointment.

2.2 Legal position regarding appointment of prosecutors

Based on the recognition that prosecutors are important players in the functioning of the criminal justice system, the Courts have taken the view that making appointments on the basis of considerations other than the suitability of a person amounts to abuse of discretionary power by the appointing authority and is a violation of Articles 14 and 16.⁶

In *State of Uttar Pradesh v. Johri Mal*, the Supreme Court observed that the appointment of a Public Prosecutor is governed solely by the Cr.P.C and/or the executive instructions framed by the State governing the terms of their appointment.⁷

Appointment of women prosecutors

There is no provision in the present system relating to appointment of women prosecutors though the Malimath Committee (2003) recommended “sufficient representation” for women. The appointment of women prosecutors was completely ignored until the Law Commission in its 154th report made a passing observation that a sufficient number of women Public Prosecutors and Assistant Public Prosecutors need to be appointed. The primary motivation for this suggestion however was not gender-equity but the need for more effective action in cases involving women who are under 18 years of age and those involving violence against women. While this study has been unable to determine the number of women prosecutors in the states, it is clear that there are very few women prosecutors at all levels. The post of the Standing Counsel (Criminal) at the Delhi High Court however is currently occupied by a woman lawyer.

The Courts have also consistently held that the office of the Public Prosecutor is a public office and thus appointments to this office are subject to judicial scrutiny. This was explained by the Madras High Court in a writ petition challenging the appointment of an advocate who was not eligible under law as Public Prosecutor.⁸ The High Court held that the post of a public prosecutor is a public

⁶ At the same time, the Courts have been quite clear that a prosecutor cannot be assumed to be biased just because he belongs to a particular political party or is of a political persuasion, since such an assumption would “seriously offend the dignity of the Bar as such”. *P.G. Narayanankutty vs. State of Kerala* 1982 CrLJ 2085

⁷ (2004) 4 SCC 714

⁸ *A. Mohambaram vs. M.A. Jayavelu and ors* AIR 1970 Mad 63

office, and in fact a public office of considerable significance⁹. The Criminal Procedure Code provides the Public Prosecutor with an important role to play in the criminal justice system, and he is not just an advocate engaged by the state to conduct its prosecutions. Further, the Rules governing the appointment of Public Prosecutors are made under constitutional powers and have statutory force, being enacted under the powers vested in the High Court under Article 227(2)(b) to make Rules for regulating the practice and proceedings of the subordinate courts, as well as Article 309 under which the legislature frames Rules governing the recruitment and conditions of service of persons appointed to public services. If the Rules have statutory force and there has been a violation of the Rule, the appointment has to be quashed.

Thus the provisions of the Code as well as the Rules framed by the government with regard to eligibility and mode of appointment of Public Prosecutors have to be strictly complied with. In cases where the said Rules have been circumvented or ignored, the Courts have been quick to strike down the appointments.¹⁰

Similarly, whenever Rules have called for consultation between two or more authorities for the purpose of selection of candidates for the posts of Public Prosecutors, the Courts have been firm that the consultation must be real and substantial, not just a formal exercise.¹¹ The Supreme Court has clarified the position in *Harpal Singh Chauhan and ors vs. State of UP*.¹² The court was of the view that the District Magistrate in this case, instead of having an effective

⁹ See also *Rajendra Shankar Tripathi vs. State of U.P. and ors* 1979 CrLJ 243 (Allahabad); *Mukul Dalal vs UOI* (1988) 3 SCC 144; *Kumari Shrilekha Vidyarthi etc. vs. State of UP* AIR 1991 Supreme Court 537. However, in a rather peculiar decision in *Rabindra Kumar Nayak vs. Collector, Mayurbhanj, Orissa and ors*, (1999) 2 SCC 627, the Orissa High Court held the office of the Assistant Public Prosecutor under the Orissa Law Officers Rules, 1971 to be an "office of profit". As a result, the election of an advocate as member/ chairman of the Panchayat Samiti was held to be invalid due to the bar in the Orissa Panchayat Samiti Act, 1959, against persons who are holding an "office of profit" under government from contesting panchayat elections.

¹⁰ See for instance *Superintendent and Remembrancer of Legal Affairs, West Bengal vs. Prafulla Majhi* 1977 CrLJ 853. (Calcutta)

¹¹ *Ibid*. In this case the Registrar of the High court had given his approval of a draft notification appointing the PP of the High Court without consulting the Chief Justice or the Full Court. This was held as not satisfying the requirements of 'consultation' in the Code.

¹² AIR 1993 Supreme Court 2436

and real consultation with the District & Sessions Judge, “simply made some vague and general comments against the appellants”. In the Court’s view this did not amount to consultation as required by Section 24 Cr.P.C.

2.3 State Rules relating to prosecutors and directorate of prosecutions

Though the Law Commission in 1958 had recommended the setting up of Director of prosecutions with its own cadre, this recommendation was not included in the Cr.P.C. In 1980 the National Police Commission suggested a new set up for the Prosecuting Agency based on similar lines.¹³

Again in 1996, the Law Commission under the chairmanship of Justice K. Jayachandra Reddy in its 154th report identified an “Independent Prosecuting Agency” as one of the several areas within the Cr.P.C which required ‘redesigning and restructuring’.¹⁴ The Law Commission supported most of the proposed amendments to the Code as contained in the proposed *Code of Criminal Procedure Amendment Bill, 1994*.¹⁵ Recommendations related to the structure of a Directorate of Prosecutions at the State level, to be adopted by a state government in the event it decided to set up a cadre of prosecutors. The Law Commission further recommended that the structure of state level Directorates of Prosecution be given statutory status through an amendment to the Cr.P.C.

The absence of such a requirement and the inadequacy of the provisions in the Cr.P.C led to a number of states adopting their own mechanisms for structure

¹³ According to the National Police Commission, the Public Prosecutor would be the administrative and supervisory head at the district level, Deputy Directors of Prosecution at the regional or district level and a Director of Prosecution at the state level. It was also proposed that posts of Asst. Public Prosecutors, Additional Public Prosecutors and Public Prosecutors be designed as a cadre provide a regular career structure for the entire state as one unit.

¹⁴ Law Commission of India, 154th report on the Code of Criminal Procedure, 1973, Vol. I (1996) at pg 3.

¹⁵ In May 1994 the Government of India introduced the Code of Criminal Procedure Amendment Bill, 1994, in the Rajya Sabha which, among other things, proposed major amendments in sections 24 and 25. The Bill was sent to a Parliamentary Standing Committee and was later examined in detail by the 154th Law Commission.

and functioning of prosecution agencies often through the enactment of Rules or Guidelines. Unfortunately this has meant that there is no consistent organisation of the prosecution agencies in the various states of India (See Table 1). Thus while certain states have adopted the system of Directorate of Prosecution (DOP), others have not. Furthermore as can be seen in table 1, there is no consistency in what is covered by the DOP.

Table 1 – Organisation of prosecution agencies in different states in India¹⁶

States where no Directorate of Prosecution (DOP) has been established	Arunachal Pradesh, Gujarat, Mizoram
States where a DOP/ prosecution agency has been established	Andhra Pradesh, Bihar, Delhi, Goa, Himachal Pradesh, Karnataka, Kerala, Madhya Pradesh, Orissa, Tamil Nadu, Uttaranchal
States where the DOP extends only upto the Magistrates Courts (and where the Sessions Courts and High Court have prosecutors on tenure posts)	Andhra Pradesh, Kerala, Madhya Pradesh, Tamil Nadu, Uttar Pradesh, Uttaranchal
States where the DOP extends to the Sessions Courts (and where the High Court has prosecutors on tenure posts)	Delhi, Himachal Pradesh, Karnataka, Orissa
States where the DOP covers the High Court, the Sessions Courts and the Magistrate's Courts	Goa

The Malimath Committee, constituted by the (then) National Democratic Alliance government to suggest reform of the CJS, also suggested that every state should create the post of a Director of Prosecution. However the Malimath Committee recommended that the director be a police officer of the rank of Director General of Police and that Assistant Public Prosecutors and Prosecutors other than State

¹⁶ The table is illustrative and not exhaustive. For more details see Annexure B.

Public Prosecutors in the High Court be under his administrative and disciplinary control.¹⁷

The issue of autonomy and independence of the prosecutor remains vital for all of the varied systems in place presently. The question of autonomy becomes further crucial because in certain states the prosecution agency (DOP or otherwise) is administered directly by the police while in others it is the Home Department of the Government. (See Table 2 for details.)

Table 2 – Departments administering DOP/prosecution in various states

States where the prosecutors function directly under the police	Arunachal Pradesh, Mizoram
States where the DOP is headed by a Police Officer	Andhra Pradesh, Tamil Nadu and Uttar Pradesh
States where the DOP/ prosecution agency comes under the Home Department	Andhra Pradesh, Bihar, Delhi, Himachal Pradesh, Orissa, Rajasthan, Tamil Nadu, Uttar Pradesh, Uttaranchal
States where the DOP/ prosecution agency comes under the Law Department	Goa and Karnataka

¹⁷ Committee on Reforms of Criminal Justice System, Government of India, Ministry of Home Affairs (March 2003). Other recommendations of the Malimath Report on the prosecution system include:

- Appointments of Assistant Public Prosecutors should be only through competitive examinations held by the Public Service Commission of the state.
- As far as appointments of Public Prosecutors and Additional Public Prosecutors at the district level are concerned 50% should be appointed through selection and promotion on the basis of seniority-cum-merit from the Assistant Public Prosecutors. The remaining 50% should be filled by selection from a panel prepared in consultation with the District Magistrate and District Judges. Such persons would not hold office for more than three years.
- Assistant Public Prosecutors and Public Prosecutors will not be posted in their home district or where they were practicing.
- Assistant Public Prosecutors be given intensive training, both theoretical and practical, at the time of appointment, and also in-service training to all Prosecutors.
- Promotional avenues be created for prosecutors in institutions for training of Prosecutors and Police Officers.

2.4 Special Public Prosecutor

Section 25(8) of the Cr.P.C provides, “The Central Government or the State Government may appoint, for the purpose of any case or class of cases, a person who has been in practice as an advocate for not less than ten years as a Special Public Prosecutor.” Provisions requiring the appointment of Special Public Prosecutors are also found in the Scheduled Castes and Schedule Tribes (Prevention of Atrocities) Act, 1989 and a number of other specific legislations.

This brief provision has been the starting point for a slew of judicial decisions over the years. The Courts have repeatedly pointed out that the Special Public Prosecutor’s role is no different from that of a prosecutor appointed in the normal course, and his duties remain quite the same. Thus like any other prosecutor, he is duty bound to assist the court to arrive at the truth rather than to obtain a conviction at all costs, and to draw the attention of the court to all points which might favour the accused even if the defence counsel fails to do so.¹⁸

Similarly the appointment of the Special Public Prosecutor (SPP) must be in strict compliance with section 25(8) Cr.P.C as well as the existing State Rules, if any. The Courts have been careful to hold that appointments which do not strictly comply with the provisions of the Code and the Rules are invalid.¹⁹ In *R.N. Tiwari vs. State of Madhya Pradesh*, the MP High Court quashed the appointment of a SPP made by the District Magistrate holding that according to section 24(8) the appointment is to be made by the state government and no notification was shown where this power had been delegated to the District Magistrate by the state government.²⁰

¹⁸ *K.V. Ramaiah vs. Special Public Prosecutor* 1961 (1) CrLJ 601

¹⁹ *Mallikarjuna Sharma and ors. vs. State of A.P.*, 1978 CrLJ 1354 (AP)

²⁰ 1990 CrLJ 2468

SPPs and Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989

Despite constitutional protection and other legislation, continuing discrimination and increased physical violence against members of Scheduled Castes and Scheduled Tribes led to the promulgation of the Scheduled Caste/ Scheduled Tribe (Prevention of Atrocities) Act, 1989. Like the previous Protection of Civil Rights Act, 1955 the 1989 Act sets up a special court for prosecution of cases under the act and requires the appointment of Special Public Prosecutors (Section 15).

The implementation of the 1989 act however has been patchy. The seventh report of the Ministry of Social Justice and Empowerment (2000) recorded a conviction rate of only 11.04% of the disposed cases while 88.96% of cases ended in acquittal. This low rate is further worrying given clear indications of under reporting and under recording of complaints by the Police under the SC/ST act.

In its 2004 report on Prevention of Atrocities against Scheduled Castes, the National Human Rights Commission noted that the failure of the State to prevent violence and punish perpetrators “can be attributed to the attitude and behaviour pattern of its agents which has been described as apathy at best and connivance at worst.” The NHRC also lambasted the Public Prosecutors who “help the accused by not carrying out scrutiny of papers before putting up *challan* in the court, not presenting the case of prosecution properly, concealing material facts from the court, pressurising the victim to compromise, colluding with the defence lawyer to spoil the case.” In another research report on the implementation of the 1989 Act in Gujarat State (2004), the Council for Social Justice studied 400 judgements in 18 districts. CSJ found that in 95% of the cases, acquittal was due to negligence on the part of the police officials and hostile role played by the government pleaders. The study was critical of the manner in which the accused were acquitted merely on the ground that the public prosecutors did not ask questions to establish that the atrocities were caste related. The CSJ study also records instances of SPP in Patan District arguing that certain provisions of the Act and rules requiring investigation by senior police officers were directions and not mandatory, despite the clarity of the Act. This has also been noted by a number of judgements by the special court in Patan district. Another report by the Woodrow Wilson School of Public and International Affairs at Princeton University, USA, focussing on SC women in Andhra Pradesh, found that non SC prosecutors (and judges) also exhibited biases against SC women suggesting that they could be “used and thrown”.

The National Commission for SCs and STs (NCSCST) has carried out a study on the status of implementation of 1989 Act in Uttar Pradesh and Madhya Pradesh. The MP study found that contradictions in the statements of complainants and witnesses were common since no proper scrutiny of cases was being done by the prosecution before putting the *challans* in the court. The same study found that the Special Public Prosecutors appointed to handle such cases were of very poor competence and experience, the reason for which was meagre amount of remuneration. Furthermore the absence of facilities created frustration amongst the prosecutors.

Subsequently in its Fifth Report (1998-1999), the NCSCST made special recommendations for implementation of the Act including strengthening of the Directorate of Prosecution for effective supervision, selection of competent and committed Special Prosecutors and also that the Special Public Prosecutors to be paid on a higher scale than the panel advocate. The report also suggested that another step to strengthen the institution of SPP would be to appoint Astd. Public Prosecutors (APP) as the SPP to deal with the atrocity cases in the Special Courts. The Sixth Report (1999-2000 and 2000-2001) further observed that in most States the appointment of Special Prosecutors was influenced by political considerations. In this respect the Sakshi Human Rights Monitor (2000) has demanded that special public prosecutors with proven human rights records should be appointed. The NHRC report agreeing with the increase of remuneration and selection of SPPs on the basis of competence and commitment, has further suggested that the NHRC itself should lay down norms for such selection to improve the level of motivation and performance.

A more contentious issue has been the appointment of counsel engaged by the complainant/victims as SPP. A connected issue is whether these SPPs should be remunerated by the complainant – either directly or indirectly. In *P.G. Narayanankutty vs. State of Kerala* the government sought the complainant's opinion on the choice of person to be appointed and on his suggestion appointed a leading member of the bar as SPP.²¹ However the government had agreed to allow the SPP to be paid by a private individual. The High Court held that whenever the government felt the need to appoint a SPP in a case or class of cases, it must not only appoint the SPP but also bear the financial burden involved. Thus the Court observed,

“Special Public Prosecutor could be appointed only when public interest demands it and not to vindicate the grievances of a private person, such as close relation of the deceased. In order that he discharges his duties properly... he should look to the State for remuneration for his services. If he looks to a private party for his remuneration, his capacity and ability to perform his role as a Public Prosecutor properly will be endangered. Government cannot appoint Special Public Prosecutor on such terms, abdicating their financial responsibility or directing him to receive his remuneration from any private individual or expecting him to work without remuneration.”

A contrary view was taken by the Bombay High Court in *Vijay Valia etc. vs. State of Maharashtra etc.*²² In Maharashtra there was a specific provision in the Rules requiring the complainant to pay the remuneration of the SPP in cases where the appointment has been made at his instance. This provision was held to be valid by the Court. Furthermore the key ground for challenging the appointment of the SPP in this case was that since he was appointed at the instance of the complainant and paid by him, he is bound to act to the prejudice of the accused. The Court disagreed with this contention finding that at each stage of the trial

²¹ 1982 CrLJ 2085 (Kerala High Court)

²² 1986 CrLJ 2093 (Bombay High Court)

when the prosecutor exercises decision-making powers there are rules and guidelines as well as the general supervisory role of the Court itself to ensure that the SPP takes these decisions responsibly and without bias. The SPP does not have untrammelled power. The Court thus held,

“we are unable to accept the theory that where SPPs are appointed whether paid by the State or the private party, the prosecution and the trial must be presumed to be biased, partial or unfair... [I]t is not possible for us to agree that a pleader engaged by a private person is a de facto complainant and cannot be expected to be as impartial as a pleader appointed by the state to conduct public prosecution. On the other hand, we are of the view, that as stated earlier, permission to engage an advocate should be given freely to the complainant. The complainant has as much a right as the accused to represent his case effectively before the court.”

The Delhi High Court found itself unable to resolve this issue to its satisfaction when confronted with a similar situation in *Ajay Kumar v. State and anr.*²³ The accused had filed a petition questioning the validity and propriety of appointment of the advocate of an aggrieved party as SPP. A senior criminal lawyer had been retained at the outset by the aggrieved family and received full remuneration, and was later appointed as SPP by the Delhi government at a professional fee of Re. 1. The High Court explored the concept of fair trial and also examined the position of a Public Prosecutor in the criminal justice system in relation to the position of a counsel appearing for private parties. In the end the Court found that the appointment of the said lawyer as SPP could not be voided on any ground. However the Court expressed its anguish:

“this conclusion should not be taken to mean either this court’s approval of the policy underlying the appointment or even of the propriety of it, or to preclude the court, now seized of the trial, or any court which may eventually deal with the matter, on the conclusion of

²³ 1986 CrLJ 932 (Delhi High Court)

the trial, to consider the question if the conduct of the trial by the SPP, who had been retained and paid by the aggrieved party, caused such prejudice to the accused at the trial as may be capable of vitiating it.”

The Court observed that this practice smacked of abdication of its obligation by the administration. According to the Court, this impropriety had been compounded by the administration by asking the said SPP to defend the validity of his own appointment before the High Court as well. The Court expressed its view that some legislative thought was required on this subject.

While no legislative thought on the subject has been forthcoming, the Supreme Court attempted to settle this vexing issue to some extent in *Mukul Dalal and ors. v. Union of India*.²⁴ Overruling the decision of the Bombay High Court in *Vijay Valia*, the Supreme Court held that the appointment of an SPP cannot be made on mere asking by the complainant. The application has to be examined by the concerned authority on the basis of existing guidelines. The Supreme Court also held that normally the remuneration should be paid by the state and only in exceptional circumstances should the fee be paid by the private party. In such cases, the Court directed that the fee should be paid in advance and deposited with a state agency from which the SPP would collect the fee.

