CHAPTER 4
POLICE, PROSECUTORS
AND DEFENCE COUNSEL

4.1 Police

The police is an instrument for the prevention and detection of crime.¹ The Code of Criminal Procedure does not provide for anything to establish a police force though it is an important agency for administration of criminal justice.² Rather, the Code premises on the fact that the police exists and confers certain powers and imposes certain duties thereon.³

4.2 Structure and hierarchy

The Police Act, 1861 embodies the law governing the constitution of police force throughout the country.⁴ This Act however does not operate in any State unless the State Government extends its operation there by order.⁵ The State may make its own

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¹ The Police Act, 1861, Preamble.
³ The earlier Codes (the Codes of 1861, 1872, 1882 and 1898) had the same scheme.
⁴ There are also certain other Central Acts dealing with the law governing the police. The Police Act of 1888 enables the Central Government to create a special police district embracing part of two or more States and to extend to every part of such district the powers and jurisdiction of members of a police force belonging to a specific State subject to the concurrence of that State Government. The Police Act, 1949 enables the Central Government to constitute general police district embracing two or more Union territories, and one police force for such district under its superintendent. The Delhi Special Police Establishment Act, 1946 provides for the constitution of a special police force in Delhi for the investigation of certain specified offences in the Union territories and in certain other areas, of which there is detailed discussion in this chapter. Furthermore, we have the Police (Incitement to Disaffection) Act, 1922 providing penalty for spreading disaffection among the police and for kindred offences. Lastly, the Police Forces (Restriction of Rights) Act, 1966 provides for the restriction of certain rights conferred by Part III of the Constitution in their application to the members of the Forces charged with the maintenance of public order so as to ensure the proper discharge of their duties and the maintenance of discipline among them.
⁵ The Police Act, 1861, s.46(1). It provides: "This Act shall not by its own operation take effect in any Presidency, State or place. But the State Government by an order to be published in the official Gazette, may extend the whole or any part of this Act to any Presidency, State or place, and the whole or such portion of this Act as shall be specified in such order shall thereupon take effect in such Presidency, State or place."
legislation instead of extending the operation of this Central Act to its limits as several States including Kerala have done.6

Every State Government establishes its own police force.7 The term police includes all persons by whatever name known who exercise any police functions in any part of the State.8 The entire police establishment of every State is deemed to be one police force.9 It consists of such number of superior and subordinate police officers and is otherwise constituted in such manner as the State Government may order from time to time.10 Any member of the police force is a police officer.11 All police officers of and above the rank of an Inspector are designated as superior police, whereas all police officers below the rank of an Inspector are designated as subordinate police.12

The service group consisting of Inspector General of Police, Deputy Inspector General of Police, Assistant Inspector General of Police, District Superintendent of Police and Assistant District Superintendent of Police belong to the

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1 By virtue of the Legislative Power provided for under Art.246(3) r/w Entry 2 of List II- State List in the Seventh Schedule of the Constitution. The Kerala Police Act, 1960 is the statute in force for this purpose in the State of Kerala.
2 The Police Act, 1861, s.2. The overall scheme set by the Act reveals such an idea.
3 The Kerala Police Act, 1960, s.2(iv); the Police Act, 1861, s.1 provides: "the word ‘police’ includes all persons who shall be enrolled under this Act."
4 The Police Act, 1861, s.2; the Kerala Police Act, 1960, s.3. It is to be noted that the Police Act, 1861, s.2 provides further that the entire police-establishment under a State Government shall be formally enrolled, while the Kerala Police Act, 1960 does not contain such a stipulation, rather, it provides for under s.7 that every officer of the subordinate police shall be formally enrolled, and shall receive on his enrolment a certificate under the seal of the Inspector General by virtue of which he shall be vested with the powers, functions and privileges of a police officer. In relation to such certificate it is further noted that s.8 of the Central Act provides for classification among police officers on a different basis in as much as it relates to their rank. Thus every police officer other than Inspector General, Deputy or Assistant Inspector General, District Superintendent and Assistant District Superintendent, of Police shall receive on his appointment such a certificate. See also Superintendent of Police, Ludhiana v. Dwaraka Das, (1979)3 SCC 789.
5 The Kerala Police Act, 1960, s.3; the Police Act, 1861, s.2. The State Act contains the expression "such number of superior and subordinate police officers" instead of the expression "such number of officers and men" contained in the Central Act.
6 The Kerala Police Act, 1960, s.2(iv).
7 Id, s.2(ix) & (x). However the Central Act conveys a little different idea. S.2 provides: "References to the subordinate ranks of a police-force shall be construed as references to members of that force below the rank of Deputy Superintendent."
Indian Police Service. On the other hand Deputy Superintendents, Inspectors, Sub-Inspectors, Head Constables and Constables are appointed by the State Government.\(^{13}\)

All these officers constitute the hierarchy of police in every State.

