4.1 INTRODUCTION

Law and Justice comes in concurrent list under the Indian Constitution, therefore, the law can be passed either by the central government or the state government. The law passed by the Central government may or may not taken into consideration by the state.

Though the common aim of prosecution machinery is one, there is slight difference of hierarchy, governing ministry and the *modus operandi* of the prosecution wings in India. On the basis of state requirements, the prosecution machinery of the state is different. In some of the provincial Governments in India, the boundary between investigation and prosecution is blurred. In few of the States the police officials head prosecution machinery wherein the boundary is completely disappeared. In Arunachal Pradesh and Mizoram the police officers head prosecution machinery. The Directorate of the prosecution is heading organs of the prosecution of the States. In some of the States the Directorate of Prosecution is headed by the police officers. In many of the States the Directorate of Prosecution works under the State Home Ministry. However in the States of Goa and Karnataka, the Law Ministry controls the Directorate of Prosecution. In recruitment procedure also, there is an executive interference. Most of the times they prefer to recommend the names of Ad hoc Appointees. Various Courts have held that the prosecution and investigation machineries should not be one and the same.

In Jaipal Song Naresh V State of Uttar Pradesh,\(^6\) it was pointed out by the Allahabad High Court that the intention of parliament to keep separate prosecution from the police is to investigate the offence and identify the guilt of accused. The Prosecutor is not under duty to represent police but has a duty to represent Crown. He should perform his duty without favor or fear. Hence, it was held that the prosecution

\(^{6}\) 1976, Cr. L. J. 32
should not be a part of investigation directly or indirectly. Before filling charge sheet in the court, the ball is in the court of police as soon as documents are prepared, it is the prosecution who leads the case. However, the role of police and Prosecutors is complementary to each other. Their mutual cooperation and harmony is a must in order to conduct effective prosecution. Police should take needful advice by the Prosecutors at the time of filling charge sheet in the law court.

Before independence, the Prosecutors were a part and parcel of the police department. They were subordinate to the police department of the respective States. In year 1973, the Code of Criminal Procedure was amended wherein the eligibility of the Prosecutors was changed and minimum seven years of practice in the Session’s court was held mandatory for Public Prosecutor in the Session’s court and 10 years practice for the Special Public Prosecutors to deal with the special cases. The termination of practice of police Prosecutors was a result of decision in Jai Pal Singh V State of Uttar Pradesh\(^97\) wherein the court quashed order of Uttar Pradesh Government wherein the Assistant Public Prosecutors were under the administrative and disciplinary control of the Superintendent of Police and the Inspector General of Police. In order to maintain independence of Prosecutors, this decision was made.

In year 1958 and 1969, The Law Commission of India has recommended to set up independent prosecution machinery.

In S. B. Shahane V State of Maharashtra,\(^98\) it was held that the objective of keeping Prosecutors outside the police control is to ensure independence. If the Prosecutors are under police control, it will affect Prosecutorial independence.

After separation of Prosecutors from police control, there were many criticisms. The State Police Commissions and Fourth National Police Commission, The Malimath Committee on Reform of Criminal Justice system in India have recommended that the Prosecutor’s office should be headed by the police officials. Same kind of recommendation was made for the prosecution wing in the State of Orissa and West Bengal.

\(^{97}\) 1976, Cr L J 32
\(^{98}\) AIR 1995 SC 1628
In order to smooth functions of police and prosecution, there is an urgent need of coordination. However, if the Prosecutors are kept subordinate to the police, it will affect the objective of the machinery.

The Prosecution Machinery faces many kinds of pressures from the executive wing. The appointment, tenure, remuneration and perks, are decided by the Executive. Hence, the Prosecutors should be protected from the Executive interference.

In Jain Hawala Case,\textsuperscript{99} the relationship amongst police, prosecution and the executive has received attention of the Supreme Court of India. In this case, the Supreme Court of India has issued specific guidelines about various functionaries of the States. Specifically, the bureaucratic politician criminal nexus had used all the means needed to thwart investigation and prosecution of corruption cases by the Central Bureau of investigation. After considering the fact and circumstances of the case, the court has issued directions for the efficient and impartial administration of justice. The Supreme Court of India has warned the concerned minister not to interfere in the investigation and prosecution.

Political interference is possible in the process of withdrawal of prosecution under Sec. 321 of the Code of Criminal Procedure. How to exercise the withdrawal of prosecution power is not mentioned in laws in India though that power is not subject to delegation and is in the domain of the Public Prosecutor. However, In the case of Bhopal Gas Leak Disaster, the Prosecutor was not considered in the compromise process.

Though Indian Public Prosecutors are theoretically independent and free, in practice, they face a lot of interference and obstacles. In Union of India V Shishil Kumar Modi,\textsuperscript{100} the Supreme Court of India quoted the words of Lord Denning in R. V Metropolitan Police Commissioner.\textsuperscript{101} The crux of the quotation is that every constable in the land should be independent from executive control and should not be subject to the order of secretary of the State. The law of the land should be enforced

\textsuperscript{99} Vinit Narayan v Union of India, (1998), 1 SCC. 226
\textsuperscript{100} 1997, 4 SCC, 770
\textsuperscript{101} 1968, 1 All E R 763
and monitored by every Commissioner of Police as well as each police constable. He must take the required steps to post his men to detect crime and honest citizens get peace. He should decide whether to investigate the case or not. Nobody should interfere in this task of decision making. He is answerable to the law itself and nobody else.

The Prosecutors are one of the important officers in the administration of criminal justice in India. The role of Prosecutor is connected with pre-trial, during trial and in post trial phases. The Prosecutors are very important for crime control in the society. Efficient Prosecutors can contribute efficiently to the administration of justice and can control crime. Indian Criminal Justice follows Adversarial Model of Justice. Hence under the light of the Adversarial Model Prosecutors in India perform their function. Basically, the Code of Criminal Procedure, 1973 is the general procedural law dealing with Prosecutors' functions. However, in addition to this, there are special laws drafted by the Parliament of India and the State Legislatures of various States in India. The Indian Evidence Act, 1872 deals with examination of witnesses and other rules of evidence. Also, the Indian Judiciary has periodically prescribed the role of the Prosecutors in pre-trial, during trial and post – trial period. Prosecutors are responsible for maintaining conviction rate of the State. As per Report of National Crime Record Bureau (NCRB) 2013, Conviction rate of India is 39.80 percent. This is a body under Home Ministry, Government of India to maintain crime records and statistics.

4.1.1 History of Indian Prosecutors

The History of Criminal Justice System in India has covered three important phases.

- Ancient Period- C 1000 BC to 1000 AD
- Medieval Period-AD 1000 to 1757
- Modern Period – AD 1757 to 1947

Indian Criminal Justice System uses adversarial Models of Criminal Justice System. The Indian Penal Code 1860 is a substantive law supported by the Code of Criminal Procedure 1973 which is procedural piece of legislation. The Indian Evidence Act, 1872 elaborates the rules of evidence. Presiding Judge conducts the criminal trial. On the basis of seriousness of the offence, the trial is decided. The Code of Criminal Procedure, 1973 has explained the kinds of offences and the courts and the specific category of Prosecutor to represent the cases. In Indian courts, a trial is initiated by a
Prosecutor who first examines witnesses in his Examination-in-chief and then he proceeds with his arguments. If evidence produced before him is found to be irrelevant or inadmissible, an impartial Judge objects to it and discards it as unacceptable. International Covenant on civil and political rights insists upon fair trials by assuming innocence and by insisting upon proof 'beyond reasonable doubt'. Indian courts follow the principle of fair trial, during which Prosecutors enjoy a lot of discretion which enables them to protect the innocent and to convict the guilty. The notion of fair trial and justice is protected. Normally, the prosecution begins after the police end their investigation. In the year 1958, the Law Commission of India had recommended the appointment of the Director of Public Prosecution to control all the Prosecutors. This is a separate department of prosecution. Trial stage is the work intensive stage for the Indian Prosecutors. However, that recommendation was not executed for many decades and the mandate of this Board of Directorate of Prosecutor was incorporated in year 2005.