While this judgment has effectively settled the legal position on the issue of remuneration of SPPs, the appointment of complainant’s counsel to this position remains unclear with different High Courts following diametrically opposite paths. The Kerala High Court has taken the view that having appeared for the complainant in the civil proceeding does not in any way disqualify an advocate professionally from appearing in the criminal proceeding as a prosecutor, since the court expected the SPP to “act truthfully and fairly, and at the same time,

²⁴ (1988) 3 SCC 144

advocate the cause for which he is engaged to the very best of his ability.”²⁵ Again, in *R. Balakrishnan Pillai vs. State of Kerala* the same High Court opined that the accused cannot challenge the appointment of a particular person on the ground of his being biased against the accused.²⁶

The Delhi High Court on the other hand has adopted a different position. In *Jitendra Kumar @ Aju vs. State (NCT of Delhi)* the Court found that the fact that the SPP had been earlier engaged as a counsel for the complainant could impair his ability to perform his prosecutorial functions.²⁷ The Court stated that the SPP in his role as prosecutor was an officer of the court and expected to assist the court to unravel the truth and to act fairly and impartially. After this judgment, the normal practice in Delhi has been to discourage the practice of complainants’ counsel being appointed as SPPs.²⁸ The judgement of the Supreme Court in the Best Bakery case however allowed increased participation of the complainant in the appointment of the SPP.²⁹ Here the Court noted, “though the witnesses or the victims do not have any choice in the normal course to have a say in the appointment of a Public Prosecutor, in view of the unusual factors noticed in this case, to accord liberties to the complainants’ party, would be appropriate.” The Supreme Court thus directed the State Government to appoint another Public Prosecutor and allowed the complainant to suggest any name which would be taken into account in making the appointment.

Prosecutors and defence counsels interviewed in Delhi displayed a considerable amount of resentment against the appointment of SPP. Prosecutors were of the

²⁵ *Azeez vs. State of Kerala*, 1984 CrLJ 1059. In this case the SPP appointed in the trial of a Motor Accident case, had appeared for the complainant in the civil proceeding for compensation before the motor Accidents Claims Tribunal in the same incident.

²⁶ 1999 CrLJ 1286 (Kerala)

²⁷ Criminal Writ Petition no. 216 of 1999, Delhi High Court. Here the accused sought quashing of the notification appointing as SPP an advocate who had appeared for a relative of the deceased in another proceeding related to the same incident. The Court struck down the notification appointing the SPP in that case.

²⁸ This has been reiterated by the Delhi High Court in *Vijay Kumar Gupta vs. State and Ors*, CrI W.P no. 1236/ 99.

²⁹ *Zahira Habibulla H Shiekh and another vs. State of Gujarat and Others*, 2004 SCC (Cri) 999, para 76.

view that SPPs were appointed in cases which are politically sensitive or difficult. They noted that SPPs are appointed in order to ensure a competent and able prosecution in cases where senior defence lawyers of standing are appearing for the accused. Both prosecutors and defence lawyers were of the view that there would be no need to appoint SPPs if competent prosecutors were available in the ordinary course. Many argued that such competent prosecutors were in fact available and if prosecutors were given proper facilities, training as well as incentives, the need for appointing SPPs even in extraordinary situations would not arise.

2.5 Other Law Officers of the Government

The posts of the Attorney General at the Centre and of the Advocate General at the state level are Constitutional. They play a role in prosecution of crimes when criminal proceedings reach the High Courts or the Supreme Court in appeal; when constitutional dimensions of crimes are considered; or in cases of violation of fundamental rights by the state, among others. These officers or persons authorised by them to do so represent the Union or the state government, as the case may be.

The Attorney and Advocate General play an important role in providing an interface between the government in power and the judicial system. Usually these officers are senior lawyers with years of legal expertise. In order to understand the juristic and political potential of these officers, it is important to view their role in a historical context.

The Attorney General

The *Government of India Act, 1915*, created an office by the name of the Advocate General.³⁰ The British colonial government felt the need for a lawyer

³⁰ Section 114, Government of India Act, 1915.

who would represent the Crown in the superior courts and perform connected functions. The powers and duties of the Advocate General were expanded by the *Government of India Act, 1935*.³¹

The Governor General had overriding powers with regard to the appointment, dismissal and remuneration of the Advocate General, exercising his “individual judgment” in this regard. This was a major departure from the equivalent position of the Attorney General at the same time in England who was admittedly a political appointee and served till such time as the ruling party remained in power. That this was by design was reiterated by the Joint Parliamentary Committee which, when considering this subject, observed:

“It is no part of our intention that the office of the Advocate General should, like the Law Officer here, have a political side to it; indeed our main object is to secure for the Provincial Government legal advice from an officer not merely well qualified to tender such advice but entirely free from the trammels of political or party associations, whose salary would not be votable and who would retain his appointment for a recognised period of years irrespective of the political fortunes of the Government or Governments with which he may be associated during his tenure of office. We think, in particular, that the existence of such an office would prove a valuable aid to a Ministry in deciding the difficult questions which are not infrequently raised by those prosecutions which require authority of Government after initiation though we recognize that the responsibility for decision in these matters must of necessity rest in the last resort in the Government itself.”³²

After Independence the Constitution of India brought in some significant changes in this office. The Constitution retained the nomenclature of Advocate General to

³¹ Section 16, Government of India Act, 1935.

³² Joint Parliamentary Committee Report C5, Vol. II page 465-66

describe the chief law officer of the state governments and provided for an Attorney General as the chief law officer of the Union Government.³³

Article 76 of the Constitution along with the *Law Officers (Conditions of Service) Rules, 1987* governs the appointment, tenure and duties of the Attorney General. The Attorney General is appointed and holds office at the pleasure of the President of India. Since the President is bound by the advice of the Council of Ministers the apolitical nature of the Attorney General is debatable.³⁴ The appointee should have the qualifications required for appointment to the position of a Supreme Court Judge. The term of office has been fixed as 3 years but is extendable for a further term of 3 years.³⁵ Over the years a practice has been established that the Attorney General resigns with the change in government without insisting upon his constitutional tenure.

The Attorney General is paid a retainerhip as well as paid according to a fixed scale on a case to case basis.³⁶ The duties of the Attorney General include giving advice to the Government of India on legal matters, appearing for the government in the Supreme Court or any of the High Courts, representing the government in references made by the President under Art.143, etc. The Attorney General is permitted private practice but is restricted from taking briefs or giving advice and appearing in matters against the government or government bodies. It is also provided that the Attorney General shall not “defend an accused person in a criminal prosecution, without the permission of the Government of India.”³⁷

³³ Article 165 and Article 76, Constitution of India respectively

³⁴ See for instance, *Basu's Commentary on the Constitution of India*, 7th Edition Volume F (1992) (Universal). A contrary view is expressed in *Constitutional Law* by M.P. Jain, Fifth Edition Vol. I (2003) (Wadhwa), at 222 where it is asserted that “according to the practice followed in India so far, the Attorney General is appointed on the basis of professional competence and not on political consideration. He is a non-party man, is appointed because of his competence as a lawyer and he is not a member of the Cabinet”

³⁵ Rule 3(2), *Law Officers (Conditions of Service) Rules, 1987*

³⁶ Details of the fees payable to the Attorney General are provided in the Rules.

³⁷ Rule 8 (1)(c), *Law Officers (Conditions of Service) Rules, 1987*

Under Article 88 of the Constitution, the Attorney General has been given the power to speak in and otherwise take part in the proceedings of both Houses of Parliament (including a joint session) and in any committee of which he may be named a member, though he is not entitled to vote in the House. By virtue of this provision the Attorney General is entitled to the privileges of a Member of Parliament.

Constitutional expert and senior advocate in the Supreme Court, Indira Jaising argues that the full potential of the post of Attorney General has remained unexploited. On the one hand while the Attorney General gives voice to the political party in power in the Court room, the Constitution has also given the Attorney General the power to give a voice to the judiciary in Parliament – a power that has remained unused. She argues that along with separation of powers between the judiciary and the legislature, there is also a need for bridges of communication, a role which the Constitution had designed to be performed by the Attorney General and which yet remains underperformed.

The Advocate General

The office of the Advocate General is created under Article 165 of the Constitution and has the same relationship with the state government as the Attorney General has with the Union government. The Advocate General is appointed by and holds office at the pleasure of the Governor. The qualification is that of a High Court Judge, although it has been held that there is no age requirement for appointment or retirement.

Given that the Governor acts on the advice of the Council of Ministers in terms of appointing the Advocate General, the post is arguably political. Further the remuneration of the Advocate General is subject to the vote of the Assembly. The functions of the Advocate General are to advise the government on legal matters and to represent the state in matters before the High Court which could

include criminal appeals of special importance. Just like the Attorney General, the Advocate General is also debarred from advising or holding briefs against the state government, or representing an accused person in a criminal prosecution.

Since the administration of justice is a state subject, an important function which has been assigned to the Advocate General *and not* to the Attorney General, is the power to enter a “nolle prosequi” or withdrawal of prosecution in a criminal case. This power is described under section 321, Cr.P.C and is a discretionary power to be exercised by the Public Prosecutor upon the instructions of the government.

In some states, the Advocate General has been designated the Public Prosecutor for the state and given much wider powers of supervision over the prosecution agency. It is clear that the powers can also be delegated by the Advocate General. In Rajasthan the Advocate General had by notification been appointed as the Public Prosecutor for the State under section 24, Cr.P.C. He in turn, by a further notification, authorised the Deputy Government Advocate, to act, plead, and argue in all matters covered by the Cr.P.C. This was challenged before the Supreme Court in *State of Rajasthan vs. Smt. Manbhar*.³⁸ The Supreme Court held:

“The Advocate General being admittedly a Public Prosecutor for the State High Court, he had the authority by virtue of the provisions of Clause (u) of Section 2 of the Code to issue directions authorizing other person to act; and once a person was so authorized, he would be a Public Prosecutor for the purpose of the Code. A Deputy Government Advocate being a person so authorised under the notification... abovementioned is thus a Public Prosecutor having full competence to present an application under section 378 of the Code.”

³⁸ (1981) 2 SCC 525

Recognizing the constitutional status of the Advocate General, the Malimath Committee had recommended that the Director of Prosecutions should be appointed in consultation with the Advocate General and should also function under his guidance.

Chapter 3

An Overview of the Prosecution System in Delhi

The National Capital Territory (NCT) of Delhi has two completely distinct and unconnected prosecution systems operating for the Subordinate Courts and for the High Court respectively. This section examines both these systems in detail.

3.1 Directorate of prosecutions at the subordinate courts in Delhi

As in the rest of the country, prior to the amendment of the Cr.P.C in 1974, the prosecuting officers in Delhi were part of the Police Department. Subsequent to the amendment, the Delhi government set up the Directorate of Prosecutions (DOP) headed by a Director of Prosecutions to conduct prosecutions in the subordinate courts in the NCT. The DOP comprises a cadre of prosecuting officers entrusted with the prosecution of cases in the Sessions Courts and Magistrates Courts in Delhi.

At the time of its inception, the DOP was placed under the Law Department of the Delhi Government. Subsequently however the DOP was placed under the Deputy Commissioner in 1980. With changes in the organisation of the police administration, this too was abandoned and the Directorate was placed under the District Magistrate. Since 1997, when Delhi was divided into 9 districts, the DOP is being administered by the Home Department (Police-II) of the Delhi Government, which also administers the police.³⁹ The *Bawa Committee Report* observes that “none of these [departments] has been equipped to supervise the day-to-day working of the department. These departments neither have a separate staff for this purpose nor could they evolve a mechanism to ensure

³⁹ *Functioning of Prosecution Department in Delhi: A study* by Jagmohan and P.S. Bawa, Home Department, Govt. of NCT Delhi, May 2000, at para 9

proper coordination between police and prosecution which is basic to the successful functioning of the system”.⁴⁰

Appointment

The most recent recruitment rules for posts of various prosecutors have been released in January 2004 by the Home (Police-II) Department.⁴¹ According to the recruitment rules, selection of Assistant Public Prosecutors (APPs) – who are at the junior most rung of the cadre, takes place through competitive examinations and interviews conducted by the Union Public Service Commission (UPSC) subsequent to the issue of advertisement calling for applications for the cadre.

The eligibility requirements are:⁴²

- A law degree from a recognized university;
- Three years experience at the bar (experience as a government advocate is considered desirable)
- Age less than 30 years.

Those who are selected are placed on probation for two years, and confirmation of appointment is done through a Departmental Promotion Committee (DPC). Assistant Public Prosecutors conduct prosecutions at the Magistrates courts. Once they are appointed they become full time employees of the state government and are forbidden private practice.

All promotions are conducted by the DPC in consultation with the UPSC. After serving for 7 years, APPs are eligible to seek promotion to the post of Additional Public Prosecutors and/or Senior Public Prosecutors who conduct prosecutions

⁴⁰ *Ibid*, at para 5

⁴¹ *Recruitment Rules for the Post of Assistant Public Prosecutor in the Directorate of Prosecution*, Government of N.C.T. of Delhi, G.O. No. F. 13/17/94/DOP/HP-II/ 350 dated 19.1.2004, Home (Police-II) Department, Delhi.

⁴² Selection criteria can be relaxed if found necessary, for the appointment of Scheduled Caste candidates, or “in the case of candidates otherwise well qualified” in consultation with the UPSC.

in the Courts of Additional Sessions Judges.⁴³ Additional Public Prosecutors who have completed 5 years tenure are eligible for promotion as Chief Prosecutors (12-14 sanctioned posts with at least one Chief Prosecutor for each District).⁴⁴

Overseeing and heading the DOP is the Director of Prosecutions, Delhi.⁴⁵ The post is filled on promotion from amongst Chief Prosecutors who have completed 5 years regular service, by a DPC chaired by the Chairman of the UPSC.

Consultation with the UPSC is necessary for amendment or relaxation of any of the requirements of the Recruitment Rules. Unfortunately this position has remained largely vacant for at least the last eight years with one of the Chief Prosecutors “acting” as director on an ad-hoc basis in addition to his own position. In July 2004, Shri BD Goel held this post on an ad hoc basis in addition to his post as Chief Prosecutor (Crime and Railways).⁴⁶ The fate of the Public Prosecutor, Delhi is similar, with Mr. Bakshish Singh holding the post on an ad-hoc basis in addition to his post as Chief Prosecutor – North and also the post of Competent Authority under the Delhi Right to Information Act.⁴⁷

The *Bawa Committee report* has also pointed out the problem regarding large number of posts in the DOP being filled on an ad hoc basis, rather than through the proper channels of promotion (see table 3). The intriguingly high number of persons working as Additional Public Prosecutors on an ad hoc basis could easily be interpreted as a device to escape the eligibility requirements of the Cr.P.C as well as the Cadre Rules. Such ad-hoc appointment also suggests an attempt to subvert the independence of the Prosecution branch which is the statutory foundation of the system. Complete information on ad-hoc posts has

⁴³ *Recruitment Rules for the Post of Additional Public Prosecutor in the Directorate of Prosecution*, Government of N.C.T. of Delhi, 19.1.2004.

⁴⁴ *Recruitment Rules for the Post of Chief Prosecutor in the Directorate of Prosecution*, Government of N.C.T. of Delhi, 19.1.2004

⁴⁵ *Recruitment Rules for the Post of Director (Prosecution) in the Directorate of Prosecution*, Government of N.C.T. of Delhi, 19.1.2004

⁴⁶ As stated in the *Bawa Committee report* above.

⁴⁷ As per response of the Directorate of Prosecutions filed in Appeal no F (664 and 665)/04 filed before the Public Grievances Commission, Delhi.

not been made available by the Delhi Government despite this being sought during the course of this study.⁴⁸

Table 3: Number of sanctioned posts, vacancies, and ad hoc appointees in the DOP

Post	Number of sanctioned posts (a)	Number of posts filled up (b)	Number of ad hoc appointees (b)
Director of Prosecutions	1	1	1
Public Prosecutor ⁴⁹	1	1	1
Chief Prosecutors	12	10	8
Additional Public Prosecutors	71	50	33
Assistant Public Prosecutors	120	85	Not known

Note (a): This column is based on information provided by the Directorate of Prosecution subsequent to a Right to information application. However this information does not completely match sanctioned posts indicated in the Recruitment Rules dated 19.1.2004 vide G.O. No. F. 13/17/94/DOP/HP-II/ 350

Note (b): These columns are based on information provided by the Competent Authority, Directorate of Prosecutions, under the Delhi Right to Information Act, vide I.D. No. 9 of 2004 and subsequent appeal no F (664 and 665)/04 filed before Public Grievances Commission, Delhi.

⁴⁸ In an application under the Delhi Right to Information Act (ID no. 9 of 2004) filed during the course of this study before the Competent Authority, Directorate of Prosecutions, information was sought regarding the number of ad hoc prosecutors working at different levels. Despite an order from the appellate authority, the response provided by the Competent Authority was incomplete.

⁴⁹ The latest recruitment rules do not mention the Public Prosecutor, and it is unclear whether this post has been abolished.

The break-up of the appointees at various levels, as stated in the aforementioned report for the year 2000 is as follows:⁵⁰

Chief Prosecutors:

Districts (9):	9
Crime Branch and Railway:	1
Anti Corruption Branch:	1
Prevention of Food Adulteration Dept.:	2

There is a vacancy of 1 post which is reserved for scheduled tribes.

Additional Public Prosecutors:

Tis Hazari:	28
Patiala House:	12
Kadkadooma:	16
Police Dept:	1
Police Training College:	4
Prevention of Food Adulteration Dept:	4

Assistant Public Prosecutors are assigned to the courts of Magistrates, which number as follows:

Tis Hazari:	33
Patiala House:	19
Kadkadooma:	18

Working conditions

The Public Prosecutors do not appear to have any support staff of their own. Even the Recruitment Rules do not contain any posts for supporting/ clerical staff at the Directorate of Prosecutions. Most staff is 'borrowed' from the police

⁵⁰ Similar information has been provided for the year 2004 by the Competent Authority, DOP, vide I.D. No 9 of 2004, but this information is inconsistent and incomplete. The 2004 recruitment rules refer to 12 positions for Chief Prosecutors in 2003. The inconsistency in figures is possible since the sanctioned strength is ostensibly based on work-load.

department and also double up as orderlies. In 2000 the DOP had only one stenographer who was assigned to the Director. Apart from that he had 1 head clerk, 2 upper division clerks and 3 lower division clerks.

Chief Prosecutors usually have an office to themselves with some clerical staff provided by the police, but no stenographers or computers. Three to four Senior Prosecutors/ Additional Public Prosecutors usually share an office – in practice this is usually a narrow passage with desks and chairs taking up most of the space. While occasionally there is a cupboard to keep files there are no computers for use in the offices.