The overall administration of police throughout the State is subject to the control of the Government vested in the Inspector General of Police and in such superior police officers as the Government may deem fit.\(^{14}\) The police force within the local jurisdiction of a District Magistrate is under the general control and direction of such Magistrate.\(^{15}\) The administration of police in every district vests in the District Superintendent of Police under the general control and direction of the District Magistrate.\(^{16}\)

In an area for which the Government has appointed a Commissioner of Police, the administration of police in that area vests with him subject to such a general control.\(^{17}\)

4.3 Police station

A police station is the lowest unit of administration of criminal justice.\(^{18}\) It means any post or place declared generally or specifically by the State Government, to be a police station, and includes any local area specified by the State Government in this behalf.\(^{19}\)

\(^{13}\)Ahamed Siddique, Criminology, Problems and Perspectives, 4th ed., p.283.

\(^{14}\)The Police Act, 1861, ss.3 & 4; the Kerala Police Act, 1960, s.4.

\(^{15}\)The Kerala Police Act, 1960, s.5, in exercising authority under this section the District Magistrate shall be governed by such rules and orders as the Government may, from time to time, make in this behalf; s.2(ii) provides: " 'District Magistrate' shall mean the officer, charged with the executive administration of a district and invested with the powers of a Magistrate of the first class, by whatever designation such officer is styled."; see also the Police Act, 1861, s.4.

\(^{16}\)The Police Act, 1861, s.4.

\(^{17}\)The Kerala Police Act, 1960, s.2(3). The situation is somewhat different in metropolitan cities like Delhi, Calcutta, Bombay, Madras and Hyderabad where the office of the Police Commissioner combines the powers of the Superintendent of Police and those of District Magistrate for the purpose of law and order.


\(^{19}\)The Code of Criminal Procedure, 1973, s.2(s); Ram Govind Singh v. Askrit Singh, AIR 1960 Pat 342; s.2(p) provides: " 'place' includes a house, building, tent, vehicle and vessel"; see also Baidyanath v. State, 1969 CriLJ 339.
4.4 Officer in charge of a police station

Generally a police officer who is a Sub-Inspector in rank is the officer in charge of every police station. The Code broadens the meaning of the expression 'officer in charge of a police station' in view of the importance of duties of such a police officer and the need for their prompt discharge. During absence or inability of the officer in charge of the police station the officer next in rank present at the police station but above the rank of constable will be the officer in charge. Any other police officer present including a constable can become the officer in charge of a police station at such contingencies if the State Government so directs. The scheme of the Code is that there is only one officer in charge of the police station.

4.5 Powers of police officers

The police being an important agency for administration of criminal justice, its officers have elaborate powers in respect of the criminal process involving investigation, arrest, search, seizure, decision to charge, etc. Out of which, the powers conferred on the officer in charge of a police station are tremendous and significant, as elicited elsewhere in this paper. The police officers superior in rank to an officer in charge of a police station also have the same powers exercisable throughout the local

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21 Dr.K.N.Chandrasekharan Pillai, op. cit., at p.17.
22 The inability of the police officer in charge to perform his duties may be due to illness or otherwise.
23 The Code of Criminal Procedure, 1973, s.2(o). It provides: “‘officer-in-charge of a police station’ includes, when the officer-in-charge of the police station is absent from the station-house or unable from illness or other cause to perform his duties, the police officer present at the station-house who is next in rank to such officer and is above the rank of constable or, when the State Government so directs, any other police officer so present.”
24 The Law Commission of India, 37th Report on the Code of Criminal Procedure, 1898, p.29, para 83 provides: “section 4(1)(p) defines an ‘officer in charge of a police station. It has been suggested by the Inspector General of Police of a State, that a proviso should be added to the effect that a Sub Inspector on duty in the interior (i.e., while he is away on tour from the police station) is an officer in charge. It appears to us, that such change is not practicable, as it would mean duplication of ‘Officer in charge of police station’. The scheme of the Code is, that there is only one officer in charge of a police station. As the scheme stands, when the officer in charge is out some person must be in charge of the police station. He has to maintain a record of the First Information Report and other records. Declaring some other officer as ‘officer in charge’ might create complications. The Law Commission of India on 41st Report on Code of Criminal Procedure, 1898 agreed with its earlier view as mentioned above at pp.10, 11, para 1.26(ix).
area to which they are appointed, as may be exercised by such officer within the limits of his station. 25 This further shows the key role given by the Code to police stations in the scheme of investigation and prevention of crime. 26

