Role of Prosecutor in Criminal Justice Administration
DESCRIPTION OF MODULE

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<td><strong>Subject Name</strong></td>
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<td><strong>Objectives</strong></td>
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<td>• To understand the organisation of the system of Public Prosecution in India</td>
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<td>• To understand the nature of the office of Public Prosecutor and his role in the</td>
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<td>administration of Criminal Justice, and</td>
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<td>• To identify and analyse the areas of concern, affecting the effective functioning</td>
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<td>of the system of prosecution</td>
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<td><strong>Prerequisites</strong></td>
<td>General understanding of the provisions of the Code of Criminal Procedure</td>
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<td><strong>Key words</strong></td>
<td>Public Prosecutor, Criminal Justice Administration, Withdrawal from prosecution</td>
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1. Introduction:

Public Prosecutors play a crucial role in most of the criminal justice systems. They are the persons entrusted with the duty of representing the prosecution side in criminal trials. The office of the public prosecutor represents the collective will of the society. It is also a ‘repository of public power to initiate and withdraw prosecution’.¹ The reason for creation of a system of public prosecution to represent the interest of the society are two-fold- firstly, to represent the collective interest of the society to render justice in a criminal matter by punishing the offender and secondly, to protect the interest of the individual accused by avoiding vexatious litigations.² The public prosecutors are officers of the court and are regarded as independent and impartial. At the same time they represent the state in a criminal trial. Thus the position and role of public prosecutors has been subjected to much discussion and judicial discourse. This module will introduce you to the existing system of Public Prosecution in India and the role of Public Prosecutors in a criminal trial.

2. Legal Framework:

Before analysing the role of public prosecutors, it would be worthwhile to examine the statutory provisions regarding the establishment of office of public prosecutor and the structure of public prosecution in India. Public Prosecutor is defined as “any person appointed under Section 24 and includes any person acting under the directions of Public Prosecutor.”³ It is a vital office as far as the administration of criminal justice is concerned. The fact that the Code of Criminal Procedure allows the Public Prosecutors to appear and plead in any court without any written authority conveys the relevance of such officers in the administration of criminal justice. More importantly, it is provided that if a pleader is engaged by a private person in case where the public Prosecutors appear, the pleader appointed by the private person has to act under the directions of the Public Prosecutors.⁴

Chapter II of the Criminal Procedure Code 1973 titled ‘Constitution of Criminal Courts and Offices’ contains three provisions that talk about Public prosecutors. Central or state government shall appoint Public Prosecutors or Additional Public Prosecutors at the High

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² Ibid
³ Sec. 2(u) of Code of Criminal Procedure, 1973
⁴ Sec. 301 of Code of Criminal Procedure, 1973
Court to represent them in any prosecution, appeal or other proceeding. Such appointment shall be made only after consultation with the High Court. The provision also authorises the appointment of Public prosecutors or Additional Public Prosecutors for the District to represent the state. They shall be appointed from a panel of advocates prepared by the District magistrate in consultation with the Sessions Judge. To be appointed Public prosecutors at the High Court or at the District, the person must be an advocate in practice for seven years or more.

The Central government or the State government can also appoint Special Public prosecutors for dealing with a particular case. It is mandatory that such a person must be in practice for ten years or more. Assistant Public Prosecutors can be appointed by the state government in the Courts of Magistrates under Sec. 25 of the Code. The section also provides that, if for the purpose of any case the Assistant Public Prosecutor is not available the District Magistrate, may appoint any other person to act as Assistant Public Prosecutor. Though the general rule is that no police officer can be appointed as a Public Prosecutor, but in case the exigencies of the case require his appointment care should be taken that he has not taken part in the investigation of the said case and he is not below the rank of an inspector. The following table will summarise the relevant points in this regard:

