PUBLIC PROSECUTION IN INDIA

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IN ALMOST all organized societies, there is public prosecution system to prosecute offenders who violate societal norms. Indeed, the system in common law countries differs from that in the continental countries. But in both the systems, this office is center of attraction. It is a power center. It wields a lot of authority. It is the repository of the public power to initiate and withdraw prosecution. These powers are untrammeled in continental countries where this office is called procurator. The word 'procurator' is derived from the Latin word *procuro* which means 'I care, secure, protect'. Though the prosecutors in the common law countries do not have this status, it appears that some of the powers exercised by procurators are similarly available to the prosecutors in common law countries. However, there are some differences. In continental countries procurator is looked upon as the strict eye of the state. He prohibits, punishes and prevents. The defence lawyer is viewed as defender. One of the procurator's chief functions must be to protect citizens' legitimate rights and interests with actions, not words, as prescribed by the law. This is not exactly the position of common law prosecutor. However, the impression that he is independent and impartial is accepted in the common law countries though in fact in these countries, he may not be impartial.[1] In course of time much of the powers of the continental procurators are attributed to the common law prosecutors though the statutory provisions do not reflect this position. Generally speaking, it could now be said that the prosecution system in common law countries works within the statutory provisions in the context of traditional powers and duties attached to this office in continental countries.

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1. Indian system owes its origin to the office of public prosecutors in the UK. In the UK, the institution of public prosecutors emerged to stop the practice of private prosecution, i.e., prosecution by the victims of the crimes. The private prosecution system was abused. There were vexatious litigation. Also, the absence of a functionary to take care of public interest augmented the development of public prosecution. Today, the public prosecution system in the UK has been reorganized as Crown Prosecution Service with the Director of Public Prosecutions at the top and Crown prosecutors at the lower levels.

In some continental countries there is a common service for investigating magistrates and procurators. They take care of investigation of crimes as well as filing of prosecution proceedings. They supervise the police functions. Being representatives of public interest, they take special care to protect human rights of citizens. In a way, in this sense, there is a tendency to consider prosecutors as part of judicial apparatus. Coupled with this impression are the following assertions. They are independent and impartial. They are not to procure a conviction at any cost. They are required to produce evidence in their possession even if it may favour the accused and they are treated as officers of the court. In this scenario, while evaluating the role and powers of the common law prosecutors, there appears to be confusion as to the nature of prosecutor's office.

At times it appears to be executive. In certain context, it may appear to be quasi-judicial. The principle laid down by the Supreme Court in *R K Jain* v. *State*[2] quoting *Shamsher Singh* v. *State of Punjab*[3] as regards the meaning and content of executive powers may tend to treat public prosecutor's office as executive. But the conclusions of some courts create doubt as to the exact nature of this office. To the suggestion that the public prosecutor should be impartial (a judicial quality), the Kerala High Court equated public prosecutor with any other counsel and responded thus: [4]

> Every counsel appearing in a case before the court is expected to be fair and truthful. He must of course, champion the cause of his client as efficiently and effectively as possible, but fairly truthfully. He is not expected to be impartial but only fair and truthful.

In a subsequent decision in *Babu* v. *State of Kerala*,[5] however, the same high court had to distinguish between a public prosecutor and a counsel for the private party thus:[6]

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2. AIR 1980 SC 1510.

3. (1974) 2 SCC 831.

4. *Aziz* v. *State of Kerala,* (1984) Cri LJ 1060 (Ker).

5. *Babu* v. *State of Kerala,* (1984) Cri LJ 499 (Ker).

6. *Id.* at 502. Also see the observations of the Supreme Court in *Shrilekha Vidyarthi* v. *State of U.P.* (1991) 1 SCC 212 at 233 which run thus :-

> In the case of Public Prosecution also known as District Govt. Counsel (Criminal) there can be no doubt about the statutory element attaching to such appointments by virtue of these provisions in the Code of Criminal Procedure, 1973. In this context, Section 321 of the Code of Criminal Procedure, 1973 is also significant. Section 321 permits withdrawal from prosecution by the Public Prosecutor or Assistant Public Prosecutor in charge of a case with the consent of the court at any time before the judgment is pronounced. This power of the public prosecutor in charge of the case is deviced from statute and the guiding consideration for it must be interest of administration of justice. There can be no doubt that this

> [P]ublic prosecutors are really ministers of justice whose job is none other than assisting the state in the administration of justice. They are not representatives of any party. Their job is to assist the court by placing before the court all relevant aspects of the case. They are not there to use the innocents to go the gallows. They are also not there to see the culprits escape conviction. But the pleader engaged by a private person who is a defacto complainant cannot be expected to be so impartial. Not only that, it will be his endeavor to get the conviction even if a conviction may not be possible.