In order to understand the theoretical background of the Prosecutors, the historical growth of the Prosecutors in Ancient, Medieval, pre-Constitutional period is important. Indian Legal System is not very old. This system is based on the original notions of justice like justice, equity and good conscience under the customary laws. In addition to those aspects, the Legal Platform established by the British Rule during their regime of three hundred years in India is very important.

4.1.2 Ancient Period

During ancient period, there was dominance of Hindu Laws, hence that period is also known as Hindu Period. In this early Vedic period the state administration of justice was headed by the kings supported by the assistants or the advisors. In Rig Veda, the king was considered as a protector of people. Law and order was maintained by the king. As per references of Kautilya’s Arthashastra and Dharmasutra, the king had a duty to protect society and ensure public welfare. The panchayats use to administer justice in the small villages adjoining kingdoms. Village headmen’s office was hereditary in the respective family or community. Kings administration was carried

out by the headmen. Sabhas and Samitees were in practice. The first time State Judicial Administration may be traced in to Pre Mouaryan Stage. According to Smriti, administration of justice is one of the important functions of the king.

4.1.3 Medieval Period
Beginning of 11th Century has witnessed downfall of the Hindu Rule. As ancient Hindu rulers were defeated by foreigners the old Hindu ruler’s kingdoms and the administration of justice began to crumple. Therefore during Mughal Rule, Muslim Criminal Law was significant law of the land in India. The roots of Muslim Law were entrenched and the Company had not encroached upon the system immediately. British administrators had slowly started to modify the existing criminal legislation. In order to modify the system, they had used various regulations.

As per Prof. M.P. Jain’s Outlines of Indian Legal and Constitutional History (6th Edition, Nexis Nexis, Butterworth, Wadhava) 2009, In year 1772, Warren Hesting has initiated in the administration of justice. He has introduced one judicial plan. That plan was meant for Bengal, Bihar and Orissa. He was realized to bring reforms in many aspects of criminal law. As per him, it was the law of barbarous construction, and contrary to the first principle of civil society, by which the state acquires an interest in every member which composes it and a right in security. In 1970, the first attempt to modify criminal law was made by Lord Cornwallis. He has stressed upon indispensability of changes in criminal law. Lord Cornwallis has initiated to modify law of evidence in year 1972 as well. He brought criminal law in to streamline with modern philosophy. As per his notion, criminal law is meant not so much for private redress, but is a public law. Each and every crime should be considered crime against society and not just against the victim. The concept of Public Prosecution has been embedded in Indian Criminal Law during this period

4.1.4 Pre-Constitutional Period
The root of Prosecutors posts embedded in India only upon establishment of the courts by the British Government to rule India. Basically, the East India Company arrived in India as traders. However after 150 years of their business transactions, in order to rule Indian States, they brought their own machinery of administration of justice in India. Basically they made certain reforms in the court system, legal
representatives, Prosecutors, and basic apparatus of the administration of justice. Initially all these officers were British whose main focus was concentrated on the three Presidency Towns namely Bombay, Madras and Calcutta. Therefore, the roots of Prosecutors in India are embedded in those towers. First time in the legal history of India, Courts, Prosecutors and the Legal Representatives were implanted systematically. Initially, the Indians were not allowed to be Prosecutors. However, with the passage of time, the Indian Prosecutors were given an opportunity to represent the State. To establish criminal justice administration in rest of the country (i.e. criminal cases beyond Presidency Towns of Bombay, Madras and Calcutta) the situation was still uncertain and criminal cases were resolved on the basis of the prevailing customs and also based on justice, equity and good conscience by the provincial King / Emperor. Before enactment of the Constitution of India on 26th January 1950, there were no uniform rules for governing prosecution in all the States in India. The Prosecutors were under supervision and control of the police wing of the respective States and they were known as Police Prosecutors. Indian Criminal Justice System witnessed many phases like Ancient period, Muslim period and in Modern Indian period; Prosecutors were introduced for the first time in the Indian Legal history.  

4.2 CONSTITUTIONAL PROVISIONS

List III of the 7th Schedule to the Indian Constitution allows the Centre and also the States to legislate on prosecution. Of course there exists no direct provision relating to prosecution in Indian Constitution. Prosecutor's post is a statutory post. It is not a constitutional post as Attorney General of India or Solicitor General of India. However, it is the duty of States to protect the interest of the society. Prosecutors represent the State in criminal courts and incidentally they protect the victim's interest. Therefore, indirectly it is incumbent on Prosecutors to protect the interest of State. Indian Constitution is a written document. It follows the Anglo-Saxon common law justice system. Article 14 of the constitution mandates equality before law or equal protection of laws within the territory of India. Article 21 mandates protection of life and personal liberty. Article 20 provides protection against self-incarceration and

104 B.L.Verma, Development of Indian Legal system, Deep & Deep Publication, New Delhi, (1987) P.161
105 Madan Lal Shrama, Ex Joint Director of Central Bureau of Investigation, India, The Role and Functions of Prosecution in Criminal Justice System.
double jeopardy. Article 20 (3) allows an accused to maintain silence. The accused will not be compelled to be a witness against himself. Under Article 20 innocents are constitutionally protected and no person would be subject to pay penalty greater than that which might have been inflicted upon him under the law in force at the time of commission of the offence. These fundamental rights can be claimed against the State which is bound to protect them. Under Article 39 (A) of State must secure equal justice to all its citizens. This is one of the Directive Principles of State Policy. Free and Fair trial is indispensable part of Adversarial criminal justice system. In *K. Anbhaazhagan v Superintendence of police*\(^{106}\). Case, the court held that Free and Fair trial is a *sine qua non* of Article 21 of the Indian Constitution. It is trite law that justice should not only be done but it should be seen to have been done. If the criminal trial is not free and fair and not free from bias, judicial fairness and judicial system would be at stake, shaking the very confidence of the Public in the system and woe would be the rule of law. There is a close nexus of truth with free and fair trial. In this regard, as per Philip Rechel, The Adversarial Process assumes that truth will emerge only from free and open competition. Here, the struggle is between the State on one hand and the defendant on the other.\(^{107}\)

### 4.3 PROSECUTORS IN POST CONSTITUTIONAL PROVISIONS

After enactment of the Constitution of India, till 1973, there were no amendments in the Prosecution machinery and the prosecutors were still under the control of District Superintendent of Police. In year, 1973, the prosecution machinery was brought under separate department and detached from the police control.

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\(^{106}\) A.I.R. 2004, S.C.524

\(^{107}\) Philip L Rechel, *Comparative Criminal Justice Systems- A Topical Approach*, Edition 1994, Pintice Hall, p. no. 15
In India the Prosecutors are not governed by any single law. In India, the Indian Penal Code, 1860 is a substantive Law which deals with the criteria of offence and quantum of punishment. If the offence is under the Special Law, then that separate law shall be applicable in that exceptional case or cases. The Code of Criminal Procedure, 1973 deals with the nature of offence and the court before which the case can be brought for adjudication and the respective Prosecutor to deal with the case. And lastly, the Indian Evidence Act 1872 deals with the rules of evidence to be followed during examination of witnesses.
Indian Prosecutors are regulated and governed under the Code of Criminal Procedure, 1973. Along with these, there are special statutes where specific provision for the Public Prosecutor is given. The Prosecutors follow the rules of evidence under the Indian Evidence Act, 1872 throughout the criminal proceedings. In addition to these provisions, there are special legislations governing Prosecutor’s appointments, their powers, etc. under the special laws enacted by the Parliament Indian and enacted by State legislatures.