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5 Sec.24 (1) of Code of Criminal Procedure, 1973  
6 Sec. 24(3) and (4) of Code of Criminal Procedure, 1973  
7 S.24(5) of Code of Criminal Procedure, 1973  
8 Sec. 24(6) of Code of Criminal Procedure, 1973  
9 Sec. 25(3) of Code of Criminal Procedure, 1973  
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<th>Designation</th>
<th>Qualification</th>
<th>Appointing Authority</th>
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<tr>
<td>Public prosecutor /Additional Public Prosecutor (High Court)</td>
<td>Advocate in Practice for seven years or more</td>
<td>Appointed by Central or state government, as the case may be, in consultation with the High Court.</td>
</tr>
<tr>
<td>Public Prosecutors/Additional Public Prosecutors for the Districts (Court of Sessions)</td>
<td>Advocate in Practice for seven years or more</td>
<td>Appointed by State from the Panel (Prepared by District Magistrate in consultation with the Sessions Judge) or from the regular cadre.</td>
</tr>
<tr>
<td>Special Public Prosecutors</td>
<td>Advocate in practice for ten years or more</td>
<td>Appointment to be made by Central or State Government for a case or class of cases.</td>
</tr>
<tr>
<td>Assistant Public Prosecutors (Courts of Magistrates)</td>
<td>Any person other than a police officer (District can even appoint a police officer to act as APP provided 1) he has not taken part in the investigation and 2) he is not below the rank of an inspector</td>
<td>Appointed by State governments</td>
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A significant development with respect to the appointment of Public Prosecutors was introduced by the Code of Criminal Procedure (amendment) Act, 2005. The amendment empowers the state governments to establish a hierarchical structure for prosecution. The states can establish a Directorate of Prosecution under the head of the Home department of the state.\(^{11}\) The Directorate shall be headed by the Director of prosecutions and there shall be

\(^{11}\) Sec. 25A (3) of Code of Criminal Procedure, 1973
Deputy Directors under him. The powers and functions of the officers shall be laid down by the state government.

3. Prosecution an Independent and Autonomous Agency:

What is the true nature of the office of the Public Prosecutor? What is his relation with his client? Is he an employee of the government? Or is the relationship purely contractual? Two questions that are pertinent in understanding the nature of the office of the public prosecutor are addressed below.

3.1 Executive or Judicial?

Is the Public Prosecutor part of the executive because he represents the state and acts in cooperation with the investigative agency? Is he a part of the judiciary because he has to be impartial and assist the court in finding the truth? The opinion expressed by a learned author of Criminal Law, Prof. K.N. C Pillai is quite relevant here. He says, “It seems that the office of the Public Prosecutor belongs to the executive. However, it is strongly felt that it is in fact, not purely executive. It partakes judicial character and as such assumes a lot of importance in a democracy. The very establishment of this office presupposes the understanding that one cannot afford to permit private prosecutions as it may result in utter chaos in the present political set up”

The Public Prosecutor was treated to be a part of the executive earlier and the need to separate it and give it an independent existence was felt gradually. For instance, the 14th Report of the Law Commission of India makes the following observation-

“It is obvious that by the very fact of that being members of the police force and the nature of duties they have to discharge like bringing a case to court, it is not possible for them to exhibit that degree of detachment which is necessary in a prosecutor. It is to be remembered that their promotion in the department depends upon the number of convictions they are able to obtain as prosecuting officers. We therefore suggest that as a first step towards improvement, the prosecuting agency should be completely separated from the police department. These recommendations of the law commission were

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12 Sec. 25A (1) of Code of Criminal Procedure, 1973
13 Sec. 25A (7) of Code of Criminal Procedure, 1973
14 Supra note 1.
accepted by the Central Government and the parliament by enacting the code of procedure 1973 made the necessary provision in Section 24 and 25 of Cr.P.C.”

Though the nature of the functions the Public Prosecutor performs has elements of executive function, it cannot be treated so. He represents the state, but his role in the court is not that of an ordinary advocate representing his client. In this regard, the observations made by the High Court of Kerala in Babu v. State of Kerala are worth reading. The court said-

“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 use the innocents to go to gallows. They are not there to see the culprits escape conviction. But the pleader engaged by a private party who is a de facto complainant cannot be expected to be so impartial. Not only that, it will be his endeavour to get the conviction even if a conviction may not be possible.”

There are instances where the Courts have held appointment of a police officer as in charge of the prosecuting agency to be against the spirit of Ss.24 and 25. Under the scheme of the Code, investigation is done by the executive ie the police and supervision of the investigation is the duty of the Judiciary ie the Magistrate. Public Prosecutor is an officer of the court who aids the court in the administration of justice by helping it to find the truth. In short it may be said that irrespective of the judicial or executive nature of the office of the Public prosecutor, he has to act impartially and with fairness.