Though the office of the public prosecutor seems to have the features of the executive, the judiciary does not seem to treat it so. For it does not approve of the appointment of police officers as public prosecutors. The Punjab & Haryana High Court in *Krishan Singh Kundu* v. *State of Haryana*[7] has ruled that the very idea of appointing a police officer as incharge of prosecution agency is abhorrent to the letter and spirit of sections 24 and 25 of the code. In the same vein was the ruling from the Supreme Court in *S. B. Sahana* v. *State of Maharashtra*.[8] Irrespective of the executive or judicial nature of the office of the public prosecutor, it is certain that one expects impartiality and fairness from the public prosecutor in criminal prosecution.[9]

It is generally asserted in India that investigation is the prerogative of the police. But it is to be understood that the magistrate has overall supervision of investigation. In case there is violation of rights of the

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function of the public prosecutor relates to a public purpose entrusting him with the responsibility of so acting only in the interest of administration justice. In the case of public prosecutors this additional public element flowing from statutory provisions in the Code of Criminal Procedure undoubtedly invest the Public Prosecutors with the attribute of holder of a public office which cannot be whittled down by the assertion that their engagement is purely professional between a client and his lawyer with no public element attaching to it.

7. 1989 Cri LJ 1309 (P&H).

8. (1995) SCC (Cri) 787.

9. In this connection, the relevant provisions from the U.N. "Guidelines on the Role of Prosecutors" are worth-noting. Guidelines 10-16 lay down thus:

> The office of prosecutors shall be strictly separated from judicial functions.
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> Prosecutors shall perform an active role in criminal proceedings, including institution of prosecution and, where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest.
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> Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.

accused, it is for the magistrate to prevent it. The purpose of production of the accused within 24 hours of his arrest, the production of FIR in the magistrate court, the submission of final report to the magistrate etc. etc. signify that though investigation is done by the police, it is to be under the surveillance of the magistrate that various measures are taken. The appellate courts also used to quash investigations in the event of violation of rights of the accused.[10]

In the performance of their duties, prosecutors shall:

(a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;

(b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;

(c) Keep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise;

(d) Consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.

Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences.

When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.

10. The cautious approach of the judiciary in this respect becomes evident from its observations in *Director, C.B.I.* v. *Niyamavedi*, (1995) 3 SCC 601 at 603 which run thus :

> Ordinarily the court should refrain from interfering at a premature stage of the investigation as that may derail the investigation and demoralize investigation. Of late, the tendency to interfere in the investigation is on the increase and courts should be wary of its possible consequences. We say no more. However, we clarify that certain directions given to the Director of CBI in regard to the investigation matters do not meet with our approval and may be ignored. In short, the adverse comments against the CBI were to say the least, premature and could have been avoided. Ignoring the innuendoes, the court was, however, right in expressing a general view that the investigating agency is expected to act in an efficient and vigilant manner without being pressurized and in dismissing the appeal.

The decision to prosecute – a function attributed to the procurator in continental countries – is taken in India by the magistrate on the report submitted by the police. Though even the courts usually call the police report as charge sheet, charging is to be done only by the court. In case the case does not signify any charge the magistrate can discharge the accused. If the magistrate is satisfied that there is a *prima facie* case then only the accused is put on prosecution. However, it is not the case of withdrawal of prosecution.