4.6 Central Bureau of Investigation

The Central Bureau of Investigation being a matter enumerated in the Union List, Parliament has exclusive power to make laws with respect to it. 27 However, Parliament has not made any fresh legislation on the matter. On the other hand invoking the power of the President under Article 372(2), the Delhi Special Police Establishment Act, 1946, has been adapted and modified for the purpose of bringing its provisions into accord with Entry 8 in the Union List in as much as it relates to the Central Bureau of Investigation. 28 Thus the special police force constituted under this Act with the statutory name, the Delhi Special Police Establishment for the purpose of investigation of certain offences has also been called as the Central Bureau of Investigation.

The Delhi Special Police Establishment is empowered to investigate into certain notified offences in the Union territories and the area of a State to which its powers and jurisdiction are extended. 29 Thus in relation to such investigations throughout there, its members have all powers and privileges which the local police...
officers have in connection with the investigation of offences committed therein. Their powers include one to arrest persons concerned in such offences. Any such member of or above the rank of Sub-Inspector may exercise there any of the powers of the officer in charge of a police station in the area in which he is for the time being. While so exercising such powers he is deemed to be an officer in charge of a police station discharging the functions of such an officer within the limits of his station.

4.7 Prosecution

In criminal law prosecution has an important role to play. All criminal proceedings are in theory instituted and conducted on behalf of the State because a crime is a wrong against the society at large rather than against the individual victim. The State representing the people in their collective capacity prosecutes the offender in almost all cases involving serious offences, which are more particularly called by the Code as cognizable offences. The Public Prosecutor or the Assistant Public Prosecutor is the counsel for the State in such prosecutions. The Public Prosecutor also represents the State in criminal appeals, revisions and such other proceedings.

4.8 Role of prosecutor

Although the police may institute criminal proceedings, the responsibility for the conduct thereafter of proceedings instituted by them lies with the prosecutor.

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30 Id., ss.2(2) and 5(2). They have duties and liabilities as well. Every such power etc. is subject to the orders of the Central Government.
31 Ibid.
32 Ibid., ss.2(3) and 5(3).
33 Ibid.
37 Dr. K.N.Chandrasekharan Pillai, loc. cit.
38 Card, Cross & Jones, loc. cit.
In the machinery of justice he has to play a very responsible role. The prosecutors are really Ministers of Justice whose job is nothing but to assist the State and the court in the administration of justice.

The object of criminal trial is to find out the truth and to determine the guilt or innocence of the accused. There the prosecutor's duty should consist only in placing all available evidence irrespective of the fact whether it goes against the accused or helps him before the court in order to aid the court in discovering the truth. He should be personally indifferent as to the result of the case and leave the court to adjudicate upon the guilt or innocence of the accused based on all such evidences.

The prosecutor must be as impartial as the court. He is not there to see the innocent go to gallows. Equally, he is not there to see the culprits escape the conviction. Rather, he is there to see that justice is done. The last thing he would desire is to secure a wrongful conviction or even to secure a conviction in a doubtful case. He must play his role always consistent with the ethics of legal profession and

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40 In Rajender Kumar Jain v. State, (1980) 3 SCC 435 at p.445; the Supreme Court has used the expression 'Minister of Justice' to describe the Public Prosecutor. In Babu v. State of Kerala, 1984 CrLJ 499 (Ker) at p.502; the High Court of Kerala lays down: "The Public 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 see the innocent go to gallows; they are also not there to see the culprits escape the conviction."
42 Ram Ranjan Roy v. Emperor, ILR 42 Cal 422 at p.428; Ghirrao v. Emperor, 34 CrLJ 1009 at p.1012.
45 Sir Alfred Denning, The Road to Justice, 1959, p. 36.
46 Md. Muntaz v. Nandini Satpathy, (1987) I SCC 299; Anant Wasudeo Chandekar v. King Emperor, AIR 1924 Nag 243 at p.245: There should not be on the part of the prosecutor any unseemly eagerness for or grasping at conviction.
fair play in the administration of justice. The prosecutor has one more role to play. He is also a legal adviser to the police department in charge of investigation.

4.9 Organisation of prosecution

There are several prosecutors under the Code. Some of them are appointed by Central Government, others by the State Government and yet others by the District Magistrate. Nevertheless, the Code does not provide for the actual organisation of the prosecuting agency. In practice, however, the prosecution work in the Courts of Magistrates is under the directions of the Police Department, while that in the Courts of Sessions is under the general control of the District Magistrate. The Public Prosecutors appointed for the High Court are under the control of the State Government.