Assistant Public Prosecutors usually do not have an office of their own. Where offices exist, they are shared with several others and effectively comprise only of a desk and chair with no shelves, cupboards or phones. Some of the Assistant Public Prosecutors interviewed during the course of this study do not use these offices at all, preferring to work from a table in the Court of the Magistrate. Prosecutors do not have a library of their own and have to use the library available to the rest of the Bar. These libraries are in a deplorable state. Stationery items including paper are in short supply. If pleadings are to be typed this is done at their own cost.⁵¹

The *Bawa Committee report* has commented on the complete lack of facilities for basic functioning provided to prosecutors – the ‘star performers’ of the criminal justice system. The report attributes the low morale of the Prosecutors to working in such abysmal conditions and appearing in court opposite private defence counsel who have all facilities such as access to latest case law, computers, clerical and logistical staff, juniors, as well as chambers where they can concentrate, study and prepare.

⁵¹ A similar situation also exists for standing counsel in the High Court who are responsible for providing their own stationary and other facilities.

Incentives and scope for career advancement

One of the issues that prosecutors are vexed with is that of their pay scales. This issue has been taken up by the Delhi Senior Prosecutors Welfare Association, which argues that during the 1960s the Public Prosecutors' salaries were on the same scale as the judicial officers in whose courts they worked. The Association has argued that this was a true recognition of their value and status as statutory officers under the Cr.P.C. However, over the years, while judicial officers have been able to lobby for tremendous pay increases, Public Prosecutors have been left far behind not only in terms of pay but also with respect to perquisites and so on. This is a situation that needs to be remedied since poor pay is a major disincentive to existing cadres as well as to future aspirants.⁵²

Another disturbing issue for Public Prosecutors at the district level is that there is very little scope for career advancement within the cadre as it is restricted to the Subordinate Courts. While a large number of prosecutors join as Assistant Public Prosecutors, there are only a few Additional/ Senior Prosecutors, and a total of 14 Chief Prosecutors. The organisational pyramid leaves little chance of promotions. This is further compounded by the practice of large number of ad-hoc appointments at the senior levels. To some extent this issue has been addressed through openings as trainers in the Police Training Institute, but here too the numbers are few. However a majority of prosecutors stagnate professionally.

The *Bawa Committee report* has also expressed concern over the limited career prospects for Public Prosecutors employed by the DOP. Apart from suggesting that outstanding work done by Public Prosecutors should be appreciated through letters of commendation or even rewarded, the Committee also recommends, "Additional Public Prosecutors and Chief Prosecutors who have a proven track record of continuous outstanding service may be considered for empanelment as

⁵² Personal interview with Mr. A.K. Gupta, Senior PP and Jt. Secretary of the Delhi Senior Prosecutors Welfare Association, on 18.11.2003 and 21.11.2003.

Additional Standing Counsels for conducting criminal matters in the High Court”.⁵³

Special Public Prosecutors

Although there are a number of criminal trials where SPPs have been appointed by the Delhi government, no Rules for their appointment service and remuneration appear to have been enacted. Since information on this issue and also the number of SPPs who are conducting trials presently was absent, an application was filed under the Delhi Right to Information Act to seek this information during the course of this study. The application was however rejected by the Competent Authority. A subsequent appeal before the Public Grievances Commission too did not disclose information.

3.2 Prosecution agency at the Delhi High Court

The Standing Counsel, Additional Standing Counsels and Public Prosecutors at the Delhi High Court, who represent the Delhi Government in criminal appeals, revisions and writ petitions, are selected through a system of empanelment. The primary difference from the system operating at the district level is that these appointments are not permanent tenure posts but are held at the “pleasure of the government”.⁵⁴ The Rules therefore state that “a Government Counsel can [...] be removed by the appointing authority from the panel at any time without assigning any reason [...]” Over time, a practice has been established where all the posts of government counsel in the High Court, whether on the criminal or the civil side, are vacated when the state government changes, making room for fresh appointments.

The appointments are governed by section 24 of the Cr.P.C which requires that the state government shall appoint a Public Prosecutor and one or more

⁵³ *Ibid*, Bawa Committee Report, at para 69.

⁵⁴ Rule 1 states that appointments shall be made by the ‘Administrator of Delhi’ and the government counsel “shall hold office at the pleasure of the Administrator”.

Additional Public Prosecutors for the High Court, in consultation with the High Court from amongst advocates practicing for a minimum of 7 years. Government Counsel in the Delhi High Court work under the supervision of the Department of Law, Justice and Legislative Affairs of the Delhi Government.

The Delhi Government has framed the *Rules/Guidelines for Constitution of Panels of Government Counsels for Conducting of Cases for and on behalf of Delhi Administration*.⁵⁵ These Rules govern the appointment, eligibility and remuneration of government counsel appearing in both civil and criminal matters. This study however focussed on government counsel appearing in criminal matters.

While the Cr.P.C provides for only two categories of prosecutors for the High Courts (Public Prosecutor and Additional Public Prosecutors), in the Delhi High Court the panel consists of the following designations:

- Standing Counsel (Criminal) – one post (senior most post).
- Additional Standing Counsel (Criminal) – one post.
- Additional Public Prosecutors (Criminal) - also called Panel Lawyers, there are 12-13 Additional Public Prosecutors at present of which two are women. At least one Additional Public Prosecutor is assigned to each Court hearing criminal matters.

Appointment – Eligibility and procedure

For the post of Standing Counsel (Criminal), the applicant should be a law graduate from a recognized university or a bar-at-law with at least 15 years of practice in the High Court on civil and criminal side, of a high reputation, and between 45 years and 60 years of age. The age of retirement is 65 years.

For Additional Standing Counsel (Criminal) the minimum requirement is 10 years practice in the High Court on the criminal side. The applicant should be of good

⁵⁵ <http://law.delhigovt.nic.in/rules.html> (last accessed 15 April 2005)

reputation and between 40 years and 55 years of age. The age of retirement is 60 years.

For Additional Public Prosecutors/ Panel Lawyer (Criminal), the applicant should have minimum 7 years of practice in the High Court on the criminal side. Good reputation, age between 30 years and 55 years of age are the other requirements. The age of retirement is 60 years.

All appointments are made by the state government in consultation with the High Court, and the guidelines lay down an elaborate a method for these appointments. In order to make recommendations for Government Counsel for criminal panels, a committee set up by the Lt. Governor includes:

1. Secretary (Law and Judicial) – Convener
2. Secretary (Home) – Member
3. Deputy Commissioner (Delhi) – Member
4. Representative of High Court – Member.

This committee is given the task of recommending names for the panel to the Lt. Governor. No procedure for this purpose is specified and the Committee may devise any procedure and criteria it considers necessary which may include an interview. This list then goes to the Lt. Governor in the form of recommendations.

The Rules however do not provide as to how the “consultation” with the High Court is to take place. In interviews conducted it was pointed out that once the list of proposed names for the panel is sent by the administration to the High Court, it is

Duties of government counsel appearing on the criminal side include:

- appearance in the Delhi High Court in the cases marked to them by the officers of the department;
- rendering advice in cases decided against the Delhi government on whether appeal/review/revision should be filed;
- rendering advice/opinions as asked for;
- keeping the Secretary and concerned officials informed of important developments in cases assigned to them, especially stay orders;
- furnishing periodical reports and statements, as well as render detailed accounts;
- performing such other duties of a legal nature as assigned to them from time to time.

considered by the Full Court sitting for this purpose.⁵⁶ On at least the last two occasions, the Full Court has also asked the government to provide a list of cases each candidate has conducted, and has rejected persons who were not practicing lawyers.⁵⁷ After being approved by the Full Court, the list is then sent back to the Secretary (Law and Judicial), who forwards it to the Chief Minister. The Chief Minister approves it and sends it on to the Lt. Governor.

The appointment is made by the Lt. Governor through a notification and is initially for a period of one year. Extensions can be granted from time to time upto a maximum of three years.

Review and accountability

Rule II (3) (*Rules/Guidelines for Constituting of Panels of Government Counsels for Conducting of Cases for and on behalf of Delhi Administration*) provides for a review of the performance of Government Counsel by the Secretary (Law and Judicial) at such intervals as deemed necessary. The Selection Committee referred to above is also required to review the performance of Government Counsel at least once a year when they make their recommendation to the Lt. Governor on retention or removal of the counsel in the panel.

There is no other provision in the Rules regarding evaluation of individual or collective performance, review of systems, or providing for accountability of Government Counsel for professional negligence or malpractice. None of the prosecutors and lawyers interviewed were aware of any prosecutor at the High Court having been subject to a disciplinary enquiry. The general belief was that where the government was dissatisfied with the performance of an individual prosecutor it terminated the person's contract. Interviews with various Public Prosecutors as well as bureaucrats from the Delhi Administration highlighted the absence of a review of the system of Government Counsel prevailing in the

⁵⁶ Personal interviews with Mr. Akshay Bipin, Additional Standing Counsel (Criminal) Delhi High Court on 5.12.2003 and 10.3.2004.

⁵⁷ Personal interview with Ms. Rebecca M. John, Advocate on 10.3.2004

State, on the lines of the review of the Directorate of Prosecutions done by the Bawa Committee.

Right to private practice

The Rules specifically recognize the right to private practice of Government Counsel, on the condition that it does not interfere with the 'efficient discharge' of their work for the Delhi Administration. While the right to private practice of prosecutors in the High Court has long been recognised, the extent of this right has caused some debate.

The Delhi High Court was called upon to decide whether a counsel appointed as Public Prosecutor (Standing Counsel (Criminal)) at the High Court can appear for the accused in a revision petition.⁵⁸ The Court determined that the Public Prosecutor holds a public office and his duties are of a public nature and of vital importance to the public. The Court observed that the Prosecutor was not merely an advocate engaged by the State to conduct its prosecutions. The Court noted that the prosecutor exercised executive functions when prosecuting a case and was part of the judicial process in that he had powers such as those in Section 321 to withdraw from prosecution. As a result, the Court found that the office of the Public Prosecutor had to be kept above suspicion and its purity and perfection had to be protected. The Court noted that the nature of the office did not alter with the mode of payment of fees, whether salary or retainer.

The Court therefore directed that:

- The Public Prosecutor and the Additional Public Prosecutors could not appear against the State in criminal matters. This would remain so even where the party had carefully avoided impleading the State as a party in a revision or an appeal, or any other criminal proceedings. This restriction applied to panel lawyers as well because no panel lawyer could appear without being appointed as an Addl. Public Prosecutor.

⁵⁸ *Lt. Col. K. C. Sud vs. S.C. Gudimani*, 1981 CrLJ 1779

- It was not permissible for the State or the Delhi Administration to allow the Public Prosecutor or the Additional Public Prosecutors to appear against itself. This is to be specifically stated in the terms of their appointments.
- The Public Prosecutor could not appear on behalf of the accused even in cases instituted on a complaint by a private party.

This decision, however, was disapproved by a division bench shortly thereafter.⁵⁹ In this case objection was raised to the appearance of an Additional Public Prosecutor for the accused persons in an appeal. The Court found that advocates who are appointed as Additional Public Prosecutors in the High Court did not give up their private practice nor did they stop appearing on the rolls of the Bar Council. Since there was no prohibition in their contract with the Delhi Government from appearing in private cases, the objection was therefore rejected.

The position has since been clarified by the Rules which specifically restrict prosecutors from taking on any matters or given advice in cases against the Delhi Administration, or in cases in which they might be called upon to appear or which might lead to litigation against the Administration. It is further stated that if the counsel is part of a firm of lawyers, then even the firm cannot take up cases against the Delhi Administration or any public sector undertaking in the Delhi High Court or in any other court, even the Supreme Court.

Mr. Akshay Bipin, Additional Standing Counsel (Criminal) Delhi High Court, was of the view that eventually each person devised their own set of values and boundaries since there is no real guideline except the bar on appearing opposite the Delhi Government. Over the years he has devised a set of principles he works by, but some Prosecutors may not be so scrupulous.⁶⁰

⁵⁹ *Mohd. Sabir vs. The State* 20 (1981) DLT 345

⁶⁰ Personal interviews on 5.12.2003 and 10.3.2004

Remuneration

Bulk of the Rules deal with the subject of fees and remuneration under a variety of situations. The Standing Counsel (Criminal) and the Additional Standing Counsel (Criminal) are entitled to a monthly retainer of Rs. 10,000 and Rs. 7000 respectively. Addl. Public Prosecutors do not get any monthly retainer but are paid Rs. 450 per case per day, subject to a maximum of Rs. 1200 per day. Prosecutors are also paid separately for drafting of pleadings, such as writ petitions, revisions and appeals. For any other out of ordinary work they are called upon to do, payments are according to standardized rates for which detailed guidelines have been framed.⁶¹

Fees are paid on presentation of a stamped receipt to the Department of Law. In case of any doubt or difference regarding the admissibility or amount of fees payable, the decision of the Secretary (Law and Judicial) is final.

In a personal interview, Mr. Akshay Bipin asserted that the remuneration paid to Additional Public Prosecutors was shockingly low. According to him these prosecutors relied on the right to private practice for their survival. The maximum of Rs. 1200 per day applies to the 210 working days in a year. Often the number of cases handled by the Public Prosecutor in a day is less than three in which case his earnings are reduced even further. Mr. Bipin felt that it was no surprise that the standard of prosecutions is low when the prosecutors are paid so badly.⁶²

⁶¹ For a criminal writ petition under Articles 226 or 227, the fee payable is Rs. 2250/- per case. If the hearing in the case goes on for longer than three days, the counsel is paid an additional refresher fee of Rs. 450/- per day subject to a maximum of three days. For petitions under Article 132 the fee payable is Rs. 900/- per case per day subject to a maximum of Rs. 1800/- for a case. In Criminal Revision Petitions the fee payable is Rs. 1050/- per case. There is also a clause that states that in cases where no substantial legal work is involved, a fee of Rs. 300/- per petition will be paid. Counsel are also entitled to 10% clerkage in addition to the fees mentioned above, as well as reimbursement of out of pocket expenses such as court fees and other miscellaneous expenses. Detailed guidelines are provided for payment of fees in identical cases, on what is 'effective hearing', what is 'substantial work', and so on. In the event that counsel are required to go out of station for a case, they are paid a daily fee of Rs. 1800/- per day, and also travel/hotel expenses at the rates admissible to Grade-I/ Class-I officers.

⁶² *Ibid.*

Special Public Prosecutors

The existing Rules governing the appointment and service of Government Counsel in the Delhi High Court do not mention SPPs nor are there special guidelines or Rules drafted by the Delhi government for this purpose. As a result, SPPs are appointed by individual notifications governing specific cases.

3.3 The question of extension of DOP to the High Court

The Delhi Senior Prosecutors Welfare Association is lobbying for expanding the cadre at the Subordinate Courts to include Additional Public Prosecutors and Standing Counsel at the High Court. They argue that a cadre based prosecution service would enhance the administration of justice in Delhi as the cadre system is inherently more independent and autonomous in its functioning. The Prosecutors in the High Court on the other hand, they argue, hold their position only at the pleasure of the government and are thus open to manipulation by the executive. According to the Association this dichotomy has been created by design to ensure that the government of the day has control over how criminal cases are pursued at the High Court. Other arguments in favour of a consolidated cadre system, as put forward by the Association, are:⁶³

- Having a separate panel for the High Court is a high financial burden on the state government, which has to pay prosecutors per case;
- Cadre prosecutors are totally barred from taking on private cases, while panel lawyers at the High Court can continue with private practice, with some restrictions. It was argued that this compromises their ability to give their best to the prosecution work, and also is open to abuse.
- Since cadre prosecutors are not permitted private practice, they are not competing with each other for clients, unlike lawyers in the High Court. As

⁶³ Personal interview with Mr. A.K. Gupta on 18.11.2003 and 21.11.2003.

a result, they are far better suited to working in a team, cooperating with each other and complementing each others' work.

- Public Prosecutors at the district level, being employees of the state government and governed by the relevant Rules, are subject to the disciplinary control of the Delhi government. As a result they are under constant supervision and their work is evaluated at regular intervals. It was argued that disciplinary action against negligent or careless Public Prosecutors is a reality, and this encourages them to perform better. Government Counsel at the High Court on the other hand, are not subject to any disciplinary control and therefore cannot be held accountable for professional negligence.

The demand for the extension of the DOP cadre has been made in the past as well. It has however found scant support either with the Courts, the Law Commission or the legislature. In 1991 a private members Bill was presented in Parliament (bill no. XXXV of 1991) which proposed the addition of section 25A to the Cr.P.C. The proposed amendment provided for the setting up of a Directorate of Prosecution headed by a Director of Prosecutions in each State, who would be responsible for conduct of cases by Assistant Public Prosecutors, Additional Public Prosecutors and Special Public Prosecutors at the subordinate courts as well as the High Court. The Bill however was not passed by the legislature.

In the *K.J. John* case the Supreme Court has settled the inter-relationship between cadre posts of prosecutors at the Magistrates Courts and tenure posts of prosecutors at the Sessions Courts in relation to the systems prevailing in UP and Kerala.⁶⁴ It was held that a regular cadre of prosecuting officers, adverted to in section 24 (6) of the Cr.P.C, is one which comprises Assistant Prosecutors at the lowest level through to Public Prosecutors at the top. When a cadre does not go up to the post of Public Prosecutors, the state government cannot be held to

⁶⁴*K.J. John vs. State of Kerala and ors*, 1981 CrLJ 121 (Kerala High Court) and *K.J. John Asst. PP Grade I vs. State of Kerala and ors.* with *UP Assistant Public Prosecutors association vs. State of UP* 1990 CriLJ 1777 (Supreme Court)

be bound to appoint persons to the posts of Public Prosecutors and Additional Public Prosecutors only from this cadre. The Supreme Court also held that it is within the competence of the state governments to keep posts of prosecutors at the Sessions Courts as tenure posts. The fundamental ratio of this judgment seems to militate against the extension of cadres to the High Court, if the state government does not wish to do so.

In 1996, when the Law Commission of India in its 154th report considered the amendments proposed to the Cr.P.C by the *Code of Criminal Procedure Amendment Bill, 1994*, it categorically rejected the proposal to extend the control of the Directorate of Prosecution over prosecutors in the High Courts.⁶⁵ The Law Commission was of the view that this was not needed arguing that, “the Public Prosecutors appointed exclusively to conduct cases on the appellate side in the High Court should be differentiated from those prosecuting officers appointed to conduct cases in the lower courts.”

During the course of interviews conducted, responses of prosecutors of the High Court were guarded on this issue. On the other hand, prosecutors at the Subordinate Courts felt strongly about the issue. Mr. Paramjit Singh Bawa (author of the Bawa Committee Report) supported the idea, but was of the view that a step by step approach would be more sustainable in the long run. He recommended that some of the better prosecutors from the Subordinate Courts should be given opportunities to argue in the High Court, and once they have established their competence, they could ask for an extension of the cadre.⁶⁶

A defence lawyer however put the entire debate in perspective. She argued:

⁶⁵ The proposed 25(4) as contained in the Bill:
“Every Public Prosecutor, Additional Public Prosecutor and Special Public Prosecutor appointed by the State Government under sub-section (1) or as the case may be, sub-section (8) of section 24 to conduct cases in the High Court shall be subordinate to the Director of Prosecution”.