It has been the consistent policy of the appellate courts in India that it is the prerogative of the public prosecutor to recommend withdrawal of public prosecution. Indeed, this prerogative right is to be exercised with the permission of the court. And it is the impression, having regard to the case law, that if the public prosecutor comes up with the proposal of withdrawal independently, i.e., without being influenced by the government, permission may be granted by the court. This principle is time and again reiterated by the courts even in cases where permission is refused. In *State of Punjab* v. *Union of India*,[11] it was ruled by the Punjab & Haryana High Court that public prosecutor's withdrawal from prosecution could be not only on ground of paucity of evidence but also in order to further the broad ends of public justice, and such broad ends of public justice may include appropriate social, economic and political purposes. In *R K Jain,*[12] the Supreme Court spelt out the contours of the public prosecutor's power for withdrawal of cases. In *Shonandan Paswan* v. *State of Bihar*[13] and in *Mohd. Mumtaz* v. *Nandini Satpathy*,[14] the Supreme Court ruled that the public prosecutor can withdraw a prosecution at any stage and that only limitation is the requirement of the consent of the court. Even when reliable evidence has been adduced to prove the charges, the public prosecutor can seek the consent of court to withdraw prosecution. It has been specifically ruled by the court that it should be seen whether application for withdrawal is made in good faith, in the interests of public policy and justice and not to thwart or to stifle the process of law.

The Madras High Court was confronted with a case wherein the same office of the public prosecutor which got a criminal case withdrawn with the permission of the court, on change of government, moved the court to launch reprosecution.[15] Fortunately, the court did not permit. And it added a sad commentary on the functioning of the public prosecutor thus: [16]

11. 1987 Cri LJ 151 (SC).
12. *Supra* note 2.
13. (1987) 1 SCC 288.
14. 1987 Cri LJ 778 (SC).
15. *State of T.N.* v. *Ganesan*, 1995 Cri LJ 3849 (Mad).
16. *Id.* at 3851.

> I feel that the same office of the public prosecutor which acted for the state to withdraw the cases, cannot come forward to set aside the order permitting to withdraw the cases, irrespective of the change in the ruling party as it will lead to uncertainty as to the finality of the proceedings when the government, ruled by a particular party, withdraws the prosecution and the successive governments, ruled by another party, wanted to set aside that order, what will be the situation, if there were successive changes in the ruling parties and if this request is allowed, certainly it will be a havoc and prejudice to the accused persons, without knowing the destination of the prosecution apart from the embarrassment to the public prosecutors. Therefore, I also feel that the state which moved for withdrawing the prosecution cannot seek to set aside the order of permission granting withdrawal of the prosecution. If a third party comes forward with such a prayer the position may be different.

Section 24 of CrPC provides for appointment of public prosecutor in the high courts and the district by the central government or the state government. Subsection 3 of section 24 lays down that for every district, the state government shall appoint a public prosecutor and may also appoint one or more additional public prosecutors for the district. Subsection 4 requires the district magistrate to prepare a panel of names of persons considered fit for such appointment, in consultation with the sessions judge. Subsection 5 contains an embargo against appointment of any person as the public prosecutor or additional public prosecutor in the district by the state government unless his name appears in the panel prepared under subsection 4. Subsection 6 provides for such appointment, wherein a state has a local cadre of prosecuting officers but if no suitable person is available in such cadre, then the appointment has to be made from the panel prepared under subsection 4. Subsection 4 says that a person shall be eligible for such appointment only after he has been in practice as an advocate for not less than 7 years. Section 25 deals with the appointment of assistant public prosecutor in the district for conducting prosecution in the courts of magistrate. In the case of public prosecutor also known as district government counsel (criminal) there can be no doubt about the statutory element attached to such appointment by virtue of this provision in the CrPC. Today appointment to the office of public prosecutor is made on the basis of political affiliation of the persons concerned. The difficulties arising out of such appointments came to be examined by the Supreme Court in *Shrilekha Vidyarthi* v. *State of U.P.*[17] The Supreme Court

17. *Supra* note 6.

deprecated this trend and declared that appointment to such vital offices should not be allowed to be made by spoils system by the political parties. But even today, the state governments distribute this office among the sympathizers of the political parties in power. And even after assuming office many of the incumbents still feel that they are to look after the interests of the ruling parties. This has been abundantly evident from the case law. The facts and decision in *Sunil Kumar Pal* v. *Phota Sheikh*[18] would reveal as to how this office could be abused to serve political ends.