4.10 Public Prosecutors for High Courts

The Central Government or the State Government shall appoint a Public Prosecutor for every High Court for conducting in such Court, any prosecution, appeal or other proceeding on behalf of the Central Government or the State Government, as the case may be. The Government shall do so only after consultation with the High

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47 Sunit Kumar Pal v. Phora Sheikh, (1984)4 SCC 532. It is inconsistent with all these principles for the Public Prosecutor to appear on behalf of the accused.
48 The Law Commission of India, 15th Report on the Code of Criminal Procedure, 1973, chapter III, para 3. It reads: "It is a matter of common knowledge, that a public prosecutor has a dual role to play, namely, as a prosecutor to conduct the trial and as a legal adviser to the police department in charge of investigation. For some reason or other, in the present administration, the latter part is not given due weight and virtual communication gap exists."
52 The Code of Criminal Procedure, 1973, s.24(1). S.2(u) provides: "'Public Prosecutor' means any person appointed under sec.24 and includes any person acting under the directions of the public prosecutor."
Only an advocate who has been in practice for not less than seven years is eligible to be appointed as a Public Prosecutor. Either Government may in the same manner appoint one or more Additional Public Prosecutors for the same purpose.

4.11 Public Prosecutors for districts

The District Magistrate, in consultation with the Sessions Judge, prepares a panel of names of persons, who are in his opinion, fit to be appointed as Public Prosecutors or Additional Public Prosecutors for the district. The State Government shall appoint a Public Prosecutor out of this panel for the district. It may also appoint one or more Additional Public Prosecutors out of the panel for the district. Where in a State there exists, a regular cadre of Prosecuting Officer, such Government shall appoint a Public Prosecutor or an Additional Public Prosecutor only from among the persons constituting such cadre. However, if in the opinion of the Government, no suitable person is available in such cadre for such appointment, it may so appoint a person from the panel of names prepared by the District Magistrate. The Central Government may appoint one or more Public Prosecutors for the purpose of conducting any case or class of cases in any district or local area. It can very well so appoint any advocate who has been in practice for not less than seven years. The Public Prosecutors and Additional

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54 Id., s.24(7). Sub-sec. (9) provides that: The period during which a person has been in practice as a pleader, or has rendered service as a Public Prosecutor or other Prosecuting Officer, by whatever name called, shall be deemed to be the period during which such person has been in practice as an advocate.
55 Id., s.24(1).
56 Id., s.24(4); see also the Law Commission of India, loc. cit.
57 Id., s.24(3).
58 Ibid.
59 Id., s.24(6).
60 Id., s.24(6), Proviso.
61 Id., s.24(2).
62 Id., s.24(7).
Public Prosecutors conduct prosecution and other criminal proceedings in the Sessions Courts and the High Courts, according to the pattern set by the Code.\(^{63}\)

4.12 Assistant Public Prosecutors

They conduct prosecution in the courts of Magistrates.\(^ {64}\) The State Government is bound to appoint one or more Assistant Public Prosecutors in every district.\(^ {65}\) The Central Government may also appoint one or more Assistant Public Prosecutors for the purpose of conducting any case or class of cases in the courts of Magistrates.\(^ {66}\) Where no Assistant Public Prosecutor is available for the purposes of any particular case, the District Magistrate may appoint any other person to be an Assistant Public Prosecutor in charge of that case.\(^ {67}\) A police officer who has taken any part in the investigation into the offence with respect to which the accused is being prosecuted, shall not be so appointed the Assistant Public Prosecutor in charge of that case.\(^ {68}\) Furthermore, a police officer below the rank of Inspector also shall not be so appointed the Assistant Public Prosecutor in charge.\(^ {69}\) Barring the appointment of such police officers as the Assistant Public Prosecutor in charge of a particular case as mentioned above no police officer shall be eligible to be appointed as the Assistant Public Prosecutor.\(^ {70}\) The Code does not prescribe any qualification for the purpose of

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\(^ {63}\) The Law Commission of India, 41\(^ {nd}\) Report on the Code of Criminal Procedure, 1898, pp.311 & 312, para 38.3; Dr. K.N. Chandrasekharan Pillai, *op. cit.*, p.18.

\(^ {64}\) The Code of Criminal Procedure, 1973, s. 25(1); The definition under s.2(u) doesn't cover the Assistant Public Prosecutors as they are not appointed under s.24; at the same time they are not defined separately.