⁶⁶ Personal interview with Mr. Paramjit Singh Bawa, retd. IPS, on 23.3.2004.

“There is certainly a point in this argument. At present we have a system where prosecutors are dedicated to a court rather than to a case. Ideally, the prosecutors at the trial court should be involved in the case through all the appeal proceedings right till the Supreme Court, or even the international courts if the case goes so far. Such a system would see prosecutors dedicated to cases right through till their final disposal. This gives the case a continuity which is very valuable. When a prosecutor comes in at the appeal stage, he has no idea what transpired in the trial except what the record reveals, and we know that this can never tell the full story. If prosecutors are dedicated to cases, they can participate in the appeal process and provide invaluable assistance to the prosecutors at the appeal court.”

⁶⁷

An examination of the mechanics of appointment, tenure and budgetary allocations reveals that this may impact upon the independence of the Public Prosecutor and thereby the guarantee of fair trial may be compromised. This is certainly a cause for concern, and appropriate institutional and administrative changes must be made both to enable the Prosecutor to discharge his statutory duty as well as to place then prosecutor beyond suspicion and recrimination.

⁶⁷ Personal interview with Ms. Rebecca M. John, Advocate on 10.3.2004.

Chapter 4

Prosecution and the Police

Opining on the nature of the post of the Public Prosecutor, the Supreme Court in *Hitendra Vishnu Thakur v. State of Maharashtra* held, “A public prosecutor is an important officer of the state government and is appointed by the state under the Cr.P.C. He is not a part of the investigating agency. He is an independent statutory authority.”⁶⁸

The relationship between these agencies was further analysed in *R. Sarala vs. T.S. Velu* where the Supreme Court observed: “Investigation and prosecution are two different facets in the administration of criminal justice. The role of the Public Prosecutor is inside the court, whereas investigation is outside the court. Normally the role of Public Prosecutor commences after investigation agency presents the case in the Court in the culmination of investigation.... [I]nvolving the Public Prosecutor in investigation is injudicious as well as pernicious in law. At any rate no investigation agency can be compelled to seek opinion of a Public Prosecutor under the orders of the Court.”⁶⁹ It was held that while it is always open to a police officer investigating an offence to seek legal advice, whether from a Public Prosecutor or from any other person, there is no obligation to do so at any stage during the investigation.

Examining some of the judicial precedents in this regard, the Court also observed that “the formation of opinion whether or not there is a case to place the accused on trial should be that of the officer in charge of the police station and none else.”

⁶⁸ (1994) 4 SCC 602

⁶⁹ AIR 2000 SC 1731. This case related to the death of a young wife, where the police had submitted a chargesheet which the father of the deceased, being unsatisfied, had challenged before the High Court. The High Court had directed that the papers be placed before the concerned Public Prosecutor, and after he renders an opinion, the police shall file an amended charge sheet in the concerned court

⁷⁰ There is no provision permitting delegation of this role. Nor is there any scope in the Cr.P.C for supporting any combined operation between the investigating officer and the Public Prosecutor for filing the report in the Court. The Court held that the investigation officer cannot therefore be directed to take the opinion of the Public Prosecutor and to file the final report afresh on the basis of that opinion.

Other judicial decisions and statutory provisions too stipulate that during the course of investigation and till the time of filing of charge sheet, the investigating agency is in control of a criminal proceeding, and it is only once the charge-sheet is filed that the Public Prosecutor takes over. Advice of the prosecutor can be sought by the police on the draft *challan*, and in most states the existing practice is that charge-sheets are sent to the prosecutor for scrutiny. However, the police is not bound by this advice, and the decision on whether a prima facie case is made out on the basis of evidence available, is taken first by the police, and then by the Court, with the prosecutor acting as little more than a conduit.⁷¹

However the prosecutor must not merely act as a conduit once the charge sheet has been filed. In a TADA case where the prosecutor was seeking extension of remand, the Supreme Court noted that the Public Prosecutor is expected to independently apply his mind to the request of the investigating agency before submitting a report to the Court for extension of time with a view to enable the investigating agency to complete the investigation. The Court continued, "He is not merely a post office or a forwarding agency. It is not enough if the Public Prosecutor merely 'presents' the request of the investigating officer to the Court or 'forwards' the request of the investigating officer to the Court – that is not to be construed a report of the Public Prosecutor."⁷²

⁷⁰ See *Abhinandan Jha vs. Dinesh Misra* AIR 1968 SC 117 and *H.N. Rishbud and Inder Singh vs. State of Delhi* (1955) 1 SCR 1150

⁷¹ See for instance, *Vineet Narain and ors. vs. Union of India and anr* 1998 (1) SCC 226, and *R. Sarala vs. T.S. Velu* AIR 2000 SC 1731. In the former case the Court observed that according to the Cr.P.C the formation of the opinion as to whether or not there is a case to place the accused for trial is that of the police officer making the investigation and the final step in the investigation is to be taken only by the police and by no other authority.

⁷² *Hitendra Vishnu Thakur vs. State of Maharashtra*, (1994) 4 SCC 602

The prosecution is required to work in close co-ordination with the police. However the blurring of co-ordination and control is a serious concern. This chapter examines the relationship between the Prosecution and the Police and seeks to establish the point that while effective co-ordination between the two agencies is crucial and necessary; this must not be secured at the cost of the independence and the autonomy of the prosecution.

4.1 The move away from Police Prosecutors

The law prevailing at the time of independence (Section 492, Code of Criminal Procedure, 1898) did not require prosecutors to be lawyers or law graduates. While the general practice was for prosecutors to be police officers, even where some prosecutors were lawyers, direct control and supervision remained with the police department.

This system served well for the British colonial government, where the executive as well as judicial functions of the state merged at various levels. For instance, the Collector performed all the judicial and executive functions of the state and was the sole repository of all state power at the district level. In this context, the functions of prosecution and investigation being performed by the same department made eminent sense. Prosecutors were thus active partners in a criminal justice system used extensively by the colonial government, among other things, to criminalise the struggle for Independence.

With Independence and the promulgation of the Constitution of the Republic of India, it was clear that the administrative mechanisms which served the purpose of a colonial state could not be expected to serve the aspirations of a newly emerging democracy.

Thus the 14th Law Commission report of 1958 observed, “in the machinery of justice, a public prosecutor has to play a very responsible role. The impartiality of his conduct is as vital to as the impartiality of the Court itself.”⁷³ The Commission therefore proposed that “the prosecuting agency should be separated from and made independent of its administrative counterpart, that is the Police Department, and that it should not only be responsible for the conduct of the prosecution in the court but it should also have the liberty of scrutinizing the evidence particularly in serious and important cases before the case is actually filed in court.” It was thus proposed that “prosecutors ought to be legally qualified persons and should be recruited from the Bar”.⁷⁴

The Law Commission made such recommendations because it found a tendency in police officers to be one-sided in their approach, The Law Commission also observed a natural preoccupation of the police with getting a conviction since the nature of their service was to measure success or failure on the basis of number of convictions achieved. It observed the tendency to be corrupt, and also the fact that police prosecutors have come to occupy a subordinate position in terms of the police department, and have no control over cases that they handle. Being part of the same service as the police, they cannot be expected to exhibit the degree of detachment necessary for a prosecutor.

The Law Commission recommended that an officer called the Director of Public Prosecutions be appointed at the head of a cadre of whole-time prosecutors responsible for conducting prosecutions. The report stated categorically, “in order to ensure that he is not regarded as a part of the police department, he should be an independent official directly responsible to the State Government.”⁷⁵ The principal functions of the Director of Prosecutions would include the administrative control of the prosecution machinery in the district, the scrutiny by

⁷³ *Ibid.* chapter 35 para 2

⁷⁴ Law Commission of India 14th report: Reform of Judicial Administration, Volume II, Ministry of Law, Government of India, 1958.

⁷⁵ *Ibid.* chapter 35 para 15

his department of every charge-sheet filed by the police, scrutiny of cases where the police decides not to initiate prosecution, examination of all cases of acquittal, and so on.⁷⁶

The Government of India however did not take any steps at the time to implement these recommendations. This led to the Law Commission revisiting the prosecution system once again in its 41st report in 1969.⁷⁷ The recommendation of the 14th Law Commission that prosecutors should be members of the Bar was endorsed at least as far as the Public Prosecutor and Additional Public Prosecutors were concerned and for the first time a mandatory minimum requirement of 7 years practice at the Bar was proposed for appointment to these posts. The requirement for consultation with the High Court for appointment of the PP and the Additional Public Prosecutors was also suggested. These suggestions were incorporated in Sections 24 and 25 of Code of Criminal Procedure, 1973 which came into effect on 1 April 1974.

4.2 Separation of powers – the judicial view

The changes made in the Cr.P.C have received the stamp of approval of the judiciary in various cases. The Allahabad High Court in *Jai Pal Singh Naresh and ors. vs. State of U.P.* was of the view that the amendments to the Cr.P.C made the legislative intent very clear, namely to free Public Prosecutors from the control of the Police department, and held, “there can be no manner of doubt that the Parliament intended that Public Prosecutors should be free from the control of the Police Department. If the Assistant Public Prosecutors are placed under the administrative and disciplinary control of the Superintendent of Police who is the principal police officer at the district level, the legislative purpose would be

⁷⁶ *Ibid.* Para 16, page 771

⁷⁷ Law Commission of India 41st report: On the Code of Criminal Procedure, 1898, Volume I (September 1969).

defeated.”⁷⁸ It held that prosecutors cannot be expected to discharge their duties in an independent fashion if administrative and disciplinary control is in the hands of the police.

The Supreme Court too has clearly endorsed the separation of the prosecution agency from the police and passed orders to ensure that prosecutors would not remain in the administrative and disciplinary control of the police. In the *S.B. Shahane* case, the Court noted,⁷⁹

“when all the subsections of Section 25 of the Code are seen as a whole, it becomes clear therefrom, that there is a statutory obligation imposed on the State or the Central Government, as the case may be, to appoint one or more Assistant Public Prosecutors in every district for conducting the prosecutions in the Magistrate’s Courts concerned, and of making such Assistant Public Prosecutors *independent of the Police Department or of its officers entrusted with the duty of investigation of cases* on which prosecutions are to be launched in Courts, by constituting a separate cadre of such assistant Public Prosecutors and creating a separate Prosecution Department for them, its head made directly responsible to the Government for such Department’s work.”

⁷⁸ 1976 CrLJ 32. This was a petition under Art. 226 for quashing a Government Order passed by the State govt. placing the Assistant Public Prosecutors under the administrative and disciplinary control of the Superintendent of Police at the District level and the Inspector General of Police at the State level. The writ petition was allowed and the impugned GOM was quashed.

⁷⁹ *S. B. Shahane vs. State of Maharashtra*, AIR 1995 SC 1628. In the State of Maharashtra, prosecutors were appointed by the Inspector General of Police or the Commissioner of Police, and on their appointment became the personnel of the Maharashtra State Police Department under the control of the IG Police, and were known as police prosecutors. After the amendment of the Cr.P.C in 1973, the government of Maharashtra issued a notification whereby the designation of police prosecutors was changed to “Assistant Public Prosecutors”, but the method of appointment as well as the department under which they worked remained unchanged. The prosecutors filed a petition before the Bombay High Court that they should be freed from the control of the police department and a separate cadre be created, but this petition was rejected. The matter came up before the Supreme Court, which found that the government of Maharashtra had failed to fulfill its statutory obligations, and passed several directions in order to release prosecutors from the disciplinary and administrative control of the police.

Although the observations of the Supreme Court in *Shahane's case* are binding on all the state governments, yet in several states amendments had been made to the Cr.P.C in clear violation of these directions. In Orissa and UP, for instance, Assistant Public Prosecutors (at the Magistrate's Courts) have been placed under the control of the police department. The U.P Act 16 of 1976 amending Section 25(2) of the Cr.P.C is said to have been challenged but without success.⁸⁰ Furthermore, in some states (e.g. Tamil Nadu, UP) the Directorate of Prosecution is brought within the control of the Police department or is headed by a police officer. The legality of this does not appear to have been challenged

4.3 A divergent view – for the sake of conviction

The changes brought about by the Cr.P.C amendment resulted in expected transitional problems. Some analysts have argued that while on the one hand prosecutors were not involved any longer in advising the police during investigation, the police also withdrew its cooperation to prosecutors once trials commenced. As a result, it has been argued that the necessary synergy between these two agencies was ruptured and the smooth functioning of the criminal justice system itself faltered leading to a decline in conviction rates in many states. However rather than viewing this as a challenge and setting up mechanisms to ensure better coordination between the two agencies while keeping the independence of the prosecutor, this argument has been used to suggest that the concept of separation between the agencies ought to be abandoned.

Even prior to the amendments in the Cr.P.C, the Assam Police Commission (1971) observed, "it would be advantageous and proper if the prosecution agency continues to remain under the control of the police department." This was seconded also by the later Delhi Police Commission who supported a separate cadre of prosecutors within the police. These views were supported by the fourth

⁸⁰ *Criminal Justice India Series, Vol. 1, West Bengal, Allied Publishers and NUJS (2001), at 128.*

report of the National Police Commission in 1980 which made some vital recommendations on the subject of prosecution. This report viewed the independence of the prosecution as a dilution of the Police's powers and goals in the criminal justice system. While the report recommended that the prosecuting cadres be constituted into a separate legal wing to function under a Director of Prosecution, it suggested this as an integral part of the state police. On the other hand, the Law Commission in 1996 was clear that the cadre headed by a Director of Prosecutions should function under the administrative control of the Home Department of the State and not the police.⁸¹

A recent report on the *Prosecution System in Orissa*, by a former Director General of Police, Orissa, Mr. A.B. Tripathy, argues forcefully against separation of agencies and calls for a reversion to the old system.⁸² The report argues that the amendments to the Cr.P.C have done a "signal disservice" to the criminal justice system, and asserts that the prosecution system in Orissa is on the verge of collapse. The author bemoans the fact that the conviction rate, which was as high as 64% in 1967-8, has dropped to an abysmal 15% in 2000 as a result of the separation of police from prosecution. Tripathy describes how smoothly the prosecution used to function under the earlier set up "based on the concept of command" where the Superintendent of Police was the officer in charge. The concept of 'separation of powers' being brought in without formulating any tangible alternative led to a vacuum, he argues, which was filled by lawyers with loyalty to the ruling political party.

Tripathy argues that this has resulted in falling standards of investigation as well, although the causal link is not made clear. Citing the example of states like UP and Tamil Nadu, where conviction rates are increasing, he recommends that the Directorate of Prosecution, set up under the *Orissa Prosecution Rules, 1997*, should be headed by a senior police officer so that the entire prosecution staff is

⁸¹ 154th Law Commission's recommendations relating to prosecution agency.

⁸² *Prosecution System in Orissa* by A.B. Tripathy, IPS (Retd.), Institute of Social Sciences (2002-3).

put under the control of the Police Department. It is noteworthy that the report does not even refer to the various judgments of the Supreme Court or to the provisions of the Constitution which militate against such a system.

Another study of the Criminal Justice System in West Bengal suggested that unmerited acquittals or underserved discharges lead to the police getting a bad name “although the fault may lie at the door of the prosecuting agency or elsewhere”.⁸³ The study further lamented, “Arduous and costly labour of the police in investigation is wasted, much to the disappointment of police officers concerned, if cases collapse in the court on account of defective prosecution”.⁸⁴

A report on the prosecution agency in the Subordinate Courts in Delhi however takes a more judicious approach.⁸⁵ The *Bawa Committee Report* considers the lack of coordination between the police and the prosecution as a direct result of separation of powers and views this as the bane of the prosecution system. However the report makes clear that, “keeping in view the observations of the Apex Court on this subject, reversion to the old system may militate against the democratic, judicial, and progressive principles that have guided the separation of judiciary from the executive and the police from the magistracy in the context of Delhi.”⁸⁶

4.4 The Malimath committee recommendations

Soon after coming into power, the BJP led NDA government constituted the Malimath Committee, giving it a sweeping mandate to recommend reforms to the

⁸³ *Criminal Justice India Series, Vol. 1, West Bengal*, Allied Publishers and NUJS (2001), at 131.

⁸⁴ *Ibid.* at 132

⁸⁵ *Functioning of Prosecution Department in Delhi* by Jagmohan and P.S. Bawa, Home Dept, Govt of NCT Delhi, (May 2000). This Committee was set up by the Home Department of the Govt. of NCT Delhi in order to “conduct a study to improve the functioning of the Directorate of Prosecution pertaining to manpower, equipment, system improvement and any other aspect having bearing on the functioning of the Prosecution Department.”

⁸⁶ *Ibid.* at 44.

criminal justice system.⁸⁷ The recommendations of the Malimath Committee relating to the prosecuting agency have to be seen in the context of the general trend of recommendations of the report.⁸⁸

While endorsing the establishment of the post of Director of Prosecution in each state who would head a cadre of Assistant Public Prosecutors and Prosecutors, the Committee recommended that the post of Director of Prosecution should be filled from among suitable officers of the police of the rank of Director General of Police in consultation with the Advocate General. The Committee observed that while the Director would function under the guidance of the Advocate General, it would be the duty of the Director to facilitate coordination between the investigation and prosecuting officers and to review their work.

In terms of accountability the Director would call for reports in all cases that end in acquittal from the prosecutors who conducted the case, as well as from the SP of the area. The Commissioner of Police/ District Superintendent of Police would hold monthly review meetings of Public Prosecutors, Additional Public Prosecutors and Assistant Public Prosecutors “for ensuring proper co-ordination and satisfactory functioning”. All Prosecutors will thus work in close coordination

⁸⁷ Committee on Reforms of Criminal Justice System, Government of India, Ministry of Home Affairs (March 2003). The first sentence of the report acknowledges “the nation is grateful to Sri L.K. Advani, Deputy Prime Minister and Home Minister, for his vision for comprehensive reforms of the entire Criminal Justice System including the fundamental principles and the relevant laws.”

⁸⁸ Making the “search for truth” the foundation of its approach to the criminal justice system, the report sets out to demolish well-established principles of criminal jurisprudence as well as liberal human rights, such as fair trial and processual justice for accused persons, which our criminal justice system has protected over the last 50 years. At the same time it refuses to address the real problems of politicization, corruption and brutalisation that characterize the police force in this country. It is woefully bereft of any academic or analytical research on which to base its sweeping recommendations, and instead seeks to base the jurisprudential shifts it makes on anecdotal information. Prof. Upendra Baxi, in a cuttingly insightful critique of the report observes, “this deeply calibrated rhetoric masks the extraordinary discontinuity between prior sane and safe thinking on restoration of efficiency and equity in the CJS and the proposals now made for a wholesale departure from human rights oriented criminal justice system. Indeed, this report vulgarizes the notion of reform itself by regarding human rights orientation of criminal justice administration as part of the problem!” See ‘An Honest Citizen’s Guide to Criminal Justice System Reform: A Critique of the Malimath Report’ by Upendra Baxi in *The (Malimath) Committee on Reforms of the Criminal Justice system: Premises, Politics and implications for Human Rights*, Amnesty International India (September 2003)

with the police department, assist it in speedy and efficient prosecution of criminal cases and render advice and assistance from time to time.