In this case, the Supreme Court was presented with a peculiar situation. The appellant's brother was murdered by some miscreants and there were virtually no subsequent proceedings against the accused for quite some time. Appellant, being an NRI was not present in India to pursue the case vigorously. When he came to India, he approached the state government to expedite things. Due to his persistent insistence, one lawyer was appointed as a special public prosecutor. He approached the sessions judge trying the case for an adjournment as he had no records with him. He was granted only a day. So he returned the briefs as he did not have sufficient time to prepare for the case. Then the junior of the public prosecutor of the area was appointed as special public prosecutor for this case. He was also given a day for preparation before the commencement of the trial. It was astonishing that the nine accused were represented by the public prosecutor of the area! The trial was a farce; witnesses were intimidated. Supporters of Communist Party of India (Marxist) assembled around the court and shouted slogans against the prosecution. Several witnesses did not turn up. Some witnesses turned hostile. The accused were acquitted by the sessions judge. Appellant's prayer to leave to appeal was rejected. His appeal u/s 401 was also rejected by the Calcutta High Court. Then, he approached the Supreme Court with special leave. Supreme Court set aside the order of acquittal after making survey on the administration of the lower court. The courts observations are self-explanatory. It observed thus: [19]

> The order passed by the learned additional sessions judge acquitting respondent nos.1 to 9 obviously suffers from a serious infirmity and we do not think it is possible to sustain it on any view of the matter. There can be little doubt that the trial culminating in the acquittal of respondent nos. 1 to 9 was appallingly unfair so far as the prosecutions is concerned and was heavily loaded in favour of respondent nos.1 to 9. It is difficult to understand how consistently with ethics of the legal profession and fair play in the administration of justice, the public prosecutor of Nadia could appear on behalf

18. (1984) 4 SCC 533.
19. *Id.*, para 10

of respondent nos.1 to 9. The appearance of the public prosecutor, Nadia on behalf of the defence does lent support to the allegation of the appellant that respondent nos.1 to 9 were supported by the Communist Party of India (Marxist) which was at the material time the ruling party in the State of West Bengal and this would naturally give rise to apprehension in the minds of the witnesses that in giving evidence against respondent nos.1 to 9, they would be not only incurring the displeasure of the government but would also be fighting against it. Moreover, it cannot be disputed that when the trial was going on and the witnesses were giving evidence, there were a large number of supporters of the Communist Party (Marxist) who were allowed to assemble in the court compound and who created a hostile atmosphere by shouting against the prosecution and in favour of the accused. Though the appellant and the complainant as also the witnesses were intimidated, no steps were taken for according protection to them so that they may be able to give evidence truly and fearlessly in proper atmosphere consistent with the sanctity of the court. It is significant to note that quite a few witnesses turned hostile and that obviously must have been due to the fact that they apprehended danger to their life at the hands of respondent nos.1 to 9 and their supporters. It is also regrettable that though at the time when the trial commenced on 22nd May, 1978, Shri S. N. Ganguly, who was appointed special public prosecutor to conduct the prosecution, asked for an adjournment of the trial in order to enable him to prepare the case particularly since he was appointed on 20th May, 1978, the trial was adjourned only for one day, with the result that S. N. Ganguly had to return the brief. Then late in the evening of 22nd May 1978 Shri S. S. Sen, additional public prosecutor was asked to conduct the prosecution and he had to begin the case on the very next morning on 23rd May 1971 without practically any time for effective preparation. We have no doubt that under these circumstances the trial was *heavily loaded in* favour of respondent nos.1 to 9. The trial must in the circumstances be held to be vitiated and the acquittal of respondent nos.1 to 9 as a result of such trial must be set aside. It is imperative that in order that people may not loose faith in the administration of criminal justice, no one should be allowed to subvert the legal process. 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. That would be subversive of the rule of law.

This decision is thus a reflection on the poor administration of criminal justice. If the government is politically partisan, the constitutional order may breakdown. It also shows that unless the state has an independent prosecution agency, administration of justice might suffer irreparably.

Of late, there has been change of approach to public prosecution. With the advent of partisan politics, political parties tend to interfere with administration of justice including appointment of public prosecutors and their functions. But the Supreme Court has been meticulously preventing the system from going astray. The decision in *Sunil Kumar Pal*,[20] *Ganesan*[21] represent the changes and the responses of the judiciary.