Provisions under the Code of Criminal Procedure, 1973
Provisions under the Special Laws enacted both by the Parliament of India and also by various State Legislatures.
Provisions under the Indian Evidence Act, 1872

In detail,

a) Provisions under the Code of Criminal Procedure, 1973

b) **PRE – TRIAL PHASE**

c) Sec. 209- Commitment of Case to Sessions Court when the Case is exclusively triable by the Court of Sessions

d) Sec 216- Court may alter charge

e) Sec 217- State to recall witnesses when charge is altered
f) **TRIAL PHASE**

- Sec 225 - Trial To be Conducted by Public Prosecutors  
- Sec 226 - Opening of a Case for Prosecution  
- Sec 234 - Arguments  
- Sec 301 - Appearance by Prosecutor  
- State amendment  
- Sec 302 - Permission to Conduct Prosecution  
- Sec 310 - Local Inspection  
- Sec 321 - Withdrawal from Prosecution

o) **POST TRIAL PHASE**

- Sec 374 - Appeal from Conviction  
- Sec 377 - Appeal by the State Government against sentence  
- Sec 378 - Appeal in case of acquittal

**Position of Prosecutors before Cr. P. C., 1973**

In pre - 1973 era, Prosecutors were attached to Police Department and they were responsible to the District Superintendent of Police. But after enactment of Cr.P.C. in 1973, Prosecutors got detached from Police.¹⁰⁸

**Pre – Trial Phase**

**Sec. 209- Commitment of Case to Sessions Court when the Case is exclusively triable by the Court of Sessions by notification to Prosecutor in the Sessions Court**

If the specific case is brought before the magistrate which ideally should be triable by the Sessions Courts exclusively, in such a situation, there is a mandate on the Magistrates courts to commit the case to the Court of Session. The respective Magistrate can send the entire record/ evidence to the Sessions court and inform the Public Prosecutor to that effect.

Sec 216- Court may alter charge

Under Section 216 of the Code of Criminal Procedure, upon application of the parties before delivery of judgment, the courts are empowered to alter charges in the specific case.

Sec 217- State to recall witnesses when charge is altered

As soon as trial begins and charge is altered or added, the Prosecutor is empowered to call again or to resummon, or to reexamine the specific witness or witnesses. However the court can ban Prosecutor to do so in case of purpose of Prosecutor of vexation or delay or defeating the ends of justice. The courts permit the Prosecutors to call next witnesses which seems to be material for the case.

Trial Phase

Sec 225 of the Code of Criminal Procedure, 1973- Trial to be conducted by Public Prosecutors

Under the Code of Criminal Procedure there is a mandate that the Public Prosecutor should conduct prosecution in every trial placed before the Sessions Courts.

Sec 226 of the Code of Criminal Procedure, 1973- Opening case for prosecution

Upon appearance of accused before the court of Sessions or if an accused is brought before the court of Sessions, the Prosecutor is under duty to open his case before the court. The Prosecutor shall describe the charge against the accused with the proposed evidences to be placed to prove the guilt in the court.

Sec 234 of the Code of Criminal Procedure, 1973- Arguments

As soon as the completion of examination of witnesses by the prosecution and the Defence Counsels is over, the case shall be summed up by the respective Prosecutor with Arguments. Arguments shall be oral as well as written. If any new issue or law point is raised by the Defence Counsel, the Prosecutors are allowed to give their counter arguments with permission of the courts.
Sec 301 of the Code of Criminal Procedure, 1973- Appearance by Prosecutor

The Public Prosecutor or the Assistant Public Prosecutors dealing with the criminal case are empowered to represent the case directly before the Sessions court or the Magistrates courts in all the stages of Inquiry, Trial or Appeal in the Appealall courts. In case of request of any private person to the Prosecutor to prosecute any person, it is mandatory for the Prosecutor or assistant Prosecutor to take the needful action upon such request.

Sec 302 of the Code of Criminal Procedure, 1973- Permission to Conduct Prosecution by the Police officer above rank of Inspector

If an inquiry or trial is conducted before the Magistrates Court, as a special case, the magistrate is empowered to permit prosecution to be conducted by the Police officer above rank of Inspector. However, prior permission of the Magistrate is mandate to permit such person to conduct the prosecution. And the Police officer who investigated the crime is not entitled to conduct the prosecution in the same case where the accused is prosecuted.

Sec 321 of the Code of Criminal Procedure, 1973- Withdrawal from Prosecution

The Public Prosecutor in the Session’s court or the Asst Public Prosecutors are empowered to withdraw from the prosecution. However the parties to the case should agree for the same and withdrawal can be possible at any stage before the judgment is pronounced. Withdrawal of prosecution can be done with respect to any one offence in the charge or from the whole offences subject to limitations under the Code of Criminal Procedure. The impact of withdrawal is that if withdrawal is made before a charge is framed, the accused shall be discharged. And in case of withdrawal is made after charge, it leads to acquittal.

Post Trial Phase

Sec 374 of the Code of Criminal Procedure, 1973- Appeal from Conviction

If a case is tried by the High Court, the while exercising extra ordinary criminal jurisdiction, the appeal will be entertained by the Supreme Court of India. In case of Punishment for seven years or more passed by the Sessions Court, the Appeal will lie to the High Court of the respective State Government. The Sessions court at
the District level entertains appeals from the Magistrates Courts or an Assistant Sessions Court.

Sec 377 of the Code of Criminal Procedure, 1973- Appeal by the State Government against sentence

Upon inadequacy of sentence, the State Government is empowered to direct Public Prosecutor to appeal in the respective High Courts. Even the Central Government is empowered to direct Delhi police to appeal to the High Court if the case is investigated by the Delhi Special Police Establishment. In such cases, only after giving reasonable opportunity of showing cause, the sentence can be enhanced of the accused.

Sec 378 of the Code of Criminal Procedure, 1973- Appeal in case of acquittal

Upon order of acquittal, the State Government is empowered to direct Prosecutor to present an appeal to the High Court. The Central Government of India is also empowered to do so in case the case is investigated by the Delhi Police established under the Delhi Special Police Establishment Act. However, Special Leave of Appeal from the High Court is needed to entertain appeal against the Aquittals.

4.5 CLASSIFICATION OF PROSECUTORS IN INDIA
a) Public Prosecutor/ Additional Public Prosecutors at High Courts and Sessions Courts

After consultation with the High Courts, Central Government or State Government is empowered to appoint Prosecutors for purpose of prosecution, appeal or for any other purpose. The Act made it mandatory that every State Government appoint Public Prosecutors for every district in the State. For that purpose the District Magistrate prepares list of the interested candidates to be a District level Public Prosecutor or an Additional Public Prosecutor. The Sessions Judge, i.e. the principal district Judge is consulted. Suitable candidate list is sent to the State and the State Government approves the list finally from the list it receives. Minimum seven years of experience is mandatory for the candidates who apply for the post of Prosecutors. That experience should be of the Session’s courts litigation. As long as the Prosecutor is on the roll of Prosecutors, he is not entitled to appear against the Government in any civil or criminal cases. In order to avoid clashes in interest, this provision is made and is strictly followed in India.

b) Special Public Prosecutors

The Special Public Prosecutors are appointed under Sec 24 (8) of the Code of Criminal Procedure 1973. They deal with the special cases registered under the Special Laws. At least 10 years practice is mandatory for the candidates willing to be Special Public Prosecutors.

Also, the Special Public Prosecutors are appointed for CBI Courts under Sec 24 (8) of the Code of Criminal Procedure, 1973. As per notification Directorate of Prosecution 2002, the Central Government issues notifications to appoint special Public Prosecutors in CBI courts.

As a result of Vinit Narayan V Union of India decided in the year 1963, Santhanam Committee has recommended the appointment of Prosecution Wing to deal with CBI cases in the CBI or the Sessions courts.