\(^ {65}\) *Ibid.*

\(^ {66}\) *Id.* s.25(1-A); This section was inserted by Act 45 of 1978.

\(^ {67}\) *Id.* s.25(3).

\(^ {68}\) *Id.* s.25(3), Proviso (a).

\(^ {69}\) *Id.* s.25(3), Proviso (b).

\(^ {70}\) *Id.* s.25(2). The rationale behind the provision is elicited by the Law Commission of India, in the 14\(^ {th}\) Report on the Reform of Judicial Administration, vol. II, p.769, para 12 as: "It must not also be forgotten that a police officer is generally one-sided in his approach. It is no reflection upon him to say so. The Police Department is charged with the duty of the maintenance of law and order and the responsibility for the prevention and detection of offences. It is naturally anxious to secure convictions...It is obvious that by the very fact of their being members of the police force and the nature of the duties they have to discharge in bringing the case to court it is not possible for them to exhibit that degree of detachment which is necessary in a Prosecutor."
appointment of the Assistant Public Prosecutors. However, they should be legally qualified and the present trend of appointing, as far as possible, qualified legal practitioners as the Assistant Public Prosecutors need be maintained.\textsuperscript{71}

According to the prevailing practice, the prosecution is conducted in the Court of Magistrate by the Assistant Public Prosecutor in cases initiated on police reports, while in cases initiated on a private complaint the prosecution is conducted either by the complainant himself or by his duly authorised counsel.\textsuperscript{72} In cases initiated on private complaint also the State can appoint prosecutors if the cause has public interest.\textsuperscript{73} Any Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person other than a legally ineligible police officer.\textsuperscript{74} Any person conducting the prosecution may do so personally or by a pleader.\textsuperscript{75}

\subsection*{4.13 Special Public Prosecutors}

The Central Government or the State Government may appoint a Special Public Prosecutor for the purposes of any particular case or class of cases.\textsuperscript{76} The Special Public Prosecutors are to conduct prosecutions and other criminal proceedings in the Sessions Court and the High Courts, as revealed by the pattern set by the Code.\textsuperscript{77} Only

\textsuperscript{71} The Law Commission of India, 41\textsuperscript{st} Report on the Code of Criminal Procedure, vol. 1, p.312, para 38.3.
\textsuperscript{72} Ibid; Dr. K.N. Chandrasekharan Pillai, loc. cit.
\textsuperscript{73} Mukul Dalal v. Union of India, (1988)3 SCC 144.
\textsuperscript{74} Id, s.302(1). As in the case of s.25(3), a police officer who has taken any part in the investigation into the offence with respect to which the accused is being prosecuted, and an officer below the rank of Inspector are not eligible for the purpose under this section also.
\textsuperscript{75} Id, s.302(2).
\textsuperscript{76} Id, s.24(8); Yale Kamisar, Wayne R. LaFave & Jerold H. Israel, Modern Criminal Procedure, 8\textsuperscript{th} ed. 1994, p.916: There appear to be three areas where the need for the services of a special prosecutor arises: 1. Conflict: The prosecuting attorney is legally precluded from proceeding due to a conflict of interest; 2. Complexity: The prosecutor is faced with a difficult case beyond his investigative and legal abilities; 3. Public trust: There is corruption within the judicial/governmental system, and public confidence requires an 'uninvolved' outsider to investigate and prosecute.
\textsuperscript{77} Dr. K.N. Chandrasekharan Pillai, loc. cit.
an advocate who has in practice for not less than ten years is eligible to be appointed as the Special Public Prosecutor.\textsuperscript{78}

4.14 Power of prosecutors

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.\textsuperscript{79} If in any such case any private person instructs a pleader to prosecute in any court, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution.\textsuperscript{80} The pleader so instructed shall only act therein under the directions of the Public Prosecutor or Assistant Public Prosecutor.\textsuperscript{81} He may, submit written arguments after the evidence is closed, with permission of the court.\textsuperscript{82}

The Advocate-General or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor is entitled to intervene and assume the charge of prosecution in any case being inquired or tried by a Magistrate despite it is case instituted on private complaint without any permission of the Magistrate.\textsuperscript{83} On such intervention the advocate appearing for the complainant shall only act under the directions of the Prosecutor.\textsuperscript{84}