3.2 Public office:

The second major concern regarding the nature of office of the Public Prosecutors is with respect to its relation with the government. Is a Public Prosecutor a public servant or is he just an advocate whose client happens to be the state. In other words, is the relationship between the government and the Public prosecutor purely contractual? Or does it involve some public element so as to claim the office to be a public office? This issue was addressed by the

15 Para 12 of Ch XXXV of Vol. 11.
16 (1984) Cr. LJ 499 (Ker)
17 The Apex Court decision in S.B Sahana v. State of Maharashtra, (1995) SCC (Cri) 787 also holds the same.
Supreme Court in Kumari Srilekha Vidhyarthi v. State of U.P and Ors. In this decision the government counsels of the state challenged the state action of terminating their services before the expiry of the term without assigning any reason as arbitrary. They contended that the relationship of the government counsel with the government is not merely one of client and counsel, as in the case of a private client, but one of status in the nature of public employment or appointment to a ‘public office’. Having regard to the statutory provisions concerning the appointment of Public prosecutors and their role in withdrawal from prosecution under S. 321 of the Code of Criminal Procedure, the Court held that, the office of the public Prosecutor is a public office and his relationship with the government is not the same as that of an ordinary advocate representing his client. Basing their reasoning primarily on Sec.321 the court made the following observation—

“This power of the Public Prosecutor in charge of the case (u/s 321) is derived from statute and the guiding consideration for it, must be the interest of administration of justice. There can be no doubt that this function of the Public Prosecutor relates to a public purpose entrusting him with the responsibility of so acting only in the interest of administration of justice. In the case of Public Prosecutors, this additional public element flowing from statutory provisions in the Code of Criminal Procedure, undoubtedly invest the Public Prosecutors with the attribute of holder of a public office which cannot be whittled down by the assertion that their engagement is purely professional between a client and his lawyer with no public element attaching to it.”

3.3 Independent and Impartial:

It is quite clear from the above discussion that a Public Prosecutor must be impartial and fair. His role is not limited to that of an advocate championing the cause of his client. He is not to secure conviction by all costs, say for example by hiding evidences or information favouring the accused. He is to aid the court in its quest to find the truth. But what are the parameters to assess impartiality? How is the fairness of his actions to be measured? There have been numerous instances before the courts where such a public office was alleged to be misused either by the incumbents or by their political superiors. Two issues may be identified to
discuss this matter further- 1) Regarding the political nature of appointments and 2) Government interference in withdrawal of prosecution.

3.3.1 Political Interference:

A major area of concern when we talk about the impartiality and independence of the office of the Public Prosecutor is the reality of such public offices being filled by candidates who are committed to their political heads. It is often the practice that, the offices of the Public Prosecutors and Government Pleaders changing its incumbents with the change in governments. The judiciary has been quite meticulous in its approach preventing politically motivated appointments and keeping a check on partisan decisions being taken by occupants of such offices. Prof. Pillai makes the following observation in this regard-

“...Today the appointment to the office of the Public Prosecutor is made on the basis of political affiliation of the persons concerned. The difficulties arising out of such appointments came to be examined by the Supreme Court in Srilekha Vidyarthi v. State of U.P. The Supreme Court deprecated this trend and declared that appointment to such vital offices should not be allowed to be made by spoils system by the political parties. But even today, the state governments distribute this office among the sympathisers of the political parties in power. And even after assuming office many of the incumbents still feel that they are to look after the interests of the ruling parties.”

The case of Sunil Kumar Pal v. Photia Sheikh provides a candid example as to how political influences can lead to utter abuse of the office of the Public Prosecutor. It was a case of murder. Due to the persistent demand of the deceased’s brother the proceedings began. The public prosecutor was given only a day to prepare his case and therefore he returned the brief. After that a junior of the Public Prosecutor was appointed Special Public Prosecutor and the Public Prosecutor was representing the nine accused. Witnesses were intimidated; many of them turns hostile and many did not appear. The High Court did not even grant a leave to appeal to the apex court against the acquittal. Setting aside the acquittal the Apex Court came down heavily on the way justice was administered by the lower courts, the made the following observations-