Advocate on the roll list with minimum ten years of practice in the Session’s courts is eligible for the post of Special Public Prosecutors in India. The Special Public Prosecutors who deal with special offences punishable under the Indian Penal
Code, 1860 or the Special Criminal Laws made either by the Central Government or the State Government respectively. Those special laws can be the Narcotic Drugs and Psychotropic Drugs Act, 1985 (i.e. NDPS), The Prevention of Money Laundering Act, 2002, The Scheduled Caste and Schedules Tribes (Prevention of Atrocities) Act, 1987. These Special Public Prosecutors are appointed for a fix period and are paid comparatively higher than the Public Prosecutors working in the Session’s court or the High courts. Upon special request from the police or Public or sometimes the State Government or the Central Government on its own appoint Special Public Prosecutors.

c) Assistant Public Prosecutors at the Magistrates Courts

The Assistant Public Prosecutors are the Prosecutors dealing with the cases in Magisterial Courts. The State Govt. conducts competitive examinations through its respective State Public service commissions. Their jurisdiction is limited to Judicial Magistrate First Class, Judicial Magistrate Second Class, Metropolitan Magistrates Court and the Chief Judicial Magistrate Courts. These assistant Public Prosecutors are appointed by States. Police officers are not entitled to work as Prosecutors. The District Magistrate may appoint any person as Public Prosecutor if he or she is not an investigating officer in a specific case and he / she is of or above the rank of Inspector. These Prosecutors are regular full time Prosecutors appointed by the Home Ministry of the respective State Government. They are entitled to receive benefits from Govt. such as retention, monthly salary, perks, etc. The District Magistrate is entitled to appoint any person as Prosecutors in the absence of specific Prosecutor on particular occasion. However, this appointment can be made irrespective of that appointee’s qualification in the field of law and competence to represent the interest of the State. From 1973, the office of Prosecutor is detached from the police department, the police officers who has investigated the case is disentitled to be an Assistant Public Prosecutors. Also, the police Officers below rank of the sub inspectors are not entitled to be Assistant Public Prosecutors.

109 Section 25 of the Code of Criminal Procedure, 1973

The Malimath Committee has urged for 50% of the Prosecutors, additional Public Prosecutors of a district should be recruited from the panel prepared by the District Magistrate after consultation with the Sessions Judge. The remaining posts (i.e. half) shall be filled up by promoting Assistant Public Prosecutors working at the Magistrates Courts.\(^{110}\) There should be a committee to scrutinize the merits of candidates to promote them as a Additional Public Prosecutor. The State Committee should be consisting of Judge of the High Court, the Secretary of Law Ministry of the State Govt. and the Director of Prosecution in the respective State. It can be argued that a law practitioner is better equipped to handle Session cases than Assistant Prosecutors from the Magistrate Court. The Law Commission of India in its 196th Report recommended the retention of part time Prosecutors in year 2006. It strongly advocates the suitability of the part time Prosecutors / additional Public Prosecutors in Public interest. Their experience should be used for handling serious crimes. The Commission held that for appointment of Prosecutors, it is better to rely on recommendations made by Sessions Judges.

**The Director of Prosecution**

The Head of the prosecuting authority in a State is known to be Director of Prosecution\(^ {111}\). A person shall be eligible to be appointed as 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 concurrence of the Chief Justice of the High Court.\(^ {112}\) He shall function under the administrative control of the Head of the Home Department in the State Secretariat.\(^ {113}\) The powers, functions and area of authority of the Director of Prosecution and the Deputy Director of prosecution shall be such as the State Government may specify.\(^ {114}\)


\(^{111}\) Section 25 A(3) The Code of Criminal Procedure , 1973

\(^{112}\) Section 25 A (2) The Code of Criminal Procedure , 1973

\(^{113}\) Section 25 A (3) The Code of Criminal Procedure , 1973

\(^{114}\) Section 25 A (7) The Code of Criminal Procedure , 1973
In year 2005, a major amendment was made to Section 25 of the Code of Criminal Procedure. The Directorates of Prosecutors are created in States for multiple reasons. Their primary task is to bring about coordination among different prosecuting agencies. In addition to this, the directorate of prosecution advises the State Govt. for filling of appeals and revision petitions. It also takes care of efficiency, integrity and discipline of all Prosecutors. The Directorate of Prosecutor consists of a Director of Prosecution, the Dy. Directors of Public Prosecutors, Additional Public Prosecutors and the Special Public Prosecutors.

Though the Directorate of Prosecution is a parent authority over the Prosecutors in India, there are certain Prosecutors who are not covered under this Authority. Those are - Assigned Prosecutors, Binary Prosecutors, Departmental Prosecutors, Vacuum Filler Prosecutors, Supplementary Prosecutors and the Advocate Generals of States. 10 years practice is mandatory for the Director of Prosecutor. The State Govt. is authorized to specify the powers and functions of its Director of Prosecutor.

d) Prosecution by Central Bureau of Investigation (C.B.I.)

The Central Bureau of Investigation has its Legal Division which plays an advisory and Prosecutor role. The Legal Division is headed by a Legal Advisor, who is sent on deputation to CBI by the parent Union Ministry of Law. This arrangement ensures objectivity of his office. The Legal Advisor is assisted by a number of Law officers namely, Additional Legal Advisor, Deputy Legal Advisors, Senior Public Prosecutors, Public Prosecutors, Assistant Public Prosecutors. These are indicated in descending order of seniority and rank. These officers who are permanent employees of the CBI, render legal advice to the investigating officers during the course of their investigations as to the viability of proposed prosecutions. Their advice is taken seriously, but they can be over-ruled by the executive CBI officers. Multiple and hierarchical systems of legal advice prevails in the CBI. Legal advice is taken seriously at least at their levels before deciding the fate of a case. After a decision has been taken to prosecute, the law officers conduct the prosecution of cases in courts.

116 For instance, in the State of Andhra Pradesh, the Director of Prosecution was created under G.O.Ms.No.323, Home (Courts C) Department,dt.26-5-1986
The level of a law officer to prosecute a case is directly related to the level of the court, i.e. the higher the court, the higher the rank of a law officer to prosecute it. Besides the CBI also engages Special Public Prosecutors from the Bar on a daily fee basis to fight important and sensational cases.

4.6 PROSECUTORS UNDER SPECIAL LEGISLATION

In addition to the crimes under the Indian Penal Code, 1860, there are specific legislations enacted by the Parliament of India and the State Legislators. Some of the enacted special laws are as under:

   a) The Narcotic Drugs and Psychotropic Substances Act, 1985
   b) The Arms Act, 1959
   c) The Gambling Act, 1867
   e) The Explosive Substance Act
   f) The Protection of Human Rights Act, 1993
   g) The Dowry Prohibition Act, 1961
   h) The SC/ST (Prevention of Atrocities) Act, 1989

Under the abovementioned laws, the Special Prosecutors are appointed. The cases can be tried in regular Sessions court or the Special Courts established by the State to carry out the functions under these statutes.

4.7 ROLE OF PROSECUTORS IN PRE-TRIAL PHASE

   a) Synchronization with the police
   b) Withdrawal of prosecution
   c) Role in Framing Charge

Serious efforts are made to build up smooth relationship among Public Prosecutors, courts and police. The Prosecutor should be fully acquainted with the facts of the case and also relevant documents such as FIR and police report. In India, “there is no coordination between the Prosecutors and police.”

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and the police are part of prosecution machinery, the Prosecutors are not familiar with the functioning of police. In Hitendra Vishnu Thakur v. State of Maharashtra\textsuperscript{118} the Supreme Court held that “Public Prosecutor is an important officer of the State Government who is appointed by the State under the Code of Criminal Procedure He is not a part of the investigating agency. He is an independent statutory authority. In Jai Pal Singh Naresh and others vs. State of U.P.\textsuperscript{119} the Allahbad High Court held that "there can be no manner of doubt that the Parliament intended that Public Prosecutors should be free from the control of Police Department." Various courts have held that the prosecution and the police are completely different and separate agencies and neither should control the other. In Jai Pal Singh Naresh v. State of Uttar Pradesh\textsuperscript{120} the Allahabad High Court held that the very aim of creating Prosecutors outside the police set-up was to ensure their independence and this could not be achieved if the police retained such a control upon Prosecutors. Yet both the functionaries need to have coordination between them. But that is solely dependent on the personal rapport a Prosecutor maintains with the police and the charisma he yields. Such characteristics of Prosecutor yields only some superficial results in discharge of his functions but not to the required level that he needs and deserves. Upon completion of evidence, if the investigating officer comes to a conclusion that there is a prima facie case, a charge sheet is filed in the court through Prosecutors. The Prosecutor’s opinion is also taken into account while conclusively deciding whether a prima facie case exists or not. However it is the police discretion to send or not to send the case for trial. The Prosecutor should personally verify the witnesses and also their proposed Statements well before the court begins examination of witnesses.