In short, not only does the Malimath Committee recommend that a police officer head the Directorate of Prosecution, it also provides this officer with administrative and disciplinary control over all the prosecutors in the district. To further strengthen the control of the police department over the prosecution agency, the Committee goes on to provide for monthly reporting to the local Police Commissioner/ DSP by all Public Prosecutors, as well as reports in each case where an acquittal has taken place by the concerned Public Prosecutor to the Director – police officer. The Committee also made a number of other recommendations on appointment etc, which too appear in contravention of law and precedent.⁸⁹

Interactions and discussions with members of the bar, prosecutors, jurists, and police officials, during the course of this study, elicited a range of responses. Not surprisingly police officials appear to be unanimous in their support to the Malimath Committee's recommendations insofar as the prosecution agency is concerned. Collapsing the issues of separation of roles and coordination, a number of officials interviewed proceeded on the assumption that there could be no coordination unless the prosecution was placed under the control of the police department. There was a strong belief that the appointment of a police officer as the head of the prosecution would be the panacea to all the ills of the criminal justice system including 'plummeting conviction rates' and the 'growing audacity

⁸⁹ The recommendations also ignore certain fundamental principles embodied in sections 24 and 25 of the Cr.P.C in relation to appointment of prosecutors. The Cr.P.C clearly states that where a Cadre exists, no person shall be appointed as Public Prosecutor or Additional Public Prosecutor for the district except from that cadre, and only if suitable persons are not found will the panel prepared by the District judge be reverted to. Malimath makes a completely unsupportable recommendation that 50% of these posts be filled by promotion and 50% from the panel. This would create a dichotomy within the prosecution service, upsetting the line of command and supervision as well as creating hostility among prosecutors themselves, surely a situation than begs to be exploited by the government in power. It would also create a rather convenient pool of prosecutors the government can draw from to handle cases which need to be manipulated for political or other reasons.

of criminals'. In their reports sent to the Malimath Committee, senior police officials from a number of states have rued the day the Cr.P.C was amended and the control over the prosecution wrested from the police. Some have argued that the prosecution has become "rudderless and directionless"⁹⁰ and one official went so far as to say that the prosecution agency has "gone to the dogs".⁹¹

Mr. Sankar Sen, (former Director General, NHRC and the author of a research paper on 'Investigation and Prosecution' for the Malimath Committee) argued that this arrangement has already been implemented in Tamil Nadu, where it is functioning admirably (See Box – Tamil Nadu) and urged for greater "trust" to be placed in the police. Describing the recommendations as "bold and apt" reflecting the needs of the times, Mr Sen argued that such an arrangement does not militate against the Supreme Court's directions, since there is no embargo against the head of the prosecution being a police officer.⁹²

A former IPS officer and author of a report on the prosecution system in Delhi, Mr. P.S. Bawa, was more restrained in his support for the Malimath recommendations on prosecution while voicing his disagreement with the other recommendations in the report. Mr. Bawa argued that since the Constitution referred only to separation of the executive from the judiciary and not of the police from the prosecution, the recommendations made by the Malimath Committee were legally valid. Although he felt that there could be no reversion to the old system of police prosecutors since this would be resisted by the judiciary, prosecutors, lawyers, and human rights activists, Mr. Bawa believed that implementation of the 'limited' recommendations of Malimath would be useful. He did however, point out that coordination between the police and the prosecution was far more complex and there were structural problems in the department in Delhi that need urgent attention including the lack of infrastructural facilities.

⁹⁰ Letter dated 20.8.2002 of the DGP, Madhya Pradesh being no. C/726/2002. See Annexure B.

⁹¹ Letter dated 20.8.2002 of the IG Prosecution, Bihar. See also Annexure B.

⁹² Personal interview on 29.3.2004 at Institute of Social Sciences, New Delhi.

Others however were more critical. Amnesty International India (All) criticised these recommendations on several grounds, not least among them being that the report does not reveal the material on which the recommendations have been made. All noted that while adjectives of “poor performance” and “poor competence” are used by the Committee to describe the current prosecution service, there is no thorough analysis of its problems. The rationale for the conclusion that appointing a senior police official as head of prosecution would solve all the problems remains unargued and unexplained.⁹³ Taking note of the directions of the Supreme Court on separation as well as on the role of the Public Prosecutor in the criminal justice system, All termed the attempt to hand over the role of prosecutor to the police as a “retrograde step” which would undermine the confidence of the public in the prosecutors.⁹⁴ It recommended a thorough and independent review of the prosecution service prior to any reforms, which must be in line with the UN Guidelines on the Role of Prosecutors.⁹⁵

The Malimath Committee was widely criticised for the lack of input taken from practicing criminal lawyers.⁹⁶ Rebecca M. John, a lawyer in Delhi, felt that the recommendation that prosecution should function under the control of the police was totally unacceptable. She argued, that with grave intellectual dishonesty within the legal fraternity today, a prosecutor who identifies totally with the police will go ahead and argue contrary to the law just to advance the police case.⁹⁷ Prosecutors interviewed at the Delhi High Court or the District Court rejected the Malimath Committee’s recommendations which were viewed as making the prosecution subordinate to the police. Prosecutors found these recommendations contradictory to the role of prosecutors as officers of the court as repeatedly upheld by the Supreme Court. It was pointed out that the earlier system of police

⁹³ *Ibid*, at page 46

⁹⁴ *Ibid*. at pages 94-98

⁹⁵ See Annexure E.

⁹⁶ *Seminar on Malimath Report and Criminal Law Amendment Bill, 2003*, organised by the All India Lawyers Union (Delhi Unit), on 14.2.2004 at Indian Law Institute, Delhi.

⁹⁷ She used the Parliament attack case as an example where the SPP appointed read out the disclosure statement made by the accused over and over again even though it was clearly inadmissible in a blatant attempt to prejudice the mind of the court.

prosecutors was abandoned precisely for the reason that prosecutors were unable to fulfil this role while under the departmental control of the police.

One prosecutor argued “our role is to assist the court in an impartial manner, and to arrive at the true facts, which may involve even opposing police evidence. In many of my matters I have been moving applications under section 190 Cr.P.C (where I do not support the police version). If what Malimath committee is recommending is implemented, we will completely lose this ability.”⁹⁸ Yet all of the prosecutors interviewed were of the view that coordination between the two agencies was essential to the smooth functioning of the criminal justice system, and there should be some legal inputs from prosecutors during investigation.⁹⁹

⁹⁸ The prosecutor has requested that the name not be disclosed.

⁹⁹ A similar view is also held by BV Trivedi – Assistant Director of the Bureau of Police Research and Development, Ministry of Home Affairs, Government of India. See ‘Human Rights and Criminal Justice System in India: A reflection on their mutual contextual nexus’ in *Criminal Justice* by KI Vibhute, Eastern Book Company: Lucknow (2004). It is not clear whether this is view is shared by the BPRD or the MHA.

Prosecution Agency in Karnataka

The system of prosecution in Karnataka is by and large structured in line with the Constitutional requirements, the Cr.P.C, recommendations of the Law Commission, as well as directions of the Supreme Court.

Taking a cue from the Law Commission reports, Karnataka implemented the separation of the police from the prosecution in 1972 when the Directorate of Prosecutions was set up (Vide GO no. LAW 115 LAG 72 dated 30.12.1972). A set of government orders issued at the time provided the organisational structure of the Directorate of Prosecution (DOP), its objective, staffing structures, pay scales, as well as details of the functions of the Director of Prosecutions and other officers. The system has been improved through various subsequent government orders.

The DOP comes under the administrative control of the Department of Law and Parliamentary Affairs of the State government. The DOP is headed by a Director of Prosecutions who is assisted by 4 Deputy Directors. There are Public Prosecutors for each district, 25 Senior Asst. Public Prosecutors and 123 Asst Public Prosecutors. The DOP is also provided with its own office staff. The prosecutors are part of a separate cadre and their eligibility, appointment and promotion are governed by the *Karnataka Department of Prosecution (and Government Litigation) (Recruitment) Rules, 1982*.

The functions of the Director of Prosecutions include supervision of the work of prosecutors in the department, giving them advice and instructions, reviewing their work, administrative control, power to transfer and making periodical reports to the government. The prosecutors are accountable to the Director and are expected to send monthly reports based on the instructions issued by him from time to time.

After the amendment of the Cr.P.C in 1973, Karnataka also experienced the vacuum resulting from the sudden breakdown in communication between the police and the prosecution. However unlike other states, Karnataka dealt with the situation and developed specific guidelines setting up mechanisms for cooperation and coordination with clearly articulated roles, responsibilities and rights for officers at each level in each department.

The information in this section is based on the report submitted by the Government of Karnataka to the Malimath Committee.

Prosecution Agency in Tamil Nadu

Prior to the amendment of the Cr.P.C, prosecutors in the districts in the state of Tamil Nadu worked under the administrative control of the Collector. At present the state does not have an integrated agency at the Subordinate Courts.

In 1984 a Directorate of Prosecution (DOP) was set up for prosecution of cases in the Magistrates Courts. The DOP was placed under the administrative control of the Home Department till 1989 when it was discontinued for 'administrative reasons'. In 1992 the Directorate was revived and functioned under a Special Officer of the rank of Joint Secretary (Home). In 1995 the post of a Director of Prosecution (with the rank of an Inspector General of Police) was created to head the DOP.

At present a Director of Prosecution (of the rank of an Additional Director General of Police) heads the Directorate at the State level. At the districts, there are 11 Deputy Directors of Prosecution. A Joint Director at the state level and Assistant Directors at the district level attend to the administrative supervision of the department. Assistant Public Prosecutors Grade II are recruited by the Tamil Nadu Public Service Commission from amongst lawyers having a minimum of 5 years experience. The next post (on promotion) is of Assistant Public Prosecutors Grade I/ Assistant Directors of Prosecution. The Prosecutors at the APP Grade I and II level are accountable to the Director of Prosecutions.

Public Prosecutors and Additional Public Prosecutors handle cases in the Sessions Courts (courts of the Sessions Judge and the Additional Sessions Judge cum Chief Judicial Magistrates respectively). These are tenure posts and are accountable to the courts not the DOP. According to the Rules, appointments are nominated by the Collector after due consultation with the Sessions Judge. It has been held by the Madras High Court that Rules governing the appointment of Public Prosecutors are made under constitutional powers (under Article 227 (2)(b) and Article 309) and have statutory force. The government is bound to follow these rules, failing which the appointments are liable to be quashed (*A. Mohambaram vs. M.A. Jayavelu and ors.* AIR 1070 Mad 63).

In his report to the Malimath Committee, the Director of Prosecutions expressed his satisfaction with the prosecution system and coordination with the police. He argued for the extension of the cadre under the DOP to include Prosecutors at the Sessions Courts. However it is likely that the prosecution agency in Tamil Nadu will be held in direct violation of the Supreme Court's verdicts and the constitutional mandate. Given further that police officials at the level of IG and DIG are handpicked by the Chief Minister, the direct control of the DOP by the police is also indirect control by the executive and a subversion of the criminal justice system itself.

Information for this section has been drawn from the Report of the Additional Director General of Police & Director of Prosecution submitted to Malimath Committee, as well as other sources.

4.5 Suggestions for Co-ordination between agencies

A call for increased co-ordination is not new. The Law Commission in 1958 recognised the need for a high degree of cooperation between the Police and the Prosecution. They deplored the attitude of police officers who feel that their role has come to an end once the investigation is complete, and stated that it should be the duty of the Superintendent of Police to ensure that prosecutors are given all the assistance and information they need during the trial. Therefore, apart from handing over the case diary, the Commission suggested that the Investigating Officer (IO) should interact with the public prosecutor to ensure that the prosecutor gets acquainted with the facts more thoroughly. It was also observed that the IO should provide all assistance during cross-examination of defence witnesses.

At the same time, the Commission noted that the lack of acquaintance with police investigation and practices was likely to affect a prosecutor's work and suggested a training of about six months to observe investigations and learn police functions.

In 1969 the 41st Law Commission Report also made recommendations on this issue. The Commission stated that it should be the responsibility of the public prosecutor to scrutinise the police report or charge sheet before it is filed and see whether a case is made out from the evidence. The Commission recommended that the prosecutor should have the authority to send the case back for further investigation and to modify the proposed charge whenever he finds it necessary to do so.

In its 154th report the Law Commission noted that the investigation and prosecution formed a continuous link, and should be closely coordinated. The vexing question of how such coordination between the police and the prosecution could be achieved while respecting the Supreme Court's directions on separation

of powers was given some attention. However the Law Commission made no independent suggestions on improving the coordination and merely reiterated some of the suggestions made by the 14th Law Commission Report and the Fourth National Police Commission Report with regard to coordination between police and prosecution agencies.

The Malimath Committee which advocated complete control by the police in the name of effective co-ordination between the two agencies further completely ignored the experiences in states like Himachal Pradesh and Karnataka. These states have implemented separation between the police and the investigation and also been able to systematize effective coordination between the two departments through a series of government orders and directions. In both these states, detailed guidelines have been given on how the investigating officer and the prosecutor will cooperate with each other during the course of a criminal proceeding. (See Annexure B for details).

The *Bawa Committee Report* makes a number of innovative recommendations for improved coordination between the police and the prosecution.

- There should be a Special Secretary in the Home Department who is solely responsible for the functioning of the DOP. This officer should be a person who is well conversant with the functioning of police, investigation, legal processes and the procedures of the court, preferably with a legal background, and should be sufficiently senior as to bring about effective coordination.
- Regular meetings between prosecutors and police officials at all levels, including monthly district level meetings, meetings between the Police Commissioner and the Director of Prosecutions, and annual conferences and workshops with DCPs and Chief Prosecutors.
- Every police charge sheet, before it is laid in court, should be examined by the DOP so that legal lacunae, if any, can be remedied.

- A legal cell in each district should be created with officers from the DOP on deputation to assist the police in investigation, bail, liaison with prosecutors, and so on.
- Apart from this, the DOP should advise the police department on legal aspects of a case at any stage of criminal proceedings, including investigation. Till such time as a legal cell is set up, prosecutors should be given an honorarium for giving advice during investigations.
- Where the prosecution branch does not recommend prosecution of the case, it is suggested that a final decision be taken by the DCP under intimation to the Director of Prosecutions.
- Bail proceedings: prosecutors must be briefed well in advance by the Investigating Officers and provided adequate material to enable them to prepare the case properly.
- The current ambiguity regarding the responsibility of keeping records and case files, as well as case property should be sorted out jointly by the two agencies.
- Feedback should be given to the DOP about action taken by the police on strictures passed in court orders against police officers.

It is quite apparent that there is a serious, ongoing tussle to gain control over the office of the Public Prosecutor. In this tug of war, rallying behind the attempt of the police to regain control over the office of the Public Prosecutor, are conservative and fascist political forces, who repeatedly conjure and exploit the fear of terrorism and growing violence in society, to garner support. However it is critical that these attempts to wrest control are firmly and urgently thwarted, as this shift will be unconstitutional and illegal.

Co-ordination sans control

Interviews with defence counsels and prosecutors revealed that they did not feel that separation of police and investigation needed to run counter to coordination between the agencies, although they all felt that at present the coordination between the two agencies was in an abysmal state. Based on their first hand experiences with the functioning of the criminal courts, they made a number of specific recommendations:

- Due to the lack of legal inputs from prosecutors during investigation, the police make a number of mistakes in the collection of evidence. By the time the charge sheet is sent to the Public Prosecutor for scrutiny, it is already too late. One suggestion was that each police station be provided with a legal person who will assist the investigating officer during investigation in order to ensure that evidence is properly collected, in accordance with the necessary ingredients of the crime. This suggestion found wide approval. It was however felt that while it is important that such person should be conversant with actual court processes, it should not be a person who is engaged in the prosecution of cases in court. This prosecutor should be paid well so that he is not susceptible to bribes and manipulation, and he should also be governed by a separate agency other than the police. This makes certain that he is independent but is also at hand.¹⁰⁰
- Investigating Officers are cavalier in their attitude to comments made by prosecutors on scrutiny of charge sheets, which have to be worded very carefully so that they are not mistaken for directions.¹⁰¹ Very few Investigating Officers do anything about the comments made by the prosecutors. It was felt that the prosecution should be given some supervisory role in the investigation to ensure that essential evidence comes on record, and should have the power to overrule a piece of evidence produced by the Investigating Officer if they believe it is inadmissible or has been collected by wrongful means.¹⁰²
- At the High Court level, while little coordination is required, the Standing Counsel (Criminal)¹⁰³ stated that she encourages senior police officers to observe court proceedings so that they hear the defence arguments and get a sense of what the court is thinking.
- Those police personnel who are focusing on investigation work can be provided intensive training in investigation procedures and in the law.¹⁰⁴

¹⁰⁰ Personal interview with Mr. Akshay Bipin, Additional Standing Counsel (Criminal) Delhi High Court on 5.12.2003 and 10.3.2004.

¹⁰¹ One prosecutor expressed the futility of asking the Investigating Officer "why has this eye witness not been examined?", rather than saying "you are directed to examine this eye witness", even when they know that this could be fatal to the prosecution case.

¹⁰² Personal interview with Ms. Rebecca M. John, Advocate on 10.3.2004

¹⁰³ Personal interview with Ms. Mukta Gupta, Standing Counsel (Criminal) Delhi High Court, on 26.3.2004

¹⁰⁴ Personal interviews with Mr. Akshay Bipin Additional Standing Counsel (Criminal) Delhi High Court on 5.12.2003 and 10.3.2004.

Chapter 5

The Prosecution and the Executive

As the Executive exercises substantial control over the office of the Public Prosecutor in myriad ways, this remains a crucial area where issues of autonomy and independence of the prosecution need interrogation and examination. For the prosecutors office to function impartially they must not be beholden to any political master. Which wing of the Government will wield administrative and disciplinary control, over the office of the Prosecutor? This will undoubtedly have direct implications for autonomy. It is in this context that the mode of appointment, security of tenure and service conditions of public prosecutors becomes important.

5.1 Appointment and security of posts

As discussed earlier, different states have adopted different systems of appointment of prosecutors, whether as cadre based employees or on a tenurial basis on contract. Most states in fact adopt a combination of both methods.¹⁰⁵ In the recent past a number of reports have taken the establishment of a Directorate of Prosecutions and a cadre of prosecutors under it, as a given. This includes the *Bawa Committee Report* for Delhi and the *Tripathy Report* for Orissa.¹⁰⁶

Irrespective of the system, political interference in these appointments, whether in order to influence the conduct of particular cases or just as part of the “spoils system” has been an issue openly discussed in the courts in the past, albeit

¹⁰⁵ For a detailed discussion on the structures of prosecution agencies in different states, see Annexure B.

¹⁰⁶ *Functioning of Prosecution Department in Delhi* by Jagmohan and P.S. Bawa, Home Dept, Govt of NCT Delhi, (May 2000); *Prosecution System in Orissa* by A.B. Tripathy, IPS (Retd.) published by Institute of Social Sciences (2002-3).

tentatively.¹⁰⁷ In the cases relating to the Gujarat riots the Supreme Court has been more vocal in its denunciation of the state government's interference in the appointment and functioning of prosecutors.