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19 Ibid.
20 (1984) 4 SCC 533
“There can be little doubt that the trial culminating in the acquittal of respondent nos. 1 to 9 was appallingly unfair so far as the prosecutions is concerned and was heavily loaded in favour of respondent nos. 1 to 9. It is difficult to understand how consistently with ethics of the legal profession and fair play in the administration of justice, the public prosecutor of Nadia could appear on behalf of respondent nos. 1 to 9. The appearance of the public prosecutor, Nadia on behalf of the defence does lent support to the allegation of the appellant that respondent nos. 1 to 9 were supported by the Communist Party of India (Marxist) which was at the material time the ruling party in the State of West Bengal and this would naturally give rise to apprehension in the minds of the witnesses that in giving evidence against respondent nos. 1 to 9, they would be not only incurring the displeasure of the government but would also be fighting against it. Moreover, it cannot be disputed that when the trial was going on and the witnesses were giving evidence, there were a large number of supporters of the Communist Party (Marxist) who were allowed to assemble in the court compound and who created a hostile atmosphere by shouting against the prosecution and in favour of the accused. Though the appellant and the complainant as also the witnesses were intimated, no steps were taken for according protection to them so that they may be able to give evidence truly and fearlessly in proper atmosphere consistent with the sanctity of the court. It is significant to note that quite a few witnesses turned hostile and that obviously must have been due to the fact that they apprehended danger to their life at the hands of respondent nos. 1 to 9 and their supporters. It is also regrettable that though at the time when the trial commenced on 22nd May, 1978, Shri S. N. Ganguly, who was appointed special public prosecutor to conduct the prosecution, asked for an adjournment of the trial in order to enable him to prepare the case particularly since he was appointed on 20th May, 1978, the trial was adjourned only for one day, with the result that S. N. Ganguly had to return the brief. Then late in the evening of 22nd May 1978 Shri S. S. Sen, additional public prosecutor was asked to conduct the prosecution and he had to begin the case on the very next morning on 23rd May 1971 without practically any time for effective preparation. We have no doubt that under these circumstances the trial was heavily loaded in favour of respondent nos. 1 to 9. The trial must in the circumstances be held to be vitiated and the acquittal of respondent nos. 1 to 9 as a result of such trial must be set aside. It is imperative that in order that people may not lose faith in the administration of criminal justice, no one should be allowed to subvert the legal process. No citizen should go away with the feeling that he could not get justice from the court because the other side was
socially, economically or politically powerful and could manipulate the legal process.
That would be subversive of the rule of law.(emphasis added)"

4. Prosecutors and Initiation of Criminal Proceedings

The importance of role of the Public Prosecutor is further made evident in Chapter XVIII which deals with Trial before a Court of Session. The chapter opens with the provision that in every trial before the Court of Session prosecution shall be conducted by a Public Prosecutor. The prosecution has to open the case by describing the charges and the evidences against the accused. The evidences the Public Prosecutor mentions in the opening statement are those sent by the Magistrate while committing the case to the Court of Sessions. Once the Magistrate sends the records, documents and articles to it, it is the duty of the Public Prosecutor to conduct the prosecution.

5. Prosecutors and Withdrawal from Prosecution

The Code of Criminal Procedure envisages the role of Public Prosecutor to commence only after the investigation is completed by the police and a decision to prosecute is taken by the Magistrate. He has very little role in deciding whether to commence prosecution. However, that is not the case with withdrawal of prosecution. The public prosecutor plays a vital role in cases where withdrawal is sought on behalf of the state. According to Sec. 321 of the Code “The Public Prosecutor or Assistant Public Prosecutor in charge of a case may, with the consent of the Court, at any time before the judgment is pronounced, 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”.

21 Sec.225 Cr.PC
22 Sec. 226 reads as follows -Opening case for prosecution. When the accused appears or is brought before the Court in pursuance of a commitment of the case under section 209, the prosecutor shall open his case by describing the charge brought against the accused and stating by what evidence he proposes to prove the guilt of the accused.
23 Sec.173 (5) (a) and (b).
This role of the Public Prosecutor has been a testing ground for the notions of independence and impartiality associated with his office. The reality of such decisions being influenced or manipulated by the political heads of the state has resulted in many situations where judicial interference became necessary. It has now been categorically laid down by various judgements that, the decision to withdraw from prosecution is the prerogative of the prosecutor as a holder of public office and the Court shall give consent to such a decision only if satisfied that it is not influenced by the interests of the political government.