**Role of Prosecutors in Withdrawal of Prosecution**

The Public Prosecutor or the Assistant Public Prosecutor in-charge of a case is legally competent to apply to the court for withdrawal.\textsuperscript{121} The Prosecutor concerned is under no legal obligation to consult the police or any other executive authority in deciding as to the desirability of withdrawal. The police feel aggrieved when such consideration is not taken with him or / and he is actuate by sloping motive or extraneous matters like political favor, party pressure, personal gain or

\textsuperscript{118} (1994) 4 SCC 602A
\textsuperscript{119} (1976 Cr L J 32)
\textsuperscript{120} (1976 Cr L J 32)
\textsuperscript{121} Sec. 321 of the Code of Criminal Procedure, 1973
like concerns. Instances are galore when Prosecutors have abused or misused the power vested in them in this regard, and have thereby tampered with the course of justice for illegitimate purposes and their personal gain. Police cannot certainly command but they may commend something out of their intimate knowledge, which may be taken into consideration by the Prosecutor. Such an opportunity is denied to the police, not infrequently, though they have been charged with the duty of ensuring that the offenders are brought to book. Such an obligation has been imposed upon them by section 23 of the Police Act of 1861. Most of the investigating officers have started thinking that their duty is over as soon as the charge-sheet is filed in the court and that thereafter they become "functus officio". They have forgotten that an effective prosecution depends to a large extent upon the amount of assistance that the Prosecutor gets from the investigating officer. Similarly, the Prosecutors, under the garb of professional independence have turned to be unresponsive and indifferent to the lawful needs of the police department. They have thereby failed to appreciate the value of a wholesome co-operation and smooth relationship with the police in the interest of justice. Under Criminal Justice System of India, the Prosecutor has discretion to withdraw prosecution.\(^\text{122}\) Sec. 320 of the Code of Criminal Procedure has the list of Compoundable offences and Non Compoundable offences. Generally, less serious offences are compoundable offences and serious crimes are non compoundable offences.

The Prosecutors are entitled to withdraw prosecution subject to permission of the court before a judgment is delivered. The Code of Criminal Procedure has provided criteria for such withdrawal. “Power of withdrawal is vested in the Prosecutor. It is the settled view that in respect of Court matters affecting the State the Public Prosecutor is the sole authority for deciding whether to withdraw the Prosecution or not. In the event of a conflict of opinion between Public Prosecutor and an Assistant Public Prosecutor, the authority of the Public Prosecutor will prevail.\(^\text{123}\)

\(^{122}\) Sec.321 of the Code of Criminal Procedure, 1973
\(^{123}\) P.Venkateh, ‘Police Diaries, Statements, Reports and Investigations’, Edition 1990 Premier, p .no. 182
**Political interference in Withdrawal of Prosecution**

Under Section 321 of the Code of Criminal Procedure, the Public Prosecutor has power to withdraw a case at any time before the judgment is pronounced. There is no clear indication in the Code of Criminal Procedure as to how this power is to be exercised. Case law has indicated that while the power to withdraw can be exercised by the Public Prosecutors only on the request of the State Government or complainant, the decision as to whether to withdraw or not is only that of the Public Prosecutors. Public Prosecutors cannot delegate his power to anyone else, not even to the State Government.

*The Malimath Committee*\(^{124}\) held that it is the duty of the Public Prosecutor to ensure with all diligence and carefulness that all details are brought on record and that prosecution does not fail due to such neglect. Prosecutors are officers of the Court whose duty is to assist the court to get at the truth, which is the sole objective of the Criminal Justice System. Any amount of good investigation would not necessarily result in success unless the institution of prosecution is manned by persons who are of merit, who are committed and who are trained by well structured professional bodies.

### 4.8 NO OBJECTION REGISTRATION BY THE PROSECUTORS

The Indian Evidence Act, 1882 has empowered Public Prosecutors to raise objections to the case. During examination of witnesses in the law courts, only relevant facts are admissible. The list of relevant facts is given under Section 5 to 55 of the Indian Evidence Act, 1872. Therefore, whenever, any questions as to any irrelevant facts are raised by the Defence Counsel, the Prosecutor always has a right to register his objections and ask the courts to disallow the Defence Counsel to ask such questions.

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The Indian Evidence Act, 1872 provides for examination of witnesses in the law courts. Prosecution shall be conducted by a Public Prosecutor in every trial before a Sessions court.\textsuperscript{125} There are three kinds of examination of witnesses.

a) The examination in Chief,

b) Cross Examination and

c) Re- examination

Under the Indian Evidence Act, 1872, “Examination of the witnesses by the party who calls him is called examination in chief\textsuperscript{126}.” In this examination of witnesses, the examination in chief is taken by the Prosecutors.

In this examination in chief, the Prosecutors are disentitled to ask leading questions to witnesses. As per the provision contained in Sec. 142 Indian Guidance Act 1872, no leading questions can be asked by Prosecutors during examination in Chief if objected to by the adverse party.\textsuperscript{127} After completion of the examination in Chief, Cross Examination commences. Examination of the witnesses by the adverse party shall be called cross examination.\textsuperscript{128} In the cross examination, leading questions may be asked by the Defence Counsel.\textsuperscript{129} Defence Counsel conducts cross examination of those witnesses who create doubts in the minds of courts. Prosecutors are entitled to re-examine the witnesses so as to strengthen their case.\textsuperscript{130} At the point of punishment the Prosecutors are entitled to give their opinion on the point of punishment.\textsuperscript{131}

4.9 INDEPENDENCE OF PROSECUTORS FROM EXECUTIVE INTERFERENCE

India has democratic form of Government. The rulers are elected by the people, they rule for the people and the Government is of the people as per Abraham Lincoln’s philosophy. The 
\textit{Montesquieu’s} doctrine of separation of power is not strictly followed in India. Though Prosecutors are separate from the Law Makers and the

\textsuperscript{125} Section 225 of the The Code of Criminal Procedure, 1973
\textsuperscript{126} Section 137 of the Indian Evidence Act, 1872
\textsuperscript{127} Section 142 of the Indian Evidence Act, 1872
\textsuperscript{128} Section 137 of the Indian Evidence Act, 1872
\textsuperscript{129} Section 143 of the Indian Evidence Act
\textsuperscript{130} Sec.137 of the Indian Evidence Act, 1872
\textsuperscript{131} Section 235 of the Code of Criminal procedure, 1973
Judiciary, some legal provisions and conventions give scope for executive interference in the Prosecutor's work. The District Magistrate shall, upon application of the Prosecutor sanction appeal or revision in the appellate courts. These appeals are filed either against acquittals or inadequate sentences. Unfortunately, our system empowers District Magistrate to initiate appeal instead of the Prosecutor who is ideally supposed to have this discretion. The Central Rule 1995 empowers the District Magistrate or Sub Magistrate to engage an eminent Sr. Lawyer. However the remuneration shall be fixed by the State Government. In Ghanshyam Kishore Bajpayee v. State of Uttar Pradesh, 2005 Cri LJ.198, the Allahabad High Court felt concern about the casual approach of the District Magistrate and the Sessions Judge in empanelling advocate. It also held that mostly part time Prosecutors are appointed on the basis of political nexus, caste or creed instead of their merits. In Zahira Habibullah Sheikh v State of Gujrath, Supreme Court has taken notice of some of the obvious irregularities in some of the cases. In the famous Best Bakery case duties of the police and of the Prosecutors provided under the Code of Criminal Procedure were not carried out by the police as well as by Prosecutors. Besides this under Sections 321 Code of Criminal Procedure 1973., the Prosecutor is entitled to withdraw prosecution of any person in respect of specific offences for which he is tried with the consent of the court and that results in acquittal of the accused. Supreme Court of India Stated that it is the Public Prosecutor alone and not any other executive authority that decides withdrawal of prosecution. Court performs only a supervisory function and not an adjudicatory function in the legal sense of the term.\(^{133}\)

Indian Prosecutors are either full time Prosecutors or part time Prosecutors. There is a possibility of appointing new cadre of Prosecutors replacing earlier cadre appointees by the earlier Govt. This is an unwelcome practice to remove the earlier appointments in toto. In Kumari Shrilekha Vidyarth etc. v. St. of UP, AIR 1991/ SC537, the newly formed Govt. in 1990, issued termination order of all the Prosecutors and Govt. Counsels in all the Districts. It had asked the administration to prepare a list of new names. This order by the UP Govt. was unreasonable. This order was scrutinized by the Supreme Court which held it to be arbitrary and unfair. It was also held to be violative of Article 14 of the Indian Constitution. Ultimately, The

\(^{132}\) (2004) 4SCC158

\(^{133}\) Sheonandan Paswan v. State of Bihar 1987 Cri LJ 793 at 830 (SC)
Supreme Court has nullified that Govt. order and retained the positions of part time Prosecutors who had suffered. Again in State of UP v. Johrimal, AIR 2000 SC 3800, the Supreme Court of India held that the State Govt. should not rescind the appointment because of change in Govt. Unfortunately the appointments of Prosecutors depends on political connections, rather than merit. In V. Ramchandra v. M.C. Jagadhodhara Gupta, 1986, Cr. L.J. 1820, Justice Ramaswamy of Andhra Pradesh High Court has narrated the qualities of Prosecutors. The qualities like, impartiality, co-operation towards the court, watch on guilty to be punished, full integrity, honest, devoted, and competency are a must.