In a number of other decisions the Courts have made it clear that the office of the prosecutor is a public office and cannot be subject to the whims of the executive. Thus while the executive has the prerogative of appointment, the appointment of prosecutors is not optional or subject to financial constraints.¹⁰⁸ Similarly in *Kumari Shrilekha Vidyarthi etc. vs. State of UP*, the Supreme Court took pains to assert that the Public Prosecutors' office could not be treated by state governments in a cavalier fashion.¹⁰⁹ The state government had argued that the appointments were on a contractual basis, being governed by the terms of the contract, and that it was open to the government to terminate the contracts at any time. The Court rubbished this argument, holding that there must be a valid reason for the action taken, even if the reason is not stated, otherwise the action will be arbitrary and therefore hit by Art.14. The Court clarified that the law would never allow an appointment to be terminated at the sweet will of the government. The Court rejected the argument that the appointment of District Government Counsel is a professional engagement like that between a lawyer and client, or a purely contractual one with no public element attaching to it. The Court reiterated that the prosecutor's was a public office and appointments and termination would be subject to judicial review. The Court thus held, "non-application of mind to

¹⁰⁷ *A. Mohambaram vs. M.A. Jayavelu and ors*, AIR 1070 Mad 63. Also see *P.G. Narayanankutty vs. State of Kerala* 1982 CrLJ 2085; *Kumari Shrilekha Vidyarthi etc. vs. State of UP* AIR 1991 Supreme Court 537; *Vijay Shankar Mishra vs. State of UP*, 1999 CrLJ 521 (Allh.)

¹⁰⁸ In *P.M. Sunny vs. State of Kerala*, (1986 CrLJ 1517) the Kerala High Court found that a large number of posts of prosecutors in the state were lying vacant, despite availability of eligible lawyers to fill them. The argument of the state government of lack of resources was rejected by the Court for the reason that "financial constraints cannot absolve the State of its constitutional obligations." The functioning of criminal courts is a necessity, and therefore the appointment of prosecutors is an absolute necessity. It was held that the government is therefore bound to make appointments to the vacant posts as per the list available with it and subject to rules of reservation.

¹⁰⁹ AIR 1991 Supreme Court 537. The petition challenged an order by which the UP government terminated the appointments of all Government Counsel (Civil, Criminal, Revenue) in all the districts in the State of UP w.e.f. a certain date and directed that fresh panels be prepared for all posts across the board.

individual cases before issuing a general circular terminating all such appointment throughout the State of UP is itself eloquent of the arbitrariness writ large on the face of the circular. It is obvious that the issuance of the impugned circular was not governed by any rule but by the whim or fancy of someone totally unaware of the requirements of rule of law”.

Interviews were held during the course of this study with prosecutors who belonged to cadre systems as well as prosecutors working on a tenure basis in Delhi. It was intriguing that both systems claimed greater autonomy and independence. Ms. Mukta Gupta, Standing Counsel (Criminal) at the Delhi High Court, felt that tenure prosecutors in the High Court are able to resist pressure from the executive. Being inherently temporary posts, with private practice to fall back upon, these prosecutors find it easier to take decisions which might invite the displeasure of the government, and cost them their jobs.¹¹⁰ On the other hand, Mr. A.K. Gupta, Senior Prosecutor at Tis Hazari (District and Sessions Court, New Delhi) was vehement in his belief that since cadre prosecutors are permanent employees, they can thus take decisions freely without fear of losing their jobs.¹¹¹

It is apparent that both tenure posts as well as cadre posts carry within them the potential for autonomy as well as political interference. Income from private practice dwindles once prosecutors are appointed to tenure posts. This might encourage prosecutors to prefer job security over autonomy. It is also an unwritten practice that prosecutors holding tenure posts resign en masse if there is a change in the ruling political party. Prosecutors in cadre posts on the other hand are not permitted private practice and thus have a lot more at stake since they do not have back-up clientele to turn to if they lose their jobs.

¹¹⁰ Personal interview on 26.3.2004

¹¹¹ Personal interviews on 21.11.2004 and 25.11.2004

Further, no amount of job security can compensate for the kind of control that is exerted over them by the branch of the executive that administers them, whether through a Directorate of Prosecutions or directly. E.g. in Delhi the Directorate of Prosecutions is administered by the Home Department – the same department which administers the police. This can obviously lead to a conflict of interest. Where the Director of Prosecutions is himself a police officer as in Tamil Nadu and Andhra Pradesh, the ability of the prosecutor to take independent decisions, no matter how secure their jobs, is bound to be seriously impaired. To this extent appointment and job security is one significant area where greater attention needs to be paid.

Discussion on cadre or tenure though becomes academic in situations that prevail in a number of states, including Delhi, where a large percentage of posts in the DOP are vacant and filled by prosecutors working in ad-hoc positions. This effectively ends all discussion on autonomy and is one of the ways in which the legislative object can be evaded.

5.2 Executive Control of the Prosecution

It has been repeatedly argued that the Public Prosecutor is the 'Minister of Justice' and an 'Officer of the Court' whose commitment must be to the Court and to principles of justice and fair play. The government is not a 'client' whose interests s/he serves at any cost like a private lawyer would. It is for this reason that s/he must be provided autonomy and freedom of decision making in order to perform his functions without fear or favour. No doubt during the best of times, this is an ideal that is hard to live up to, but at least the facilitating environment for achieving this goal must be created and protected.

Subsequent to the amendment of the Cr.P.C in 1974, however, different state governments have adopted different mechanisms and methods to organise their

prosecution agencies.¹¹² There is also a lack of uniformity with regard to the Department of the State Government which controls the DOP. In a number of states the prosecution of agency or the directorate of prosecutions is administered by the Home or Law Departments of the State Government. More often than not, in the same state, the cadre prosecutors under the DOP are administered by one department while the tenure prosecutors are administered by another. While the post of the Director of Prosecutions in some states is a promotion post, in a few it is a judicial officer, and in yet others the post is held by a senior police officer. The issues of political interference and autonomy plague all these systems.

Prosecution agency in Arunachal Pradesh

The state of Arunachal Pradesh is interesting for the reason that till date the constitutional mandate of separation of powers between the executive and the judiciary has not been implemented, and as a result even the judicial and executive functions of the state are combined. The officer performing judicial and executive functions at the district level is the Deputy Commissioner-cum Ex Officio District and Sessions Judge. In this scenario, it is not surprising that separation of police and prosecution functions has not been implemented yet.

There is no Directorate of Prosecutions. There are approximately 6 prosecuting Officers appointed and administered by the Police Department. A few years ago these officers were appointed as Public Prosecutors under the Cr.P.C by a government notification, but this has been stayed by the Gauhati High Court and the case is pending. In the result, a district wise panel of lawyers has been prepared by the government, and lawyers are appointed from this panel by the Deputy Commissioner-cum Ex Officio District and Sessions Judge on a case to case basis. The qualifications for empanelment are not available. Some prosecuting officers have been appointed as Addl. Public Prosecutors under TADA, and continue to function in this capacity.

Information based on letter dated 25.10.2002 of the DIG-P, Itanagar to the Malimath Committee.

¹¹² Available details of the prosecution systems prevailing in different states of the country have been placed in Annexure B.

Political interference can also take a more direct form. In a classic case demonstrating the extent to which political interference can vitiate a criminal trial, all the nine accused who happened to be members of the ruling CPI (M) party were conveniently acquitted by the trial court. The Supreme Court observed a large number of blatant irregularities in the trial and scrutinized the role of the CPI (M) led government in West Bengal. In a telling reference to the pressure exerted by the ruling party on the Court, the Supreme Court observed, “no citizen should go away with the feeling that he could not get justice from the court because the other side was socially, economically or politically powerful and could manipulate the legal process.”¹¹³

The inter-relationship between the investigation agency, the prosecution agency and the executive, and its relevance for the rule of law was examined by the Supreme Court in *Vineet Narain and others vs. Union of India and anr.*¹¹⁴ This case related to the Jain Diaries and came to be better known as the *Hawala* Case. The fundamental principle on which the Court’s directions in this case were based was the right to equality, in that all citizens of the country must be treated equally in criminal proceedings – no matter how high they might be placed. The Court thus observed the need to free the investigation as well as the prosecution from executive control.

The Supreme Court recognised the Minister as the final disciplinary authority responsible to Parliament with respect to the functioning of these agencies. It observed that for this very purpose the Minister had the power to review the working, give broad policy guidelines, appraise the quality of work and call for

¹¹³ *Sunil Kumar Pal vs. Phota Sheikh and Ors*, (1984) 4 SCC 533

¹¹⁴ 1998 (1) SCC 226. A complaint had been made to the Court that the Central Bureau of Investigation (CBI) was dragging its feet in the investigation of this case because of the involvement of senior bureaucrats and politicians along with powerful criminals in the *hawala* racket. The Court followed a procedure which has come to be known as a ‘continuing mandamus’ where it monitored the progress of these cases over a long period of time. In this particular decision the Court passed detailed directions, in the form of court Rules, on the functioning of the Central Vigilance Commission, the CBI, the Enforcement Directorate as well as the prosecuting agency.

information relating to the agencies. However the Court warned, “all the powers of the Minister are subject to the condition that none of them would extend to permit the Minister to interfere with the course of investigation and prosecution in any individual case and in that respect the officers concerned are to be governed entirely by the mandate of law and the statutory duty cast upon them.”¹¹⁵

The Supreme Court observed that an impartial investigation conducted in an atmosphere free of interference needed to be followed by an equally proper prosecution for the effort to bear fruition. This called for a strong and competent prosecution agency. Accordingly the Court issued a series of detailed directions for the prosecution of CBI (Central Bureau of Investigation) cases by able and impartial prosecutors. It directed, “steps shall be taken immediately for the constitution of an able and impartial agency comprising persons of unimpeachable integrity to perform functions akin to those of the Director of Prosecutions in [the] UK.”

These directions were made in a case where the Court was deeply concerned by the bureaucrat-politician-criminal nexus which had used all means available to thwart the investigation and prosecution of cases under the Prevention of Corruption Act by the CBI. They remain equally applicable to the functioning of state level prosecution machinery in criminal proceedings in the ordinary course as also those relating to misconduct/ rights violations by state functionaries.

Apart from the regime in power, the prosecution is also susceptible to the pressures of the rich and powerful. Ironically in the Shankar Guha Niyogi murder trial, at Durg, it was the prosecution agency, the C.B.I, which requested the trial be held in camera on the tacit plea that it was inconvenient for a small court room to accommodate a large number of people. A request obviously not opposed by the accused persons. This was done in a case where powerful industrialists and their cronies were arraigned as accused for the murder of a

¹¹⁵ *Ibid*, at para 27-28.

trade union leader. Fearing that justice might not be done behind closed doors, the *Chhatisgarh Mukti Morcha* filed a writ petition before the Jabalpur High Court and obtained an order that stated, “the court room is a temple of justice, where everybody including parties and the complainant have got a right to access, access is not limited to parties.”¹¹⁶

The same tendency on the part of the prosecution was visible in the trial of accused Chandrakant Shah charged with escape from judicial custody.¹¹⁷ The accused was acquitted as the prosecution failed to place on record the warrant committing the accused to judicial custody nor did it examine the constable who was on duty at the time of escape. In the absence of this material evidence the Judge decided that there was no evidence to suggest that the accused had been in judicial custody, much less escaped from custody. This is clearly against the directive of the Supreme Court that it is “as much the duty of the prosecutor as of the court to ensure that full and material facts are brought on record so that there might not be miscarriage of justice.”¹¹⁸

The need to free the prosecution from interference of all hues, including the executive, is clear. There is an urgent need to build upon the obligations placed on the state by the Constitution and the recommendations made by the various Law Commissions along with international practice based on principles of liberal jurisprudence to compel the enforcement of the directions of the Supreme Court and various High Courts exhorting the need for independent prosecution.

¹¹⁶ Order, dated 17.2.1995 in Writ Petition No. 152/1995.

¹¹⁷ One of the industrialists accused for the murder of trade union leader Shankar Guha Niyogi, convicted by the trial Court and eventually acquitted by the Supreme Court.

¹¹⁸ *Shakila Abdul Gafar Khan vs. Vasant Raghunath Dhobale*, (2003) 7 SCC 749

Unable or Unwilling – the Hashimpura Trial

While the Court have laid down the test of public interest to assess whether a particular case deserves the appointment of a SPP, the interpretation of public interest remains contentious and undoubtedly political. This point is well illustrated by the travails of the Hashimpura trial. In May 1987, the Provincial Armed Constabulary (PAC) had been called in to curb communal rioting in Meerut, Uttar Pradesh. On 22nd May 1987, the PAC herded over 50 Muslim male youth in their truck and instead of taking them to jail drove them towards the Upper Ganga canal. Here at two spots the detainees were shot at point blank range and the corpses thrown into the canal. A few men miraculously survived to tell the tale. A Crime Branch CID enquiry pointed an accusing finger at 19 PAC officers and men. The chargesheet was finally filed in 1997 in a Ghaziabad Court, but the trial did not commence.

Finally on a petition of the victims the case was transferred by the Supreme Court to Delhi. Here after much delay and many applications and entreaties by the victims the State of UP appointed a SPP in 2004. However it was soon discovered that the appointed SPP lacked the statutory qualifications and the appointment was cancelled. Again many months and many applications later another SPP was appointed. Despite the observations of the Supreme Court in Zahira Sheikh's case, the victims were neither consulted nor heard. This SPP has yet to commence his arguments on Charge. Eighteen years have passed and the trial is yet to commence. The appointment of the SPP remains mired in *realpolitik*. The rhetoric of minority protection notwithstanding, challenging impunity and prosecuting the enforcers of law is obviously not on the agenda of the State. The appointment of an SPP 17 years after the incident has still brought no succour to the victims.

5.3 Power of withdrawal from prosecution

One of the most important powers given to the Public Prosecutor is the power to withdraw from the prosecution of a case. Section 321, Cr.P.C provides that at any time before the judgment is pronounced, the Prosecutor or Assistant Public Prosecutor in charge of a case may, with the consent of the court, withdraw from the prosecution of any person either generally or with regard to one or more of the offences he is being tried for.¹¹⁹ In other jurisdictions this is termed as the power to enter a “nolle prosequi”.

¹¹⁹ The full text of section 321 is provided in Annexure A.

The provision is skeletal and does not give an indication as to how this power is to be exercised. This gap has been filled to some extent by judicial interpretation and the scope and extent of the power of the Public Prosecutor under Section 321 has been agitated on several occasions before the various High Courts and the Supreme Court.

Perhaps the most controversial case regarding the interpretation of Section 321 was the prosecution of the (then) Chief Minister of Bihar, Jagannath Mishra, and some of his associates, for alleged offences relating to the manipulation of funds of a cooperative bank. The prosecution was launched when Mr. Mishra was not in power, but soon after he was elected Chief Minister, a decision was taken by the state government (at a meeting which he himself chaired) that the prosecution against himself and his associates should be dropped. An application under section 321 made by the Public Prosecutor was allowed by the Trial Court. The case came before the Supreme Court where a three judge bench upheld the Trial Court's order.¹²⁰ However, due to a dissenting opinion by one of the judges, the matter came before a Constitution Bench. While the decision of the Trial Court was again affirmed by a majority verdict, Justice P.N. Bhagwati wrote a detailed dissent.¹²¹

Examining the entire range of judicial decisions on the issue, the Supreme Court affirmed its approval of the legal principles laid down in an earlier decision, as follows:¹²²

- “1. Under the scheme of the Code prosecution of an offender for a serious offence is primarily the responsibility of the Executive

¹²⁰ *Sheo Nandan Paswan vs. State of Bihar and others* AIR 1983 SC 194

¹²¹ *Sheo Nandan Paswan vs. State of Bihar and others* AIR 1987 SC 877

¹²² *R.K.Jain vs. State* (1980) 3SCR 982. This case related to the prosecution of Mr. George Fernandes and Mr. Bansi Lal for offences committed during agitations against the Emergency. When the Janata Party came to power, it had sought to withdraw from the prosecution of these offences, and this was upheld by the Supreme Court.

2. The withdrawal from the prosecution is an executive function of the Public Prosecutor.
3. The discretion to withdraw from the prosecution is that of the Public Prosecutor and none else, and so, he cannot surrender that discretion to someone else.
4. The government may suggest to the Public Prosecutor that he may withdraw from the prosecution but none can compel him to do so.
5. The Public Prosecutor may withdraw from the prosecution not merely on the ground of paucity of evidence but on other relevant grounds as well in order to further the broad ends of public justice, public order and peace. The broad ends of public justice will certainly include appropriate social, economic and political purposes sans Tammany Hall enterprise.
6. The public prosecutor is an officer of the Court and responsible to the Court.
7. The Court performs a supervisory function in granting consent to the withdrawal.
8. The Court's duty is not to re-appreciate the grounds which led the Public Prosecutor to request withdrawal from the prosecution but to consider whether the Public Prosecutor applied his mind as a free agent, uninfluenced by irrelevant and extraneous considerations. The Court has a special duty in this regard as it is the ultimate repository of legislative confidence in granting or withholding its consent to withdrawal from the prosecution."

The Court also added that it is the duty of the Public Prosecutor to inform the Court about the reasons on the basis of which he has reached a decision to withdraw from prosecution, since both the Court and the Public Prosecutor have a duty to ensure that justice is done, and to "protect the administration of justice against possible abuse or misuse by the executive." In this case the Court felt that there was sufficient evidence to show that the Public Prosecutor had applied his independent mind to the case upon the request of the government, and

arrived at an independent decision to withdraw from the prosecution. The Trial Judge also was satisfied on this score. It would therefore not be proper for the Supreme Court to interfere in the decision of the Public Prosecutor to withdraw from the prosecution.

While agreeing with the above stated principles in his dissenting opinion, Justice Bhagwati asserted that the only ground on which the Public Prosecutor can withdraw from prosecution is public justice and quoted with approval from *RK Jain's case*,

“In the past we have often known how expedient and necessary it is in the public interest for the Public Prosecutor to withdraw from prosecutions arising out of mass agitations, communal riots, regional disputes, industrial conflicts, student unrest, etc. Wherever issues involve the emotions and there is a surcharge of violence in the atmosphere it has often been found necessary to withdraw from prosecution in order to restore peace, to free the atmosphere from the surcharge of violence, to bring about a peaceful settlement of issues and to persist with prosecutions where emotive issues are involved in the name of vindicating the law may even be utterly counter productive. An elected Government, sensitive and responsive to the feelings and emotions of the people, will be amply justified if for the purpose of creating an atmosphere of goodwill or for the purpose of not disturbing a calm which has descended it decides not prosecute the offenders involved or not to proceed further with prosecutions already launched.”

The Hon'ble Judge was of the view that the fact that the manner in which the decision to withdraw from prosecution was taken by the state government was a violation of the elementary principle that justice must not only be done, it must be seen to be done. He was of the opinion that this ought to have weighed with the

Trial Court and it ought to have refused to grant its consent to the application of the Public Prosecutor.

