Chapter-IX

PUBLIC PROSECUTOR – ETHICS

There are Codes, Acts, Rules and Instructions instructing the prosecutor and guiding him to discharge his functions. Law allows certain discretion to be exercised by the prosecutor. In exercising the discretion there may be choices to follow one rule instead of the other rule. He may have to pursue one policy instead of the other. Occupational cultures may hamper his vision. Therefore, there is need for ethical principles that should shape the way in which he exercises his powers and discharges his duties in the Criminal Justice System. This chapter examines some of those ethical principles of Public Prosecutors and their observance by them and explores the problems of putting principles into practice and the solutions to overcome problems.

Many legal rules are based on ethical principles. However, the function of ethical principles is to supply strong reasons for adopting a particular rule in a given situation or to pursue a particular course of action in general. Besides that ethics would govern the practices of prosecutors and would lead them to develop best practices. Several situations are dealt with by non-mandatory rules and their non observance is not illegal and hence their observance or breach is not well supervised. Ethics prompt the observance of those rules. Certain ethical values are results of judicial precedent and the courts monitor the compliance of those ethics on part of prosecutors. Some of the ethical principles deserve mention.

Impartiality

Impartial as between persons. In the context of prosecutor, it requires that no
preference should be shown specifically towards a person viz., suspect, accused, and victim. His attitude towards anyone should not be based on extraneous grounds such as wealth, connection, sex, race and such other factors. Prosecutor ought to behave according to the assigned role rather than according to personal convenience, profit, or other extraneous motivation. In the adversarial system of criminal justice, the defence lawyer’s role is essentially partisan and he can take advantage of any legal point in favour of the accused, however technical it is and he could pursue that to the advantage of the accused. On the other hand, the prosecutor’s role is not that of an advocate appearing for a party. The prosecutor is supposed to act impartially, not seeking convictions as such but taking on the role of a ‘minister of justice’. The prosecutor’s goal should be to conduct the case dispassionately, seeking justice according to the law and disclosing to the defence all evidence that should be disclosed. Kerala High Court stated that prosecutor withholding an eyewitness from testifying before court solely on the ground that his evidence is likely to go against the prosecution case or withholding an independent and neutral witness from testifying in the court but adducing only the evidence of a partisan or interested witness alone are to be deprecated. Supreme Court stated that when there are two categories of witnesses to the occurrence of crime, one consisting of persons closely related to the victim and the other consisting of witnesses who have no such relation, the prosecutor has to act in a fair manner and should examine witnesses of the latter mentioned category too. These two rulings are indicative of the ethics of the prosecutor not to favour his own case or favour the cause of the victim and not to grasp at the conviction of accused and he shall be impartial to the result of the case.

and the norm to comply with is only to get all that evidence which could unfurl facts before the courts.

**Independence**

Police and prosecutors are two wings of the Home Department in the State. Each of the States may have a Directorate of prosecution headed by a Director of prosecution appointed by the State Government with the concurrence of the Chief Justice of the High Court. All cadres of prosecutors except the advocate General are subordinate to the Director or his deputies. The Director and his deputies are not from police and they are drawn from legal profession. Thus, the prosecutors are functionally independent from police as well as judiciary. While being independent, prosecutor has to interact with police, witnesses, victim, and court. In his many strands of interaction he should keep up his independence and take decisions befitting his legal status. Ethics shape proper prosecutorial cultures. In his relationship with the Police, there are administrative guidelines\(^261\) compelling the police officer to forward the case file to the Assistant Public Prosecutor who shall assess the evidential sufficiency to charge the accused. He could also suggest for further investigation, if in his opinion the evidence collected is insufficient to send the case to court. Thus the prosecutor is independent in this sphere of activity. The researcher found that in practice, barring a few exceptions, the prosecutor never insisted the police for compliance of this administrative norm. The practice patently available in the State of Andhra Pradesh as openly acknowledged by almost all prosecutors is that the police do not send case files to them and the prosecutors on their own also do not call for case files for scrutiny. Thus prosecutors have compromised their
independence. Hundreds and thousands of cases disposed of by criminal courts bear testimony to the fact that many cases have not met the legal requirements of proof of guilt. Thus the unethical compromise of prosecutor’s independence in decision making resulted in wasteful trials.

In his relationship with the court when the issue is about withdrawal from prosecution, the prosecutor is independent and should decide the issue independently. Supreme Court of India stated that withdrawal powers are the exclusive province of prosecutor’s discretionary powers and any prosecutor who bends to the commands of executive authority in this sphere betrays the authority of his office. Plethora of reported decisions in the law Journals indicate failure of prosecutors acting independently in withdrawal decisions. The researcher finds that a great majority of trial judges openly state that they never saw a prosecutor independently moving the process for withdrawal of cases fit for withdrawal. All this indicate abdication of independence by prosecutors and they pursued cases not fit for prosecution resulting in injustice and waste of resources.