In this context, the case of Sheonandan Paswan v. State of Bihar24 the court held that the role of the court in granting permission for withdrawal of prosecution is limited to seeing that the decision is made by the Public Prosecutor independently and having regard to the interests of public policy and justice. The Public prosecutor’s decision to apply for withdrawal is not limited to paucity of evidence. Once the court is satisfied that the application is made in good faith, in the interests of justice and public policy and not to thwart or stifle the process of law, the court may grant permission. In other words the role of the court in this regard is not adjudicatory, and not supervisory. The court need not go in to the merits of the reason for withdrawal. It has to just satisfy itself that the decision is made independently and in good faith. The same has been the approach of the Apex Court in a number of other cases as well.25

The following points may be noted with respect to the role of the Public Prosecutor in cases of withdrawal from prosecution-

- Decision to withdraw prosecution is the prerogative of the Public Prosecutor
- The decision to withdraw prosecution under section 321 of the Code may be exercised by the Public Prosecutor anytime before the judgement is pronounced.
- The consent of the court is necessary for the Public Prosecutor to withdraw from a case. The role of the Court in this case is not adjudicatory, but supervisory.
- If the decision of the Public prosecutor is independent and in the interests of justice, the court has to grant permission.

24 (1987) 1 SCC 288
- The decision to withdraw prosecution may be due to paucity of evidence to pursue the case further. But there may be other reasons also.
- So long as the decision is made in good faith and free from external influences, especially governmental pressure, the courts shall not interfere.

5.1 Duty not to suppress material facts, evidences or witness:

An understanding of the role of the Public Prosecutor would not be complete without a mention of the duties that are cast on them either by the statute or by judicial pronouncements. The most important duty of the Public Prosecutor is the duty not to suppress any material fact or evidence relevant to the case.26

As mentioned earlier the Public Prosecutor is not just an advocate representing the cause of his client. Therefore he need not procure a conviction by hook or crook. “The object of a criminal trial is to find out the truth and determine the guilt or innocence of the accused. The duty of the prosecutor in such a trial is not merely to secure conviction at all costs but to place before the court whatever evidence is possessed by the prosecutor, whether it be in favour or against the accused, and to leave the court to decide upon all such evidence-

whether the accused was or was not guilty of the offence alleged.”²⁷ The attitude expected from the Public Prosecutor is made clear by the Law Commission in its 14th report in the following words- “A public prosecutor must be personally indifferent to the result of the case. His duty should consist only in placing all the available evidence irrespective of the fact that whether it goes against the accused or helps him, before the court, in order to aid the court in discovering the truth. It would thus be seen that in the machinery of justice a Public Prosecutor has to play a very responsible role; the impartiality of his conduct is as vital as the impartiality of the court itself.”²⁸ In Darya Singh v. State of Punjab²⁹ the apex Court held that the Public Prosecutor must never allow the devise of keeping back from the court’s eye witnesses only because their evidence is likely to go against the prosecution case. In other words he shall not pick and choose witnesses and evidences.

6. Summary:

Public Prosecutor plays a vital office in the administration of criminal justice. It is an office created by the statute. The Public Prosecutor represents the state in criminal prosecutions.

²⁷ Ghirrao v. Emperor, 34 CriLJ 1009 (1012)
²⁸ 14th Report Vol.II p.765
²⁹ AIR 1965 SC 328.
However, he is not an advocate of the state. He is the holder of public office and has to discharge his function impartially and independently. They are not to suppress material facts, evidences or witnesses even if it is not in favour of his case. In other words, he is not to secure a conviction by any means. His duty is to aid the court in finding the truth. Politically motivated appointments and interference by political heads in the decisions concerning prosecutions are challenges to the independent working of the office which has been dealt quite seriously by the judiciary.

Self-check exercise

1. Examine the relationship of the Public Prosecutor with the government? How is it different from that of an ordinary client representing his client?
2. Examine the provisions relating to appointment of Public Prosecutors? Does the Amendment of 2005 make any changes in the way Prosecutors are appointed?
3. What is the role of the court in cases where withdrawal of prosecution is sought by the Public Prosecutor?
4. Examine how far the judiciary has tried to safeguard the independence of the office of the Public Prosecutor?