Unfortunately, the Court did not dwell on what exactly constitutes “application of independent mind” by the prosecutor. While the majority judgment seemed to be satisfied with a bland statement to this effect made by the Public Prosecutor in the application to the Court for withdrawal, the minority decision seemed to rely on the surrounding circumstances to conclude that the decision was improper. The question of what “application of independent mind” really means remains unanswered.

In a variety of others cases Courts have held that withdrawal of prosecution may be permitted by the courts under section 321 in the interest of peace and security, but withdrawal is not permitted merely on the ground of the inability of the prosecution to procure a conviction.¹²³ A POTA special court in Delhi allowed the Prosecution Department to withdraw a Prevention of Terrorism Act (POTA) case against the Kashmiri separatist leader, Ghulam Moinuddin Bhat to “facilitate the continuing peace process in Jammu & Kashmir”. The Public Prosecutor in the case had submitted that Mr. Bhat’s release would have a beneficial effect on the peace process in Jammu & Kashmir and that the same was in public interest and in the larger interest of society.¹²⁴ However a plea to bring in caste bias as a ground to withdraw prosecution was turned down by the Allahabad High Court as it apprehended that it would give birth to caste wars in the State.¹²⁵

In its judgment in *Govt. of NCT Delhi vs. Preet Public School*, the Delhi High Court listed some of the grounds on which the Public Prosecutor can withdraw

¹²³ See *Durai Murigan vs. State* 2001 CrLJ 215 (Mad); *Razack vs. State of Kerala* 2001 CrLJ 275 (Ker); *Suraj Prasad vs. State of UP* 2001 CrLJ 371 (All.)

¹²⁴ Reported in *The Hindu*, 8.5.04.

¹²⁵ *State of UP vs. 3rd Additional District Judge and Sessions Judge* 1997 CrLJ 3021 (All)

from prosecution as emerging from the various decisions of the Supreme Court.¹²⁶

- “1. Broader considerations of public peace;
2. Larger considerations of public justice;
3. Promotion of long lasting security in a locality;
4. Halting a vexatious prosecution;
5. Considerations of public policy;
6. Purposes of law and order;
7. Advancing social harmony;
8. Inexpediency of prosecution for reason of State;
9. Injustice to the accused in case the prosecution is continued;
10. On other similar and cognate grounds.”

The Court clarified that the above grounds were illustrative and not exhaustive. It was further stated that the Public Prosecutor can also apply for withdrawal from prosecution on the basis of an application made by the complainant. However the Court made clear that the Public Prosecutor could not act on his own when making an application under Section 321 but had to act upon a request from the state government that had engaged him. Of course, after this request is received, the Prosecutor is expected to apply his independent mind to the issue and arrive at his own decision.

Interviews with prosecutors, criminal lawyers as well as police officers during the course of this study indicate another reality. The general belief was that prosecutors are mere “post offices” when it comes to the decision to withdraw, and it is the government in power which takes this decision. “It is just not true in reality that they apply their minds independently to that decision or that they have any say in it at all,” argued Ms. Rebecca M. John, a criminal lawyer in Delhi.¹²⁷ This is cause for serious concern since the decision of the Public Prosecutor to

¹²⁶ 71 (1998) DLT 341

¹²⁷ Personal interview on 10.3.2004

withdraw from prosecution is given statutory protection and the stamp of approval of the Judiciary.

In his dissenting opinion in the *Sheonandan Paswan case*, Bhagwati J., dwelt on what a prosecutor should do if he disagrees with the decision of the government that the prosecution should be withdrawn.¹²⁸

Bhagwati J. was of the view that the prosecutor should communicate his refusal to the state government and then resign. It is difficult to see how this could be a solution in practice. In Delhi the cadre of prosecutors at the Subordinate Court level are under the disciplinary and administrative control of the Home Department of the state government – the same department which takes the decision to withdraw from prosecution and also administers the police. Prosecutors themselves are badly paid, handle enormous workloads with almost non-existent infrastructural support, and are treated with scant respect in the Courts.¹²⁹ Their self esteem and their standing at the Bar is not high. In these circumstances a public prosecutor who refuses to toe the dictated line of the government would

Withdrawal of cases – the Scheduled Castes and Scheduled Tribe (Prevention of Atrocities) Act, 1989

The power provided to the State to withdraw cases can also be used along caste lines. In Maharashtra the Shiv Sena had made the withdrawal of the SC/ST atrocities Act an election issue in 1995. After coming into power, it declared that it would ask the Central Government to amend the Act to limit its “abuse”. Since that was not politically feasible, the Shiv Sena began withdrawing over 1100 cases registered under the Act alleging that these cases were false and were registered out of personal bias. A 2004 NHRC report on the implementation of the SC/ST Atrocities Act, 1989 notes that the withdrawal of cases effectively sent the message to the police not to register cases and ensured that the Act would not be taken seriously.

The problem is clearly not limited to Maharashtra and the Shiv Sena alone. The NHRC noted that the West Bengal Government was not allowing registration of cases under the Act because of their conviction that violence against SCs is not guided by caste consideration. The report further observed that a Rajasthan Cabinet Minister had recently termed the registration of cases under the Act as a ‘headache’ for the police.

¹²⁸ AIR 1987 SC 877

¹²⁹ One prosecutor working in the Patiala House court complex stated that the department does not have a typist available. As a result prosecutors are expected to either send hand written drafts or get them typed at their own cost.

indeed be a rarity. The risk losing the job in the process makes any refusal further unlikely.

Ultimately the exercise of power under Section 321 is a political act and despite judicial interpretation continues to be exercised as such. Ms. Indira Jaising, senior advocate, Supreme Court, drew attention to the Bhopal Gas Leak case where the Union of India entered into a settlement with Union Carbide Corporation (UCC) in 1989 for a sum of \$470 million (US) in return for withdrawal of all pending civil and criminal proceedings.¹³⁰ Ms. Jaising pointed out that the Union Government was at that time a major shareholder in Union Carbide India Limited – the Indian subsidiary of UCC which managed the Bhopal plant. Logically the Union of India should have been arraigned along with the other accused in the criminal proceedings, and held accountable for the deaths of thousands of Indian citizens as a result of the gas leak. Instead the Union Government was able to not only take over all civil proceedings ‘on behalf’ of the victims, but also subvert the criminal proceedings in its capacity as “State”. Given that the settlement was arrived under the aegis of the (then) Chief Justice of India, R.S. Pathak, it is hardly likely that there was any independent ‘application of mind’ of the public prosecutor in charge of the criminal case before the Chief Judicial Magistrate, Bhopal, before withdrawing from prosecution in the case.¹³¹

It is precisely such situations where the centrality of the independence of the Public Prosecutor in the criminal justice system is brought into sharp relief. The existing law is clearly inadequate in providing the Public Prosecutor any room for resisting political or other pressures from the dominant ruling elite while taking these decisions on a day-to-day basis leave alone in the face of state complicity in criminal acts. If the criminal justice system is in fact committed to dealing with state impunity, the office of the public prosecutor must be empowered to take

¹³⁰ Personal interview on 22.5.2004

¹³¹ In a review petition filed before the Supreme Court against this settlement, while the monetary compensation was left undisturbed, the criminal proceedings were restored. *Union Carbide Corporation etc. vs. Union of India etc.*, 1991 4 SCC 584.

autonomous decisions, not just in the ordinary course but also in the face of such pressures and at times of crisis.

5.4 Prosecuting orchestrated communal violence

Concerns have been raised by civil rights activists and social movements about the failure of the criminal justice system in trials relating to communal crimes where the state or its agents and functionaries have been complicit in encouraging or perpetrating the violence. Post independence history has been punctuated by communal riots where the role of the police and the administration, whether by omission or commission, has been called into question. The role of the Public Prosecutor and the relationship with the Government is of particular significance in the few instances discussed here.

1984 Anti Sikh Carnage

The criminal cases relating to the 1984 Anti-Sikh carnage in Delhi is a study in the failure of the criminal justice system to deliver justice. In 2000, Delhi based Advocate, Vrinda Grover examined a sample of 126 cases at the Sessions Courts and found that 94% of these cases ended in acquittals, with only 7 cases where the accused were convicted.¹³²

An examination of the trial proceedings shows that the prosecution was completely unprepared to meet the challenge of going to trial on the basis of evidence collected during investigations vitiated by police bias, corruption and state complicity. Trapped in traditional notions of how a criminal trial should proceed and how evidence should be brought on record, neither the prosecutors nor the Courts were able to meet the legal challenges presented by a situation of mass carnage. This was further compounded by the State's unwillingness to appoint lawyers with integrity and experience as special public prosecutors. As a

¹³² *Quest for Justice: 1984 Carnage*, by Vrinda Grover, VMAP-Oxfam, (August 200) (unpublished).

result, the 'deficiencies' of evidence in each case, such as delay in filing of FIRs, difficulties in identification of accused persons and their specific roles in a mob, non-availability of dead bodies, and so on, were examined in isolation, even though it was common knowledge that the city of Delhi had been thrown into anarchy for several days where state machinery had abdicated its legal responsibilities, more specifically those of diligent investigation and collection of evidence. A totally unprepared and disinclined prosecution followed a corrupt and tainted investigation thereby ensuring that the perpetrators and masterminds of the carnage remained beyond the reach of the law.

1992-3 Bombay riots:

The aftermath of the 1984 carnage ought to have been a humiliating debacle for the criminal justice system, but no lessons were learnt nor any mechanisms set in place to deal with future state sponsored mass murders. In December 1992 and January 1993, when Bombay was convulsed by communal riots subsequent to the demolition of the Babri Masjid in Ayodhya, the criminal justice system again failed.

According to a report by Jyoti Punwani, even though a number of rioters were initially arrested under TADA, the criminal cases have either dragged on endlessly or ended in acquittals.¹³³ The victims are primarily working class people belonging to minority communities, and their cases are represented by poorly paid, disinterested, and often communally oriented public prosecutors. She observes that the public prosecutors "are only too willing to overlook police lapses and prejudices. They are unwilling to use the many provisions available to bring the accused to trial quickly. So indifferent are they to the task at hand that they neither meet their clients for pre-trial briefings, nor bother to inform them of the course of the cases." Punwani also refers to the case against a Shiv Sena heavyweight, Madhukar Sarpotdar, under section 153A, IPC (promoting hatred between two communities) which dragged on for eight years before charges

¹³³ *Mumbai, Shame!* by Jyoti Punwani, Tehelka, Vol.1 Issue 13, May 1, 2004.

were framed, and then for the last two years, has been stagnating because the cross examination of the first prosecution witness has not been done. The Public Prosecutor in this case resigned after he did not receive his salary for 6 months.¹³⁴

Another case, where the accused were charged with stripping naked and killing a girl child and her uncle, ended in an acquittal. The Public Prosecutor did not even meet the mother of the child before she gave evidence in the trial, allowing the defence lawyer to confound her testimony. The mother was not even informed of the acquittal. When the Public Prosecutor recommended an appeal be filed, the government (BJP-Shiv Sena) ignored him.

Of the 23 police officers accused of murder, not a single one has spent a day in jail, several of them being granted anticipatory bail without opposition from Public Prosecutors. Many of these officers have been promoted several times and hold senior positions in the investigation agency today. The subordinate judiciary has expressed its dissatisfaction with the conduct of the prosecution in a number of these cases. For instance, in a case where Ram Deo Tyagi, former Commissioner of Police, Mumbai, was the accused, the Magistrate was compelled to pull up the Public Prosecutor on the ground that he was representing the prosecution as well as the accused at the same time.¹³⁵

Yet in cases of rioting registered against accused belonging to minority communities, trials proceeded at great speed, no witnesses turned hostile, and 'creative' methods were used by the prosecutors and the Courts to sidestep legal hurdles. In some of these cases the Supreme Court has had to intervene in the interest of justice.

¹³⁴ *Ibid*, see Box *Political heavyweight goes scot free*

¹³⁵ *Ibid*, see Box *Top Cop Evades Arrest*.

2002 Gujarat genocide

In its decision in the *Best Bakery case* the Supreme Court was scathing on the role of prosecutors during trial.¹³⁶ This case relates to an incident occurring during the anti-Muslim riots in Gujarat in 2002. The Supreme Court expressed its outrage at the manner in which the justice delivery system has been “taken for a ride and literally allowed to be abused, misused and mutilated by subterfuge” by the investigating agency, the prosecution, the Court, and the state government. The investigation was perfunctory, the public prosecutor acted more as a defence counsel, and the Court acted as a silent spectator.

Emphasizing the centrality of the concept of fair trial in our criminal justice system the Court observed:

“the concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interests of society is not to be treated completely with disdain and as persona non grata ... The principles of rule of law and due process are closely linked with human rights protection... It has to be unmistakably understood that a trial which is primarily aimed at ascertaining truth has to be fair to all concerned....Denial of fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated.”

¹³⁶ *Zahira Habibulla H. Sheikh and anr. vs. State of Gujarat and ors.* 2004 (4) SCALE 375. In this case, 14 persons belonging to the minority community were brutally killed by a mob of Hindu fanatics and their property, the Best Bakery, burnt down. The petitioner before the Supreme Court, Zahira, was a key witness in the case, but had been compelled to turn hostile before the Trial Court due to threats from supporters of the accused. The trial court acquitted the accused. Zahira approached the National Human Rights Commission with an affidavit stating that she had not been able to give evidence before the trial court out of fear for her safety, and describing the events as she recalled them. The NHRC, among other petitioners, approached the Supreme Court seeking re-trial of the case, and its transfer outside the jurisdiction of Gujarat.

It was further pointed out that “the prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system”. During the trial, the Public Prosecutor had not taken any steps to prevent one witness after another turning hostile even though it was apparent that they were being threatened. The Prosecutor allowed a large number of eye witnesses to remain unexamined, did not examine key witnesses on the ground that they were ‘mentally unsound’ even though there was no material to support this. Other witnesses were examined in a hurried manner or examined even before the date on which they had been summoned. On the other hand, several family members of the accused were examined as prosecution witnesses, who obviously went out of their way to project the accused as saviours. In this manner, the Public Prosecutor failed in his duty to the Court.

The Supreme Court was of the view that the acquittal of the accused by the trial court “is unmerited and based on tainted evidence, tailored investigation, unprincipled prosecutor and perfunctory trial and evidence of threatened/terrorized witnesses”. Noting thus that this was no acquittal in the eyes of the law, the Supreme Court accordingly directed that a re-trial be held and transferred the case to a court of competent jurisdiction in the state of Maharashtra. The State government was directed to appoint a Public Prosecutor, taking into account the suggestions of the affected persons in this regard.¹³⁷

While these observations were welcomed, other cases from Gujarat are languishing. Over the last few years, human rights activists, lawyers, social workers, and ordinary people have struggled to get FIRs registered, to get accused persons arrested, to oppose bail applications, to get the police to investigate, to get chargesheets framed, even getting mass graves exhumed.

¹³⁷ There was initial confusion regarding whether the Public Prosecutor for this case would be appointed by the Gujarat Government or the Maharashtra government. This was in itself recognition that the officer will play an important role. See ‘Gujarat has to appoint public prosecutor for Best Bakery case retrial’, Meena Menon, *The Hindu*, 2.6.2004.

The criminal justice system has stone walled them, and continues to do so. No small part in this exercise has been played by Public Prosecutors, many of whom have been handpicked by the state government from RSS and VHP cadres. It can only be hoped that the spotlight on the Public Prosecutor in the Best Bakery case will initiate systemic changes to protect the autonomy and independence in decision-making of public prosecutors in all criminal trials, and especially in criminal trials where the role of the government itself is suspect.

‘Independent Counsel’ in the USA

In the United States of America an ‘Independent counsel’ is a judicially appointed investigator of charges of misdeeds by high government officials. Originally termed “special prosecutor,” the position was first created by the Ethics in Government Act, 1978. Prompted by the Watergate – Richard Nixon affair, the purpose of the law was to avoid the conflict of interest that might develop when senior officials are to be investigated by officials from their own executive branch.

Over time the 1978 Act was renamed the Independent Counsel Act. Other amendments were introduced in 1982, 1987 and 1994. The Act also survived a challenge to its constitutionality before the US Supreme Court in 1988. The five year term of the various Acts emerged as a compromise to avoid the perceived dangers of creating a permanent autonomous body. The 1994 law permitted the investigation of members of Congress and has been codified in 28 U.S.C. § 591-99.

The creation of an independent counsel was seen as necessary to inspire public confidence. When allegations of wrongdoing are lodged, the Attorney General conducts a preliminary investigation. Unless the allegations can be proven absolutely false, the Attorney General must appoint an Independent Counsel. The Act also established a detailed procedure governing appointments of independent counsel and divested the Attorney General of the power to select them. The request for an appointment of an independent counsel was made by the attorney general; the counsel was appointed by an independent judicial board. If the Independent Counsel's investigation finds the allegations to have merit, charges can be filed.

An independent counsel was also used to investigate the Iran-contra affair, and President Clinton's Whitewater and Lewinsky scandals. With the end of the 5 year period in 1999, there were calls for letting the Act to expire and allowing the attorney general to appoint outside prosecutors. Critics of the independent counsel law argued that since the same situation worked perfectly well previously forcing the resignation of Richard Nixon after Watergate, there was no need for an independent office which would itself be immune from accountability and carry the potential for abuse of power. The American Civil Liberties Union opposed the moves to allow the law to lapse. Arguing that the independent counsel was an essential tool to protect against abuses of power by government officials, ACLU instead argued that the law should be made permanent. Following prosecutor Kenneth Starr's confrontations with President Bill Clinton the law was allowed to expire and was not renewed in 1999.

5.5 Filing of appeals and revisions

Section 378, Cr.P.C provides that appeals to the High Court against sentence on grounds of inadequacy as well as appeals against acquittal can be filed only by a Public Prosecutor upon the direction of the State government (or the central government as the case may be).¹³⁸ This clear provision has been strictly construed by the Courts for the most part, so that appeals that are not filed by the Public Prosecutor or an officer properly authorised by the Public Prosecutor have been rejected on this preliminary ground.

In *Superintendent and Remembrancer of Legal Affairs, West Bengal v. Prafulla Majhi* the Calcutta High Court held that the filing of an appeal under s. 378 is not a mechanical function which the Public Prosecutor exercises on instructions from the state but rather a decision to be taken responsibly and after application of his independent mind.¹³⁹ Not associating the Public Prosecutor with the filing of the appeal would certainly invalidate the appeal. In *State (Delhi Administration) v. Dharam Pal and ors*, a preliminary objection was raised by the counsel for the accused that the petition has not been filed by an authorised person, having been made by a private lawyer instead of the Additional Public Prosecutor of Delhi or the Standing Counsel of Delhi Administration.¹⁴⁰ Subsequently, a notification was issued by the Delhi Government appointing the private lawyer as SPP for conducting the case. The Court thought it fit not to allow the objection since the infirmity had been rectified subsequently. The Cr.P.C does not however empower a private party to file a revision petition against an order of acquittal passed in a case instituted in a police report. The private party cannot claim locus standi by way of getting permission of the public prosecutor in such a

¹³⁸ The full text of the provisions is given in Annexure A.