However, no one is willing to learn the lesson and every time the new Government treads the ill minded path. Once again, the Supreme Court to say that the State Government is not expected to rescind the appointments with the change in the Governments\footnote{State of U.P v. Johrimal, AIR 2004 SC 3800}. Yet the repetition of malpractice was once again resorted to and the issue came up for adjudication before Allahabad High Court\footnote{Ghanashyam Kishore Bajpayee v State of Uttar Pradesh, 2005 CriLJ 1985.}.

The appointments of Prosecutors have become dependent on political affiliations rather than merit. In fact, the engagement of the Public Prosecutor on a tenure basis and on payment of fees on a daily basis, has paved the way for disregard and apathy on the part of the Public Prosecutor.\footnote{Sairam Sanath Kumar, Dr.V.Krishna Ananth, The prosecutorial system in our criminal justice administration – A close look, Vol.II,NULAS Law Journal ,page 14 at 17} A Prosecutor with impartial disposition, a Prosecutor who assists the court, a Prosecutor who sees that the guilty is punished, a Prosecutor with unquestionable integrity, honesty and devotion to duty and of competence is required.\footnote{The qualities of prosecutor are narrated by Mr.Justice Rama Swamy of the High Court of Andhra Pradesh in V.Ramachandra v. M.C.Jagadhodhara Gupta, 1986 Crl.LJ 1820.}
Under Section 24 of the Code of Criminal Procedure, 1973, the Government shall appoint Prosecutors in High Court and the Sessions courts. The District Magistrate is empowered to enlist the cadre of prosecuting officers in consultation with the Session’s Judge. The District Magistrate is representative of the State Government in the District concerned. Here, the ruling political party recommends the list of preferred persons for the posts of Prosecutors. Generally the ruling political parties recommend the names of Advocates who are near and dear to them. In some States of India, the State Government is eligible to appoint Prosecutors without consultation with the Session Judge. At this moment, there is a political interference in appointment of Prosecutors.

The appointment of a Prosecutor is a compelling constitutional necessity, obligatory under the Code of Criminal Procedure also. The State is, therefore, wrong if it ever assumed that there is no administrative necessity to make appointment of Prosecutors. Financial constraints cannot absolve the State of its constitutional obligation. If functioning of criminal court is a necessity, the post of a Prosecutor to conduct the prosecution is an absolute necessity. Just as abolition of all courts due to financial constraints cannot even be imagined, so also, the non-appointment of a Prosecutor to conduct cases in criminal courts cannot be tolerated. The system of putting one Prosecutor in charge for more than one court shall be stopped. Considering the heavy pendency in each of the criminal courts, a Prosecutor shuttling from one court to another does not do any justice to either court. The functioning of the criminal courts cannot be paralyzed even temporarily by the non appointment of Prosecutors. The State is bound to make appointment to the existing vacancies without delay.

In Subhash Chandra v. The State, the Supreme Court has emphasized the independence of the office of Public Prosecutor. It was observed that "any authority that coerces or orders or pressurizes a functionary like the Public Prosecutor in the exclusive province of his discretionary power, violates the rule of law, and any Public Prosecutor who ends before such command betrays the authority of his office.

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138 A.I.R. 1980SC 423
In Vineet Narra\n v. Union of India i.e. Jain Hawala case,\textsuperscript{139} the relationship between the investigation, prosecution and the executive received the Supreme Court's attention. Here, the bureaucrat-politician-criminal nexus had used all means necessary to thwart the investigation and prosecution. The corruption cases were handled by the Central Bureau of Investigation. The Court monitored the progress of these cases and passed detailed directions on the functioning of various agencies involved; and even warned the minister in charge to avoid interfering with the investigation and prosecution.

In this way, the Prosecutors have nexus with the executive under the Indian criminal justice system. In order to bring facts before the court, the Prosecutors are required to examine the witnesses. The process of examination of the witnesses by the Prosecutors is Chief Examination of the witnesses.

4.10 JUDICIAL OPINIONS ON PROSECUTORS IN INDIA

Indian Judiciary is playing a pioneering role in clarifying the role of the Prosecutors in India. As under Indian Constitution, decisions of the High Courts and the Supreme Court of India are binding. Also, in case of vacuum resulting from absence of clarity of law, Indian Judiciary fills up that gap with the precedents. Position of Prosecutor is of trust. As to the special position of the Prosecutors, he is a representative of the State and is part of the court and in that sense he is called a minister of justice. His function is to assist the Court in arriving at the truth. The position of the Prosecutor is thus \textit{quasi-judicial} and one of trust.\textsuperscript{140} In this manner the Prosecutor carries his functions under Indian Criminal Justice System.

Assurance of Fair trial is one of the expectations under Indian Criminal Justice system. Assurance of fair trial implies that the trial must be fair both to the accused and also to the prosecution. The opening address of the Public Prosecutor must achieve this pious object.\textsuperscript{141} In this context, this guideline is necessary for faithful discharge of the functions of Prosecutors. In Indian Criminal Justice system, the Public Prosecutors and the additional Public Prosecutors conduct every trial before the Sessions

\textsuperscript{139} 1998 (1) SCC 226
\textsuperscript{140} R.V.Kelkars, \textit{Lectures on Criminal Procedure}, 4\textsuperscript{th} Edition by K.N.Chandrashekhara Pillai, Eastern Book Company, p. no.11
\textsuperscript{141} Surendra Prakash Tyagi, \textit{Session Trial Practice and Procedure}, Vinod Publication, 1989, p. no136
court. In the Magistrates’ Courts, the Assistant Public Prosecutors conduct prosecution at various stages like inquiry, trial or appeal. Public Prosecutor or the Assistant Public Prosecutor can appear and plead. They need not carry any written authority for this purpose. The Prosecutor certifies the non compliance with the conditions of pardon whenever the terms of pardon are not followed. Even Indian Prosecutor can apply for withdrawal of prosecution with prior consent of the court before delivery of Judgement. He is empowered to file appeal. It may be for increasing sentence on the ground of inadequacy or for acquittal of an accused on the ground of innocence.

When the case is of the Public importance or when it is a case of miscarriage of justice appeal can be initiated. Prosecutor can apply for transfer of case from one court to another. He can file complaint in the court on behalf of the Public servant under IPC or any other law for the time being in force. The present criminal justice system is based on the principle that any crime committed by an individual is a crime against the societal order, against the State itself. The prosecution and punishment for the crime is therefore the responsibility of the State. Prosecution on behalf of the State is performed by a Public Prosecutors appointed by the State. The Prosecutors are required to play an impartial and neutral role and prosecute all persons who have been charge-sheeted by the police.142

As to the ideology for Prosecutorial function, the basic function of a Prosecutor is to seek the truth about criminal actions. Thus, if a Prosecutor discovers an evidence which proves guilt of the defendant, or if the Prosecutor finds an evidence which relieves the defendant of any criminal liability, the Prosecutor must turn that evidence over to the defendant. If a Prosecutor finds no evidence as to a defendant's guilt, he or she must drop the charges or he must decline to press the charges. In practice, Prosecutors find that they are Judged in the court of Public opinion on the number of convictions that they obtain”143 Here, the moral duty of Prosecutors is Stated. But, in fact, if the Prosecutor is afraid of media then, instead of following this ideology, he uses that piece of evidence against the accused.