\textsuperscript{78} The Code of Criminal Procedure, 1973, s.24(8).
\textsuperscript{79} Id, s.301.
\textsuperscript{80} Id, s.301(2).
\textsuperscript{81} Ibid.
\textsuperscript{82} Ibid.; see also Kuldeep Singh v. State of Haryana, 1980 CrilJ 1159, at p.1160 (P & H HC).
\textsuperscript{83} Id, s.302(1); Babu v. State of Kerala, 1984 CrilJ 499 (Ker HC).
\textsuperscript{84} Id, s.301(2); such intervention on the part of the prosecutor is warranted only when the cause has public interest. The power shall not be used for defeating justice. See Kihar Kesar v. Satyanarayana, 1984 CrilJ 344 (AP HC).
4.15 Withdrawal from prosecution

Withdrawal from a prosecution means retiring or stepping back or retracting from the prosecution. The Public Prosecutor or Assistant Public Prosecutor in charge of a case has power to withdraw from the prosecution of any person. This power can be exercised only in cases initiated on police report and not in cases initiated on private complaint. The prosecutor can so withdraw from the prosecution only with consent of the court.

The withdrawal can be sought at any time before the judgment is pronounced. The provision has no application at all at the appellate stage. During the pendency of the committal proceedings in the Court of Magistrate in cases involving offences triable exclusively by Court of Session there can be withdrawal from the prosecution with the consent of the Magistrate. Where an accused is charged with

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17 Public Prosecutor v. Mandangi Varjuno, 1976 CrI LJ 46 (AP HC) at p.47; It is as well withdrawal of appearance from the prosecution or refraining from conducting or proceeding with the prosecution.
18 The Code of Criminal Procedure, 1973, s.321; It is to be noted that the section provides for 'the withdrawal from the prosecution' and not 'the withdrawal of the prosecution'. See Subhash Chander v. State, (1980)2 SCC 155; The Code of Criminal Procedure, 1898, s.494 contained the law which was in force prior to the present Code.
20 The Code of Criminal Procedure, 1973, s.321; Rajender Kumar Jain v. State, (1980) 3 SCC 435 lays down at p.445: "It shall be duty of the Public Prosecutor to inform the court and it shall be the duty of the court to appraise itself of the reasons which prompt the Public Prosecutor to withdraw from the prosecution. The court has a responsibility and a stake in the administration of criminal justice and so has the Public Prosecutor, its 'Minister of Justice'. Both have a duty to protect the administration of criminal justice against possible abuse or misuse by the Executive by resort to the provisions of s.321 Criminal Procedure Code. The independence of the court requires that once the case travelled to the court, the court and its officers above must have control over the case and decide what is to be done in each case." See also M.N. Sankaranarayanan Nair v. P.V. Balakrishnan, (1972) 1 SCC 318 at p.322; Shenonandan Paswan v. State of Bihar, (1983) 1 SCC 438 at 456; Pichhai Cheerrath Mamoo v. A.P.P. Malappuram, 1980 CrI LJ 901 (Ker HC) at p.904; Tejinder Singh v. Bhavi Chand Jindal, 1982 CrI LJ 203 (Del HC) 26.
21 Ibid; The withdrawal can be done only in the trial court; see T.C. Thiagarajan v. State, 1982 CrI LJ 1601 (Mad HC) at p.1607.
more offences than one and where more accused than one are prosecuted at the same trial, the prosecutor may withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried.92

If the withdrawal is made before framing charge, the accused shall be discharged in respect of such offence or offences. If it is made after a charge has been framed, or when no charge is required under the Code, he shall be acquitted in respect of such offence of offences.93

If the prosecutor in charge of the case has not been appointed by the Central Government and the offence relates to a matter to which the executive power of the Union extends, or was investigated by the Delhi Special Police Establishment, or involved the misappropriation of, destruction of, or damage to, Central Government property, or was committed by a Central Government servant in the course of his official duty, the prosecutor shall not move the court for its consent to withdraw from the prosecution unless the Central Government permits him to do so.94 Further, the court shall, before according consent, direct the prosecutor to produce before it the permission granted by the Central Government to that effect.95

Nature of power

Under the scheme of the Code the prosecution of an offender for a serious offence is primarily the responsibility of the executive. The withdrawal from the prosecution is an executive function of the prosecutor. The discretion to withdraw from the prosecution vests in the prosecutor.96 The statutory responsibility for deciding

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92 The Code of Criminal Procedure, 1973, s.321; s.218 provides for separate charge for distinct offences and the trial thereof, while s.223 provides for charging several persons jointly.
93 Ibid.
94 Id. s.321 Proviso; see also the Law Commission of India, 41st Report on the Code of Criminal Procedure, 1898, pp.313 and 314, paras 38.6 & 38.7.
95 Ibid.
withdrawal equally rests upon him. He cannot surrender it to someone else for these reasons. Moreover, this function relates to a public purpose entrusting him with the responsibility of so acting only in the interests of administration of criminal justice. This additional element flowing from statutory provisions in the Code undoubtedly invests the 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. It is non-negotiable and cannot be bartered away in favour of those who may be above him on the administrative side.