¹³⁹ 1977 CrLJ 853 (Calcutta)

¹⁴⁰ 1982 CrLJ 1103 (Delhi High Court)

case.¹⁴¹ However in *K. Pandurangan v. SSR Veluswamy*, the Supreme Court noted that revision filed by the complainant is maintainable.¹⁴²

As with the decision to withdraw from prosecution, many of the lawyers and prosecutors interviewed felt that there was no effective exercise of decision-making power by prosecutors with respect to filing of appeals and revisions. The procedure followed in Delhi with respect to appeals is that the concerned Public Prosecutor who has been dealing with a case prepares an acquittal report, after which the matter passes out of his hands going to superior officers who scrutinise the case file and take a decision on whether to file an appeal or not. Once the decision to file an appeal is taken, the trial prosecutor is not involved in drafting the grounds of appeal or even consulted by the prosecutor who handles the appeal. If nothing else this is an inefficient process since the special inputs the trial prosecutor could have made to the appeal process are lost completely. As far as revisions are concerned the concerned Public Prosecutor makes a proposal for filing a revision petition to his superior officer and the decision is taken at a higher level. Once the decision to file the revision is taken, the concerned prosecutor is informed and their role ends with the preparation of the pleading sent to the superiors.

¹⁴¹ *Kishan Swarup vs. State of Delhi*, 1998 (SCC) Cri. 1587

¹⁴² 2003 (3) JCC 1653

Chapter 6

The Prosecution and the Victim – Complainant

The underlying principle of prosecution contained in the Cr.P.C is that the State is responsible for conduct of prosecutions on behalf of the victim and is represented in court by the Public Prosecutor. The rationale behind this principle is that no private person should be allowed to use the prosecution process to wreak private vengeance on anyone, and it is the society, represented by the state, which has the primary interest in ensuring that crimes are punished, and therefore controlled.

6.1 Role of victim-complainant as witness

The criminal justice system recognises the role of the victim/complainant largely to the extent that s/he is a prosecution witness, and beyond this the victim/complainant does not have a role to play in the actual prosecution process. Concerns have been raised about the erosion of even this limited role for victims/complainants in criminal trials due to the harassment and intimidation by accused persons. Case after case has collapsed in Court after complainants have retracted their earlier statements and had to be declared hostile.

In the criminal prosecutions relating to the 1984 anti Sikh carnage, the issue reached unprecedented proportions to the extent that some of the complainants (widow survivors) were actually charged and tried for perjury. Most recently in the Best Bakery case the Supreme Court was forced to confront the full ramifications of this malady in a petition filed by the National Human Rights Commission.

In the Shankar Guha Niyogi murder trial it was the sheer strength, determination and support of the *Chhatisgarh Mukti Morcha*, that enabled the workers to courageously and honestly depose before the Trial Judge, Durg and withstand

the intimidation and inducement offered by the accused industrialists.¹⁴³ However in the absence of the support of a peoples movement or organisation, individual witnesses often succumb to the money and muscle power of the accused persons. The equality before law is rarely able to grasp the gross inequalities of the world outside.

Unlike in the United Kingdom, where Crown Prosecutors are actively involved in the witness protection programme, Public Prosecutors in India have neither a statutory role nor have they been proactive in taking on a task which ought to be of central concern to them. The issue is dealt with on a case to case basis, and often it takes a herculean effort just to get a personal security officer assigned to a particular witness. Even this device has proven its ineffectiveness many times over.

While a complete analysis of the issue of witness intimidation is beyond the scope of this study it is necessary to point out that despite the glare of media attention and criticism from civil society, statutory changes are yet to materialise for witness protection. The Supreme Court had taken upon itself the task of devising guidelines for protection of witnesses in criminal cases after a public interest litigation was filed before it. Subsequent to the Best Bakery case, the Law Commission too had taken up this matter and has produced a consultation paper on witness identity protection and witness protection programmes.¹⁴⁴

6.2 Role of victim-complainant in prosecution process

No doubt the role of victims/ complainants is ordinarily restricted to their status as prosecution witnesses, yet the Cr.P.C provides some, albeit very limited, space

¹⁴³ Shankar Guha Niyogi, the charismatic leader of the *Chhatisgarh Mukti Morcha* was shot dead in Bhilai, Madhya Pradesh, in September 1991. The Trial Court, Durg convicted 2 industrialists and their men for the murder of a trade union leader for the first time in Indian legal history. Subsequently in Appeal however the Supreme Court vide judgment dated. 20.1.2005, acquitted all except the hired assassin.

¹⁴⁴ The paper is available at <http://www.lawcommissionofindia.nic.in/> (accessed 15 April 2005)

for the victims of crimes to participate in trials. Section 301 of the Cr.P.C which applies equally to Sessions as well as Magistrate's courts, states clearly that in any case which is at the stage of enquiry, trial or appeal, the Public Prosecutor or Additional Public Prosecutor in charge of the case may appear and plead without any written authority.¹⁴⁵ Sub section (2) however clarifies the role of a pleader instructed by a private person to represent him in any court, as follows:

- a) The pleader shall act under the direction of the public prosecutor in charge of the case;
- b) After the evidence is closed, the pleader may submit written submissions with the permission of the court.

Section 302, Cr.P.C permits the complainant's lawyer a much wider role in cases pending before a Magistrate's Court. A Magistrate may permit the prosecution of a case to be conducted by any person (other than a police officer below the rank of a sub inspector or an officer who has been involved in the investigation of the case) – in a number of cases this could be the complainant's lawyer.

These two provisions relate to the role of a private party's lawyer in a criminal proceeding initiated by the State. These provisions have been clarified further in several judicial decisions. In *Roop K. Sheorey vs. the State*, the Punjab High Court held that when a private pleader acts under the direction of a Public Prosecutor in the prosecution of a case, no permission of the Court is required.¹⁴⁶ It also observed, "so long as the Public Prosecutor does not abdicate his functions and retains with himself the control over the proceedings a private counsel can examine or cross-examine witnesses or even address arguments." The Court drew a distinction between "acting under the direction of a Public Prosecutor" envisaged in S. 301(2) and "conducting the prosecution" envisaged in section 302. In the former the Court found that permission of the Court was not required since the control of the case lay with the prosecutor. In the latter

¹⁴⁵ The full text of the provisions is given in Annexure A.

¹⁴⁶ 1 (1965) DLT 90

situation, the control over the conduct of the prosecution was handed over to the private pleader and the Public Prosecutor moved to the background. In such a situation the Court observed that the Cr.P.C necessarily required the permission of the Court.

Magistrates have however been slow to grant permission to counsel for complainants to take over the conduct of prosecutions even though such power is plainly available in section 302. In *Babu v. State of Kerala* the Kerala High Court discussed the scope and ambit of section 302.¹⁴⁷ The Court was of the view that permission should not be granted by the Court as a matter of course, observing,

“There is an ocean of difference between assisting the Public Prosecutor under Section 301 and conducting the prosecution on the basis of a permission granted under Section 302. Public Prosecutors are really ministers of justice whose job is none other than assisting the State in the administration of justice. They are not representative of any party. ...But the pleader engaged by a private person who is a de facto complainant cannot be expected to be so impartial. Not only that, it will be his endeavour to get a conviction even if a conviction may not be possible. So the real assistance that a Public Prosecutor is expected to render will not there if a pleader engaged by a private person is allowed to take the role of a public prosecutor.... This does not mean that permission cannot at all be granted. Under very very exceptional circumstances permission can be granted under section 302 [...] But that is to be done only in cases where the circumstances are such that a denial of permission under Section 302 will stand in the way of meting out justice in the case. A mere apprehension of a party that the Public Prosecutor will not be serious in conducting the

¹⁴⁷ 1984 CrLJ 499. See also the decision of the Supreme Court in *Shivkumar vs. Hukamchand* 1999 CrLJ 1277 (SC).

prosecution [or] simply because a conviction or an acquittal in the case will affect another case pending will not by itself be enough.”

On the other hand, the Bombay High Court tried to extend the right of private parties in *Vijay Valia etc. vs. State of Maharashtra etc.*¹⁴⁸ The Court stated that whether an offence is cognizable or non-cognizable it was an offence against the State. Therefore the prosecution whether conducted by the State or by the private party was prosecution on behalf of the State. The Court thus noted that both the State and the private party had a right to prosecute the offender. Whether the complainant is a victim of the offence, a relative of the victim or otherwise an aggrieved party, he has a right to be heard and vindicated. In this light the Court further held that whenever there was a request made by a private party to engage an advocate of his choice to be paid for by him, the request should be granted as a rule. If the State refuses the request, the reasons for refusal should be stated and communicated in writing. The Court noted that these reasons would further be justiciable. This decision was however overruled by the Supreme Court in *Mukul Dalal's case* where it was held that such a request made by the complainant cannot be granted on the mere asking.¹⁴⁹

The right of the victim's dependants to engage a lawyer for proper conduct of the case once again came to be tested in the light of the constitutional provisions and section 225, 301 and 302, Cr.P.C in *Bhopal Singh vs. State of Rajasthan*.¹⁵⁰ In this case the parents of the deceased wanted their counsel to participate in the trial. The Court felt that this would defeat the purpose sought to be achieved by Article 21 of the Constitution and observed that the larger public interest required the prosecution to be conducted by an independent person like the public prosecutor.

¹⁴⁸ 1986 CrLJ 2093 (Bombay High Court). This judgment was delivered by Sawant, J.

¹⁴⁹ (1988) 3 SCC 144

¹⁵⁰ 2001 CrLJ 912 (Raj)

In the Shankar Guha Niyogi murder trial the Chhatisgarh Mukti Morcha, apprehensive that the prosecution may falter in its task, sought permission from the Jabalpur High Court to assist the prosecution. The Jabalpur High Court vide its order gave an exceptionally broad interpretation to the scope of section 301(2), Cr. P.C, perhaps cognizant of the gross inequality between the two contesting parties. The High Court directed:

“first as the Public Prosecutor has already agreed for the assistance which may be provided to him in view of section 301(2) of the Code and secondly if the complainant feels that the Public Prosecutor is not taking interest or take different attitude or abdicating his functions, in the proceedings, it is well settled that the private counsel can cross-examine the witnesses or even address in the manner laid down in the Code, and the complainant in such a situation may invite the attention of the Court. It would be the duty of the Court to see that justice does not suffer and would be open to the Court to act under section 301(2) or to allow the appointment of a counsel by the complainant for conduction of a case.”¹⁵¹

The matter of right of a private complainant in a criminal proceeding has recently been settled by the Supreme Court in the *JK International case*.¹⁵² In this case a complainant had been denied the right to be heard when a writ petition was filed by the accused for quashing of First Information Report (FIR). The Supreme Court considered the statutory provisions as well as the precedents on the subject, observed that the role of the private complainant in the trial of offences was not wiped out by the takeover of prosecution by the State. Given the provisions of the Cr.P.C which allowed the complainant certain amount of participation in the trial, the Court observed, “how can it be said that the aggrieved private person must keep himself outside the corridors of the court when the case involving his grievance regarding the offence alleged to have

¹⁵¹ *Ibid.*

¹⁵² *J.K. International vs. State of Delhi*, 90 (2001) DLT 157

been committed by the persons arrayed as accused is tried or considered by the court.”

The Supreme Court also approved of the practice of issuing a notice to the injured person or to a relative of the deceased in order to provide him with an opportunity to be heard when a police report is presented to the Magistrate under section 173 of the Code stating that no case has been made out against the accused and there is no sufficient ground for proceeding to trial.¹⁵³ The Court was of the view that a reasonable opportunity to be heard must be granted to the complainant in a writ petition for quashing of FIR filed by the accused persons.

A sensitive prosecution agency – suggestions from the Bar

Meetings between the Public Prosecutor and the complainant or other witnesses should be built into the system, as is the case in the British and American systems. This would enable them to refresh their memory about their earlier statement, which most likely was made to the investigating officer many years ago. The Public Prosecutor can also warn the witness about what to watch out for during cross-examination, since a large number of prosecution witnesses tend to crumble in front of the defence lawyer. Unfortunately, in our system if the Public Prosecutor meets the witness, it is treated with suspicion and labelled as ‘tutoring’.¹⁵⁴

Prosecutors should also be encouraged to take proactive stands in sensitive cases where the law is still developing. For instance, as one lawyer pointed out, in cases of child sexual abuse there are huge gaps in the law relating to examination of child witnesses. An application by a Public Prosecutor asking for necessary changes in such cases would make a very powerful impact.¹⁵⁵

Some of these decisions relating to rights of private complainants during trial have been examined in the 154th report of the Law Commission as well as in the Malimath Committee Report. The Law Commission observed that private complainants or victims of crimes also have a role in bringing the offender to justice. The scope of sections 301 and 302 were examined by the Law

¹⁵³ This was laid down by the Supreme Court in *Bhagwant Singh vs. Commissioner of Police*, (1985) 2 SCC 537

¹⁵⁴ Personal interview with Rebecca M. John, Advocate on 10.3.2004

¹⁵⁵ *Ibid.*

Commission which found them to be satisfactory and requiring no change.¹⁵⁶ The Malimath Committee too has strongly advocated a greater role for the complainant in criminal proceedings. However this is envisaged at the cost of basic rights of the accused which is a clear infringement of the Constitution.

6.3 The Victim and Witnesses Paralegal Service

A plethora of judgments reiterate that the Public Prosecutor does not represent the Police but the State, and this is undoubtedly in harmony with the scheme of a free and fair trial as also presumption of innocence guaranteed to the accused. However the experience of complainants, victims and witnesses with the criminal justice system has laid bare certain gaps and inadequacies which need urgent attention and remedy. Survivors and relatives of those killed in communal massacres, police torture and victims of marital cruelty all speak of a common isolation experienced within the criminal justice system. This particularly affects the large number of complainants who do not have the means and resources to engage a private counsel to safeguard their interests and concerns in the course of criminal proceedings.

While scrupulously maintaining high standards of autonomy and integrity of the Office of the Public Prosecutor, there is a need to create a separate mechanism which functions as a bridge between the complainant/ victim/witnesses, and the Court and enables them to effectively participate in the judicial proceedings. While the accused may be guided through the maze of law and legal procedures by his counsel the victims invariably find themselves totally and completely confounded. There is thus a need to create a separate office of paralegal persons, located in the court premises, which functions as a guide for victims, explains to them their rights and role in the criminal trial and makes the legal system more accessible and comprehensible for them. This will certainly

¹⁵⁶ Importantly for this study the Law Commission did however recommend that section 302 ought to be amended insofar as it allows police officers to take over the conduct of prosecution of a case.

enhance the administration of justice and enable the victims to effectively participate in the proceedings and depose before the Court.

Inordinate delay is today an admitted reality of the criminal justice system. Witnesses are summoned by the trial court to give evidence, often long after the commission of the crime. Sometimes the trial is so protracted that witnesses may testify even after 10 years, of an incident. In accordance with law and specifically the Cr.P.C and the Indian Evidence Act, an eye witness is required to recall almost every detail pertaining to the alleged offence. This usually proves to be an impossible demand to meet as over the years human memory tends to falter and fade away. Perhaps the right to speedy trial in this context needs to be seen as much a right of the victim as that of the accused. This further reinforces the need for the creation of an office of paralegal staff that enables witnesses to testify in Court after years.

An agency of trained and sensitive paralegal persons would be apt to act as an adjunct of the Prosecution office rather than relying upon the Investigative wing. The main task entrusted to this office would be to liaison between the complainant/ victim/ witnesses and the Prosecutors office and equip them to testify in Court. These and other changes emanating from concern for the victim must on no count be effected at the cost of the rights of the accused, whose rights as enshrined in the Constitution and criminal laws must at all times be zealously guarded.

Chapter 7

Issues for the Future

Scant attention has been paid to the system of Public Prosecution in India, either by the Government, the legal community or human rights activists. It was perhaps the increasing engagement of the women's movement with the legal apparatus, the blatant miscarriage of justice suffered by survivors of communal violence as well as the overarching influence of the investigation agency perceived sharply, in trials under anti terrorist laws, which turned the spotlight on this rather neglected aspect of the criminal justice system.

This report delineates certain key areas in the prosecution system which require discussion and debate. It is undeniable that there is a palpable loss of public confidence in the criminal justice system over the last three decades. Any serious analysis of the reasons for this would clearly apportion responsibility to a range of factors. A more than fair share of the blame would however have to be borne by the police force, which faces grave charges of criminalization, corruption and institutional communalization. It is indeed ironic that the same police force seeks for itself even greater power and control. While increased coordination between the police and prosecutor is crucial for an effective and efficient prosecution, control of the prosecution by the police goes against the spirit of the constitutional mandate of fair trial. This is also the view held both by the Law Commission and the Courts.

In states in India where the contrary position exists prompt measures must be taken to bring prosecution in line with the established constitutional position, as otherwise it shall lay itself bare to the accusation of illegality and partiality. The crisis is far more grave in the state of Mizoram and Arunachal Pradesh where the power of the executive, judiciary and prosecutor all vest in the same person, thereby reducing both democracy and justice to a farce.

Other jurisdictions such as England, U.S.A and South Africa, have witnessed a progression towards separation of domains and functions of the Police and Prosecutor. In fact many countries have enhanced the authority of the prosecutor by assigning them the task of determining whether a case should be prosecuted or not, in accordance with established tests. It is thus mandatory that the prosecution functions independent of any control, influence or supervision by the police.

For the legal system to claim to be independent and impartial, all components of the criminal justice system must necessarily enjoy a fair degree of impartiality and independence. Just as justice needs to be "seen to be done" so fairness too must be "seen to be demonstrated". In this context it would be useful to consider restructuring the office of the Public Prosecutor to institutionalize autonomy, in terms of appointment, tenure and financial allocations. Currently in most states the prosecution agency is placed under the control of the Home Ministry. As the Public Prosecutor is an officer of the Court it would perhaps be judicious to place this agency within the purview of the Law Ministry. At the same time effective systems of accountability need to be developed.

Over the years a visible hierarchy has grown within the prosecution system, with the post being coveted by most lawyers at the level of the higher judiciary, and in sharp contrast no stature being accorded to those functioning at the District and other subordinate courts. This situation must be rectified, as it is before the subordinate courts that the rights and liberties of hundreds of citizens are determined.

Modeled along the lines of the "Victim and Witness Care initiative", in England, there is an urgent need to evolve a mechanism that meets the needs of the victims and complainants, while not treading on the impartiality or integrity of the Prosecutor's office. The Domestic Violence against Women (Prevention and Protection) Bill attempts to fill his lacuna, by creating posts of Protection Officers,

to assist women victims of violence, in accessing justice and other services.¹⁵⁷
However such a system must be mainstreamed and made available for all victims and witnesses.

It is unlikely that these suggestions will find many willing takers. However it would do well to remember that the question of the autonomy of the office of the Public Prosecutor is vital not just in the interest of justice but for democracy itself.

¹⁵⁷ Bill drafted by the Lawyers Collective, Delhi, 2004