Propriety:

The position of a Public Prosecutor appointed by the State is one of great trust and confidence. Prosecutors appointed under Criminal Procedure Code 1973 are to conduct prosecution of cases filed by police in the courts against accused. They cannot defend the accused even if the accused are police officers with whom he has inter-departmental

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262 Subash Chander v. The State, AIR 1980 SC 423.
263 Krishnavataram v. The State of AP, 1969 (2) APLJ 352 (AP).
relationship\textsuperscript{264}. It would be inconsistent with the ethics of the legal profession and fair
play in the administration of justice, if Public Prosecutor appears on behalf of the accused
persons. His appearance on behalf of the accused would give rise to apprehension in the
minds of the witnesses that in giving evidence against the accused, they would be not
only incurring the displeasure of the Government but would also be fighting against it\textsuperscript{265}.
Instances are not lacking where the prosecutor not only examined the witnesses for
prosecution but he summoned and examined all those possible witnesses whom the
defence may call it on its side and as those witnesses did not support prosecution version
he cross examined them. The technical rules of law of evidence are not violated, but the
courts strongly condemned those practices\textsuperscript{266}. All these rulings reinforce the ethical
norms with clear duties and lead to practical impact on prosecutors in maintaining
propriety.

A Public Prosecutor being public servant gets to know a great deal about a crime
and a criminal and various inputs that led to prosecution of a criminal for the crime he
has committed. After the individual ceases to be a prosecutor, either because he retired
from service or because his tenure is over, he normally goes back to bar and practices as
an advocate. However, for the information he gathered during his tenure he holds a sort
of fiduciary relationship with his erstwhile client and the ethics of propriety demand him
not to use that information against the State or in favour of others, which would be likely
to harm the cause of the State.

\textsuperscript{264} Kannappan v. Abbas, 1986 Cri.LJ 1022.
\textsuperscript{266} Re Biswanath, 100 IC 365 as collected in Sarkar on Evidence at page 2150, 15\textsuperscript{th} Edition, Wadhwa and
Company Nagpur.
Certain aspects of the matter are governed by principles of confidentiality and privileged communication doctrines\textsuperscript{267}. In a way, those rules of evidence are concerning productions of evidence in the court. However the spirits of those rules conveys the ethical principle of propriety and debar the advocate, who was formerly a prosecutor, from doing certain acts. A concrete example would make it clearer. Every advocate is entitled to advice and defends his client. Every accused has choice of selecting his own advocate\textsuperscript{268}. In the light of these principles, the question that arises is whether a Public Prosecutor is precluded, after his term as Public Prosecutor has come to an end, from appearing for the opposite party. This question directly fell for consideration before courts. There was a criminal trial of many accused concluded before a Sessions Court and by its judgement the court convicted some of them and acquitted some of them. The State Government sought for the advice of the Public Prosecutor about fitness for appeal against the acquitted accused. The prosecutor advised for appeal against acquittal. The State preferred the appeal. At that stage, the term of the Public Prosecutor was over and he became a private advocate and he filed his memo of appearance in the appellate court in defence of the acquitted accused. State challenged this and the Andhra Pradesh High Court upheld the challenge of the State and directed the advocate not to appear for the accused in that case. While arriving at that conclusion the High Court stated that the advocate while holding the post of Public Prosecutor was precluded from appearing on behalf of the accused. After his term is over if he appears for the accused, against whom he had advised the State, it causes embarrassment for himself in appearing for both sides. It also creates justifiable suspicion and apprehension that may be created in the mind of

\textsuperscript{267} Sections.124, 126,129 of the Indian Evidence Act 1872.

\textsuperscript{268} Article 22 (1) of the Constitution of India.
his erstwhile client. Proper professional conduct is not a mere matter of compliance with technical rules. It is one of which everyone who aspires to be called a gentleman should have an instinctive appreciation. The interest of the administration of Justice, the observation of the highest traditions of the bar of which the advocate is a member should itself dictate him to reject the proffered brief for the other side. The question of propriety cannot depend upon the doctrine of confidential communication principles alone. He must always interpret any particular situation against himself and against his interests for the maintenance of the highest standards of professional ethics. This ruling precisely thus summarised the ethics of propriety.

Working at the best of ability

There is a need for every prosecutor to maintain proper work culture. He should never fall prey to laziness and do his advisory work as a matter of mere routine. He should always work to the best of his ability. It is unethical, if he fails to show proper respect for citizens and the rights of the accused. Speaking about the advisory role of a prosecutor in instructing his client regarding preferring an appeal against an acquittal judgment, the Andhra Pradesh High Court said that the prosecutor should call for all the materials, look into them, give serious consideration and only then give an opinion. Not doing so would be to jeopardise and harass an acquitted accused contrary to the highest standards of professional ethics and fair play that is attached to the office of the Public Prosecutor. Thus, between slackness and hard work it is the ethics that shall guide the prosecutor in discharge of his duties.

270 In Re-Public prosecutor AIR 1960 AP 64.
To sum up, many of the acts, attitudes and discretionary exercises of prosecutors are characterised by ethics rather than by binding rules. It is desirable to have a proper document of ‘Statement of Values’ prepared by the Directorate of Prosecutions putting together examples of situations where there may be a divergence between the ethical and other approaches. The next step would be to inculcate the principles through training and other means. The main task would be to convey the reasons why these principles are worth adhering to, whether by abstract instructions or by means of role-play exercises, debates, etc. Otherwise, a statement of ethical principles would be a poor match for a well-entrenched occupational culture. The ethical approach may be viewed as preventive, in the sense that it seeks to foster ethical conduct that will lead to fewer ‘system errors’ and fewer miscarriages of justice\textsuperscript{271}. After all, the prosecutor is claimed to be Minister of Justice and the system shall prepare him to act as such.

\textsuperscript{271} See generally Andrew Ashworth, the Criminal Process an Evaluative Study, 2\textsuperscript{nd} Edition, 1998, Oxford University Press.