142 BikramJeetBatra,,PublicProsecutioninneedofreform,”www.amanpanchayat.org,” (Date of visit 21st March 2013)  
In *P.M. Sunni v State*\(^{144}\), the Government cannot stop or stay a criminal trial by refusing to appoint a Prosecutor either on the ground of absence of any administrative necessity or due to paucity of funds. The appointment of a Prosecutor is a compelling constitutional necessity which is also obligatory under the Code of Criminal Procedure. Regarding Public Prosecutors for sensitive cases in *K. I. Pavunny v Assistant Collector*\(^{145}\) the court held that for the conduct of sensitive cases like those under Customs Act and Gold Control Act, the cases must be assigned only to those counsels who possess experience and ability in that branch of law.

**General Duties of Prosecutors**

Following are the duties of Prosecutors based on the statutes and case laws.

a) **Examination of Independent Witnesses**\(^ {146}\)

When there were independent witnesses who had seen the occurrence, it was incumbent on prosecution to examine them. If the examination of such witness is necessary to protect the interest of the State, the Prosecutor is under duty to examine that witness.

b) **Duty to Examine Important Witnesses**

Sometimes, the witness may be of such importance for securing conviction, and then to protect the interest of justice the Prosecutor is under a duty to examine that witness. It is the duty of the Public Prosecutor to examine important witnesses. Dropping of important witnesses is not proper since it deprives the right of defence to cross examine such witnesses.\(^ {147}\) For the sake of protection of victim’s right, it is necessary to examine such a witness.

c) **Duty in Cases of Hostile Witnesses**

The witness who does not support the party who has invited him to be his witness is called a hostile witness. Section 154 of the Evidence Act 1872 permits the prosecution to cross examine such witnesses who have turned hostile.\(^ {148}\)

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\(^{144}\) 1986 Cr.L.J.1517, 1520 Ker.

\(^{145}\) (1997) 3 SCC, 721


\(^{148}\) P.Venkatesh, *Police Diaries, Statement Reports and Investigations*, Premier
d) Duty to be Fair

*Prabhu Dayal Gupta v State*¹⁴⁹ it was held that while presenting case, the Prosecutor needs to be just and reasonable. Relevant evidence should be placed before the courts without bias and prejudice, all the evidences supporting and against the prosecution case should be categorically brought before the court to determine the guilt or innocence of an accused. An exhaustive scene should be placed before the court without hiding or concealing any material fact.

e) The Public Prosecutor has a Public Responsibility at the time of Withdrawing Prosecution.

In *Koli Nana Bhana and others v. State of Gujarat*¹⁵⁰, decision of withdrawal of prosecution lies with the Prosecutor engaged in the case. This is the Prosecutor's exclusive prerogative which can take initiative for withdrawal if the case is fit for withdrawal of prosecution as per existing provisions.

In *State v. Bhim Singh*¹⁵¹ it was held that when the cognizance of the complaint is taken by the magistrate, the Prosecutor should take initiative in the case and not wait for the Magistrates initiative in the case.

In *Habeeb Mohamad v State of Hyderabad*¹⁵² it was held that irrespective of the side of the case, the Prosecutor should bring before the court, all the angles of the case for and against an accused. Prosecutor’s job is not limited to make strong prosecution case but it extents to bring other side of the case before the courts too.

In *Darya Singh v State of Panjab*¹⁵³, it was held that the Prosecutor’s duty is to decide the names of witnesses to be examined on priority to reveal the story before the courts. While dealing the cases, Prosecutors are expected to act in honest and fair manner without hiding anything from the courts which may go against prosecution.

¹⁴⁹ 1986, Cr. L. J. p. no. 389
¹⁵⁰ 1986 Cr. L. J . 571 p.no.574
¹⁵¹ 1978 Cr. L. J. 1041 p. no. 1043 (HP).
¹⁵² A.I.R.1954,S.C.51
¹⁵³ 1965, Cr.L.J.1950
Though Public Prosecutors are the State representatives, their ultimate aim should not be to get convictions by hook or crook. All the time it is not necessary that the State wins the case by multiple convictions. The Prosecutor’s job is to place before the court available relevant material irrespective of its impact on the conviction rate.

g) Duty in Context of Standard Number of Witnesses to be Examined

The number of witnesses which should be examined by the Prosecutors in the court does not matter. As evidence is weighted and not counted under the statutory provisions of Indian Legal System,

(a) In *Tangaru Pradhan V State of Orrissa*, the court held that Law it is well settled that there can be conviction on the basis of sole testimony of witness. It is not necessary for the Prosecutor to bring as many prosecution witnesses as he can to secure conviction.

(b) In *Sardul Singh v State of Bombay*,

The Prosecutors are not duty bound to call on the record each and every witness connected with the case without keeping any witnesses apart. There is no formula about the number of witnesses to be examined by the Prosecutors. However, the caution to be taken by the Prosecutor is that the witness should be able to place significant information about the discovery of truth. Upon failure of witnesses to show their passion for truth, the court has liberty to draw adverse inference against the prosecution.

(c) In *Ishwar Singh v State of Uttar Pradesh*,

The important witnesses who are able to bring before the court the relevant information of the case should be examined by the Prosecutors on priority basis. The base of the case should be strong. If the Prosecutors delay to examine the fundamental witnesses, then it affects the prosecution case.

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154 1984,(2) 576
155 1957, CR.L.J.1335
156 Cr.L.J.1983, 1883
(d) In *Dr. Ashok Dubey v State of Madhya Pradesh*,\(^\text{157}\)

It is not necessary for the Prosecutors to examine each and every witness connected with the case. Though it is the duty of the Prosecutor not to skip examination of a single witness. However, based on the loyalty of witness, the Prosecutors have a discretion to enlist the witnesses in the respective courts.

(e) Duty of prosecution to prove specifically which specific weapon was used and how it was used.\(^\text{158}\)

In order to measure the seriousness or extent of gravity of the weapon used in crime affecting human body, the concerned experts needs to be called by the Prosecutors and their examination needs to be conducted.

(f) Duties of Prosecutors in Human Rights Context\(^\text{159}\)

Careful supervision of all the activities of the law court should be done by the Prosecutors. The Prosecutor should religiously follow the procedural laws. For better and effective performance, the Prosecutors should guide investigation officers during pre-trial phase. The Prosecutor should decide the case independently. The principles of equity, justice, good conscious, truth, lawfulness, and the like should be adhered to.

(g) Duty to Examine Expert Witness\(^\text{160}\)

Whenever the court is in need of support of the expert witness in the specific matter, it is the duty of Prosecutor to facilitate the same by involving professional and impartial witness.

(h) Duty to Prove Place of Occurrence\(^\text{161}\)

The Prosecutors are under a duty to prove the exact venue of commission of offence. This onus of proof for this purpose lies on prosecution i.e. to say on the Prosecutors exclusively. In case of general exceptions under the Indian Penal Code, the duty to prove the place shifts on the defense side.

\(^{157}\) 1980, Cr.L.J,111


\(^{159}\) Public Prosecutor's Office of Law Resource- www.humanrights.lv/doc/latlik/prok.htm, (Date of Visit 22nd Dec. 2013)

\(^{160}\) *Ibid*, Ft 158  p. no. 207

\(^{161}\) *Ibid*, Ft 158 , p.no.198
(i) **Examination of Investigating Officer is to Avoid Acquittal**

Investigating officer plays a very important role in the criminal cases in India. Investigation officers are considered as Prosecution Witnesses. Therefore, much care is taken by the Prosecutors to examine the investigation officer. Most of the cases lead to acquittal due to material contradictions and omissions in the case. In order to avoid miscarriage of justice, the Prosecutor should examine the police officer/ officers who have dealt with the case.

(j) **Duty of Prosecution to Explain the Delay in Examining Prosecution Witnesses by Investigating Officer during Investigation**

If there is a delay on the part of the police doing investigation, then the Prosecutor is a duty bound to explain to the court the reason for such delay.