The Government may suggest to the prosecutor that he may withdraw from the prosecution, but none can compel him to do so. The only limitation on the discretion of prosecutor is the requirement of consent of the court.

Reason for withdrawal

The Code does not mention any reason for the prosecutor to withdraw from the prosecution nor does it mention any ground for the court to grant or refuse permission thereto. The court as well as the prosecutor has a duty to protect the

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61 Rajender Kumar Jain v. State, (1980) 3 SCC 435 at p.445. In Sheomundan Paswan v. State of Bihar, (1983) 1 SCC 438, though the Supreme Court accepted this position it took a somewhat inconsistent view. At p.492 Baharul Islam, J. observed: "Unlike the judge, the Public Prosecutor is not an absolutely independent officer. He is an appointee of the Government, Central or State (see ss.24 and 25 Cr.P.C.), appointed for conducting in court any prosecution or other proceedings on behalf of the Government concerned. So there is the relationship of counsel and client between the Public Prosecutor and the Government. A Public Prosecutor cannot act without instructions of the Government; a Public Prosecutor cannot conduct a case absolutely his own, or contrary to the instruction of his client, namely the Government. Section 321...does not lay any bar on the Public Prosecutor to receive any instruction from the Government before he files an application under that section.... On the contrary the Public Prosecutor cannot file an application for withdrawal of a case on his own without instruction from the Government."
administration of criminal justice against possible abuse or misuse under the guise of this provision. It is settled that the prosecutor must exercise this power only in the interest of justice which may be either that he will not be able to produce sufficient evidence to sustain the charge or that subsequent information before the prosecuting agency would falsify the prosecution evidence or any other similar circumstance which it is difficult to predicate as they are dependent entirely on the facts and circumstances of each case. Moreover, the power must be exercised with object to further the broad ends of public justice, public order and peace this power. Thus even in cases where reliable evidence has been adduced to prove the charges the prosecutor can exercise this power if it is in order to further any of these objects. On the other hand he cannot

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105 M.N. Sankaranarayanan Nair v P.V. Balakrishnan, (1972) 1 SCC 318; Bansi Lal v. Chandan Lal, (1976) 1 SCC 421; Dy. Accountant General v. State of Kerala, AIR 1970 Ker 158(FB); Sadanand Muralidhar Burna v. State of Maharashtra, 1976 CriLJ 68 (Bom HC). The observation of the Supreme Court in Rajender Kumar Jain v. State, (1980) 3 SCC 435 is worth noting. It reads at p.445: “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 prosecutions in order to restore peace, to free the atmosphere from the surcharge of violence, to bring about a peaceful settlement of issues and to preserve the claim which may follow the storm. 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 to prosecute the offenders involved or not to proceed further with the prosecution already launched. In such matters who but the government can and should decide, in the first instance, whether it should be beneficent or beneficial to launch or continue prosecutions.”

106 Thurm an W. Arnold, ‘Law Enforcement – An Attempt At Social Dissection’, 42 YLJ 1, (1932), at pp. 17-18: “It is the duty of the prosecuting attorney to solve the problem of public order and safety using the criminal code as an instrument rather than as a set of commands. This makes it proper and necessary that some laws should be enforced, others occasionally enforced and others ignored according to the best judgment of the enforcing agency. The criminal problem must be looked at as a war on dangerous individuals and not as a law enforcement problem, unless we want to escape from reality by taking refuge in an ideal world of false assumptions concerning both criminal codes and criminals”, Rajender Kumar Jain v. State, (1980) 3 SCC 435 at p.445: “the broad ends of public justice will certainly include appropriate social, economic and political purposes”.

exercise this power even on the ground of paucity of evidence when there is no such object to be furthered.\textsuperscript{108}

**Ground for according sanction**

The independence of the court requires that once the case has travelled to the court, the court and its officers must have control over the case and decide what is to be done in each case.\textsuperscript{109} The statutory discretion vested in the Public Prosecutor, who is though an officer of the court is neither absolute nor unreviewable, but it is subject to the court’s supervisory functions.\textsuperscript{110} The prosecutor is as well bound to convince the court the grounds and needs for withdrawing the prosecution.