The Supreme Court's approach towards politically motivated withdrawal of prosecutions by some state governments has been very progressive. It gave new meaning to the traditional doctrine of *locus standi* and allowed even political opponents to fight out cases in the court. In *V. S. Achuthanandan* v. *R. Balakrishna Pillai*,[22] the Supreme Court allowed the petitioner's challenge to the order of withdrawal of prosecution of the respondent passed by the Kerala High Court. In fact, it was with the active support of the court that the prosecution against the respondent, a former minister, was permitted by the Kerala High Court to be withdrawn.

It seems that the office of the public prosecutor belongs to the executive. However, it is strongly felt that it is in fact, not purely executive. It partakes judicial character and as such assumes a lot of importance in a democracy. The very establishment of this office presupposes the understanding that one cannot afford to permit private prosecution as it may result in utter chaos particularly in the present political set up. However, while one may adopt this office in the place of private prosecution, one cannot forget the interests of the victim. It is not unlikely that the public prosecutor may not share the concern of the victim to safeguard his interest. The Indian CrPC ensures this by permitting pleaders appointed by the private persons to represent the interests of the victims.[23] However, the courts

20. *Supra* note 18.

21. *Supra* note 15.

22. (1944) 4 SCC 299.

23. S.301 lays down thus:

(1) The Public Prosecutor or Assistant Public Prosecutor in charge of a case may appear and plead without any written authority before any Court in which that case is under inquiry, trial or appeal.

(2) If in any such case any private person instructs a pleader to prosecute any person in any Court, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution, and the pleader so instructed shall act therein under the directions of the Public Prosecutor or Assistant Public Prosecutor, and may, with the permission of the Court, submit written arguments after the evidence is closed in the case.

insist that such person should work under the directions of the public prosecutor. This shows that the court gives more importance to the public interest.

The public prosecutor in India seems to be not an advocate of the state in the sense that he has to seek conviction at any cost. He has necessarily to be impartial, fair and truthful not only because he is a public executive but also because he belongs to the honourable profession of law, the ethics of which demand him to have these qualities. The facts in *Sunil Kumar Pal* and *Ganesan* make us to open our eyes to the realities. The need for change is strongly felt. The CrPC came to be amended by the Parliament making it possible for the state government to adopt the prosecution service consisting of director of public prosecutions at the top and the district public prosecutor and assistant public prosecutor at the lower formation of the judiciary.[24]

These provisions are yet to be implemented by the state governments. Reorganization of the public prosecution system under this pattern may

24. S.25A inserted by Act 25 of 2005, section 4 (w.e.f. 23-6-06) lays down thus:
25A. Directorate of Prosecution –
(1) The State Government may establish a Directorate of Prosecution consisting of a Director of Prosecution and as many Deputy Directors of Prosecution as it thinks fit.
(2) A person shall be eligible to be appointed as a Director of Prosecution or a Deputy Director of Prosecution, only if he has been in practice as an advocate for not less than ten years and such appointment shall be made with the concurrence of the Chief Justice of the High Court.
(3) The Head of the Directorate of Prosecution shall be the Director of Prosecution, who shall function under the administrative control of the Head of the Home Department in the State.
(4) Every Deputy Director of Prosecution shall be subordinate to the Director of Prosecution.
(5) 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.
(6) Every Public Prosecutor, Additional Public Prosecutor and Special Public Prosecutor appointed by the State Government under sub-section (3), or as the case may be, sub-section (8), of section 24 to conduct cases in District Courts and every Assistant Public Prosecutor appointed under sub-section (1) of section 25 shall be subordinate to the Deputy Director of Prosecution.
(7) The powers and functions of the Director of Prosecution and the Deputy Directors of Prosecution and the areas for which each of the Deputy Directors of Prosecution have been appointed shall be such as the State Government may, by notification, specify.
(8) The provisions of this section shall not apply to the Advocate General for the State while performing the functions of a Public Prosecutor.

help us a lot in preventing police torture, harassment and delay. There would be more transparency in police-citizen relationship if the public prosecutor becomes an independent functionary interposed between the police and the court.