(k) **Duty to Explain Delay in F.I.R**

It is expected that the First Information Report should be lodged as soon as possible in the police station. Prompt First Information Report is always better in strengthening prosecution case. In case of delayed First Information Report, there can be suspicion and lead to create doubt about prosecution case. Therefore, the Prosecutors should be able to justify the reasons for delayed First Information Reports in the Law Courts. Upon successful justification, there cannot be any room of suspicion affecting prosecution case.

There can be many factors responsible for for delayed First Information Report. For Example, Terror of the accused in the locality, Fear of damage to family honor specifically in rape or outrage of modesty cases, delay due to infliction of grave injuries on the victim of the case, delay due to upset mindset of the victim or informer, Non availability of police station in the vicinity of crime and so to cover the long distance, needs to be carefully explained by the Prosecutors.

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162 Ibid, Ft 158, p.no.215  
163 Ibid, Ft 158, p.no.217  
164 Ibid, Ft 158, p.no.217
(l) **Duty to Examine Magistrate who conducted Test Identification**\(^ {165}\)

In this case, it was held that the executive magistrate who dealt with the identification parade should be examined by the Prosecutors. Unless and until the examination of executive magistrate is conducted by the Prosecutors and the genuineness of the identification memo is admitted by the Defense Counsel, that identification memo cannot be an evidence and that cannot be used in the courts of law.

(m) **Examination of New Witnesses**\(^ {166}\)

During trial of criminal cases, new witnesses not named in F.I.R. nor named in charge sheet or not examined by the investigating officer can be examined by the Public Prosecutor.

The Prosecutors are empowered to conduct the examination of witnesses whose names are not categorically mentioned in the First Information Report or in the charges of the police officers and who have not interrogated those witnesses earlier.

**Prosecution cannot take Advantage of Weaknesses of Defence**

In *Jose v State of Kerala*\(^ {167}\), it was held that Prosecution shall stand on its own feet. It cannot take advantage of the weaknesses of defence side. The prosecution can succeed by substantially proving the very story it alleges. Nor can the court, on its own, make out a new and novel case of the prosecution and convict the accused on that basis.

**Cases Relating to Protection of Innocents**

Following are the case laws relevant to the functions of Prosecutors:

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\(^{165}\) Ibid, Ft 158 p.no.221
\(^{166}\) Ibid, Ft 158 p.no.225
\(^{167}\) 1984, Cr. L.J.748
a) In *Zahira Habibullah Sheikh v State of Gujarat*\(^{168}\) The appeal raised a significant issue as to improper conduct of trial by the Public Prosecutor and role of the investigation machinery itself which was not proper. In this case, it was held that the duty of Prosecutor is to ensure that all material facts are brought on record so that there might not be miscarriage of justice. In this case, on the point of acquittal, the court held that “It is no doubt true that the accused persons have been acquitted by the trial courts and their acquittals have been upheld, but if the acquittal is unmerited, and based on unmerited and unprincipled prosecution, it is no acquittal in the eyes of law and no sanctity or credibility can be given to the so-called findings. In this case, the State Government was directed to appoint another Public Prosecutor. The special feature of this case is that it was open to the victim and witnesses of the case to suggest any suitable name of their choice for that appointment. The court held that though the witnesses or the victims do not have normally have any say in the matter of appointment of a Public Prosecutor, in view of unusual factors of this case. It would be appropriate to give such liberties to the complainant parties.

b) In *Padam v Emporor*\(^{169}\) the court has held that in opening of the case, the Public Prosecutor has to place before the court the whole case. He is not entitled to change the case in the course of giving evidence. He has to give the full list of the witnesses whom he wants to examine in the addressing presentation.

c) In *Adam Ali Java v King*\(^{170}\) the Supreme Court held that it is the exclusive privilege of the Public Prosecutor to open the trial and none other can do it. Hence, it is now a settled law that in every trial before a Court of Sessions, the prosecution shall be conducted by a Public Prosecutor. It is immaterial whether the -trial pending in Court of Sessions was instituted on police report or on a private complaint. In this case, the court further held that it is illegal to commence the case in the absence of Public Prosecutors.

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\(^{168}\) (2004) 4SCC158; Criminal appeal no.446-449 of 2004, p.no.160

\(^{169}\) 30 CR. L.J. 993

\(^{170}\) A.I.R. 1948, P.C.63
d) In Antu Mahadu Dhavade V State of Maharashtra\textsuperscript{171}, regarding the function of the Public Prosecutors in law courts, the court held that the function of Prosecutors is to bring the truth before the court and not merely to beg a conviction from the court. In some cases, the State Government may be directed by the Supreme Court to appoint other Public Prosecutor.

*The Malimath Committee* has recommended that there should be a competitive examination conducted by the Public Service Commission to appoint the Additional Public Prosecutor. 50% of the Additional Public Prosecutor to be filled by the State by promotion on seniority cum merit basis. District Judges and the Magistrates PPS not to be posted in the home districts or the place where he or she has been practising. At least 3 years practice should be the criteria when the candidates are from the Bar. Sufficient reservation should be given to maintain the balance of Prosecutor’s women/ration. The Additional PP should be furnished with the intensive continuous training and promotional avenues. There is a need of verifying accountability of the Prosecutors. Hence the Director of Prosecution must verify the reports on acquittal cases. These reports should be given by the Prosecutors and the Superintendent of Police as the Police and Prosecutors team work is good for efficient result, mutual co-operation is needed. For advising the Police Commissioner and DSPD in legal matters the PPS and Sr. Pp to be posted to ensure proper coordination, the Commissioner of Police and the Sp. P.p should hold monthly review meetings.

The Committee on Reforms of Criminal Justice System is concerned about the recruitment of Public Prosecutors “Its recruitment, training and professionalism need special attention so as to make it synergetic with other institutions and effective in delivering good results.

According to the reforms it should be a compulsory post of Director of Prosecution in every State Government and the Officers should be chosen from the Director General of police of the respective State. Periodical recruitments should be made as soon as the earlier term comes to prepare a panel to select 50% Prosecutors in the court. In order to maintain fairness the Prosecutors / additional PP should not be

\textsuperscript{171} (1983) 2 M.B.C.R
given their work in the home district. Sufficient numbers of women should be recruited as Prosecutors.

Indian Criminal Justice system has protected interest of the innocents from arbitrary powers of the State. Indian Constitution has provided a right to life and personal liberty to the citizens of India under Art. 21 of the Constitution. Under Art 20 of the Constitution of India\footnote{Professionals, Constitution of India, Edition 2007, p.no.9}, provides protection in respect of conviction of offence. Therefore, innocents are constitutionally protected under the Constitution of India. In view of this provision, no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence’ nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of commission of an offence.

In the Magistrate Courts the Assistant Public Prosecutor is appointed. They plead in criminal cases filed by the police department. They advise police in the investigation or pending trials in courts filed by the police officers. They prepare and scrutinise charge sheets and guide concerned authority for rectification.

4.11 CONCLUSION

Indian Prosecutors need a strong and comprehensive theoretical background. The administration of criminal justice is not mature enough to concentrate on the Prosecutors. The Judiciary in India has periodically tried to shape the Prosecutors. Since Indian Criminal Justice is not much older there is a need of more authenticity and comprehensiveness in the laws governing Prosecutors in India. The term Prosecutors is defined and his prerogative of opening a criminal case is given the role in the examination of witnesses are elaborated, however the right and duties of the Prosecutors need to be elaborated more clearly from time to time. The Law Commissions and Judiciary have suggested certain reforms however in order to maintain the balance of rights of victim and of the accused, it is not possible to follow those reforms.
India follows an Adversarial Model of justice. Fair trial is the goal and the
Prosecutors need to prove the case beyond reasonable doubts. Failure of the
Prosecutors to prove the cases beyond reasonable doubt, leads to the benefit of doubt
to the accused. It leads to acquittals. The role of Prosecutors in India is very
significant since more acquittals can encourage criminal activities in future and may
lead to rise in crime rate. Hence, in order to prevent the rise of criminal activities in
future, the Prosecutors in India should be empowered and strengthened.