The court need not grant permission for withdrawal from the prosecution as a necessary formality - granting it for mere asking. Of course, being an executive function, it would be subject to a judicial review on certain limited grounds like any other executive action.\textsuperscript{111} It may accord consent if and only if it is satisfied on the materials placed before it that the grant of permission is not being sought covertly with an ulterior purpose unconnected with the vindication of the law which the executive organs are in duly-bound to further and maintain.\textsuperscript{112} Though the court has wide discretion either to grant or to withhold consent, yet it must be exercised only on sound legal principle without any arbitrariness or fancifulness.\textsuperscript{113} There cannot be any hard and fast rule for determining the cases in which the court can accord or refuse consent.

\textsuperscript{109} Id at p.445.
\textsuperscript{112} M.N. Sankaranarayanan Nair v. P.V. Balakrishnan, (1972) 1 SCC 318 at p.324; Dwarka Prasad v. State, 1982 CriLJ 713 (Ori HC) at p. 714.
\textsuperscript{113} Purshottam Vijay v. State, 1982 CriLJ 243 (MP HC) at p. 251.
It must ultimately depend on the facts and circumstances of each case. All that the court has to see is whether the application is made in good faith, in the interest of public policy and justice and not to thwart or stifle the process of law.

4.16 Advocate General

The Advocate General has a significant part in the mechanism of prosecution. He is the supreme law officer of the State and the only constitutional functionary among such officers. He may represent the State Government in any criminal case in which it is a party before any court upon direction. In a case where the Advocate General appears for the State and in a criminal appeal where he has been specifically empowered by the Government to appear, the Public Prosecutor has no right to be heard except through him under his instructions. The functions and powers of the Advocate General and the Public Prosecutor are distinct.

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114 State of Orissa v. Chandrika Mohapatra, (1976)4 SCC 250 at p.254; In Pijush v. Ramesh, 1982 CriLJ 452 (Gau HC) at 456: The order of the court must be a speaking order which means the order must be based on sufficient reasoning so that the superior court can look into the propriety or legality of the order. Consent must be emerged from an opinion framed by the court on the grounds and circumstances that may be connected with the case. A judicial opinion must be based on some objective materials placed before the court simultaneously with the prayer for withdrawal. See also State v. Mohd. Ismail, 1981 CriLJ 1553 (Ker HC) at p.1555.


118 The Constitution of India, Art.165 and Rule (2) of the Rules formulated by the Governor (Kerala) in pursuance of the duties under Art. 165(2) & (3); Rule (2) (i) (iii) (vi) (vii) & (viii); see Abdul Rahiman v. State, 1997(1) KLJ 640 at pp.642 & 643.


120 Ibid; Subhash Chander v. State, AIR 1980 SC 423: The power of withdrawal from the prosecution can be exercised by the Public Prosecutor in charge of that case alone and not by the Advocate General. (However the Rules formulated by the Governor under Art.165(2) & (3) permits him to do so subject to limitations-see Rule (2) of Part III); State of Kerala v. Krishnan, 1981 KLT 839: so long as the Advocate General or the Addl. Advocate General is not a Public Prosecutor of the High Court under s.241(1) neither of them can present an appeal to the High Court from an order of acquittal under s.378(1) if the State Government directs.
4.17 Defence counsel

Like the police and the prosecutor, the defence counsel is also a functionary with equal importance in the administration of criminal justice. Any person accused of an offence before criminal court, or against whom proceedings are instituted under the Code has the right to be defended by a pleader of his choice. A pleader is one who is legally authorised to practise in any court or any other person appointed with the permission of the court to act in any proceeding.

There shall be only one class of persons entitled to practice the profession of law, namely, advocates. A person who entered in the roll of advocates prepared and maintained under the Advocates Act, 1961 is called an advocate. Every advocate is entitled as of right to practice throughout India in all courts including the Supreme Court, before any tribunal or person legally authorised to take evidence, and before any other authority or person before whom such advocate is by or under any law for the time being in force entitled to practise. The advocates are the officers of the court. Nevertheless they are not in the regular employment of the State. The accused himself shall pay his advocate the fee for engaging him.

The adversary system of criminal trial, which we have adopted, assumes that the State using its investigative resources and employing competent prosecutor...
would prosecute the accused, who, in turn, will employ equally competent defence
counsel to challenge the evidence of the prosecution.\textsuperscript{126} Thus the right to consult, and to
be defended by a legal practitioner of his choice, is made fundamental right besides it is
a statutory right.\textsuperscript{127} But for the advocates all these rights would become meaningless and
it would make the system providing for adversarial criminal trial defunct.

\textsuperscript{126} The Expert Committee, Report on Legal Aid, p.70.
\textsuperscript{127} The Constitution of India, Art.22(1) and the Code of Criminal Procedure, 1973, s.303.