CHAPTER 2

Strengthening the Public Prosecutorial Service

Strengthening the Public Prosecutorial Service in Bangladesh

Justice Shafiur Rahman

Fairness and justice are concepts that remain undefined, unpredictable, and highly relative. What is fair to one may be unjust to another. Thus, the law has to be certain, predictable, uniformly applicable, and properly understood. Law, however, is very dynamic and very much influenced by the tide of times. Consequently, it is not easy to talk of, much less enforce, the rule of law. It is against this volatile backdrop that the prosecutorial service plays a significant role in upholding the rule of law in the criminal justice system.

At the initial stage, the public prosecutor is empowered to decide whether to prosecute a case in court or not. During trial, the public prosecutor controls the direction of the prosecution. In each stage, the prosecutor has specific functions and deals with different law enforcement agencies, namely, the police and the courts. As a major player in the criminal justice system, the prosecution service maintains a relationship with both agencies and even serves as a buffer between them. It is therefore crucial to have an efficient, competent, and credible public prosecutorial service in any criminal justice system. This paper looks into the current state of the public prosecutorial service in Bangladesh and its problems, and makes recommendations to improve the service.

The Current State of the Public Prosecutorial Service

At present, no organized and integrated prosecutorial service exists in Bangladesh. Administratively, the solicitor wing of the Ministry of Law, Justice and Parliamentary Affairs handles the prosecutorial function. The Ministry appoints prosecutors from among practicing lawyers or from the police for a short term, usually for the duration of one case, sometimes until the appointing government is in power.

Lawyers are appointed as public prosecutors, additional public prosecutors, and assistant public prosecutors to prosecute serious offences before the court. They are assigned to a specific territorial jurisdiction and are not transferable. They are paid retainer fees depending on the number and nature of cases they handle. They handle private cases, civil and criminal, provided they have no conflict of interest.

On the other hand, police officers are appointed prosecuting sub-inspectors, prosecuting inspectors, and deputy superintendents of police prosecution to prosecute minor offences before the lower magistrates. They are permanent members of the police service under the Home Department who are allowed to act as prosecutor except in cases investigated by them.

Public prosecutors in Bangladesh have no control over the investigation; such control lies with the magistrates (Sections 157 and 159, Criminal Procedure Code). There is no separate corresponding wing in the executive police. The duties of the public prosecutor commence with the appearance of the accused before the courts. There are three types of duties. The first type refers to duties performed independently, without taking

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instructions from another authority. Examples are the duties to conduct the prosecution, present the case, and lead the presentation of evidence. In performing these duties, the prosecutor exercises independent discretion. The second type refers to those duties performed with the permission or under the direction of the court. An example is the power of the prosecutor, with the permission of the court, to withdraw other charges against an accused who has been convicted of one or more charges. The third type refers to those duties performed with the permission or under the direction of the executive government. An example is the filing of appeals against judgments which can only be done upon direction from the executive branch.

Based on the latest available data,[1] the strength of the public prosecutorial service includes 63 public prosecutors, 40 additional public prosecutors, 88 special prosecutors, and 1,249 assistant public prosecutors. There are 497 courts which require presence of prosecutors.[2] The case load of each prosecutor is approximately 1,054 cases. No indicators are available to assess the performance of the public prosecutors on a regular basis. The only informal measures of their performance are adverse remarks recorded by the court in judgments and the prosecutor's continued political value to the administration in power.

The budgeted amount for the public prosecutorial service for 2005–2006 is reportedly Tk15 *crores* and 88 *lakhs* (approximately $2,268,571). In the immediately preceding year, 2004–2005, it was Tk15 crores and 85 lakhs (approximately $2,264,286) of which Tk15 crores (approximately $2,142,857) was paid as retainer fee to the prosecutorial service and the remainder spent on its management. In 2003–2004, the expenditure was Tk12 crores (approximately $1,714,286) on retainer fee and 75 lakhs (approximately $107,143) on management.[3] The retainer fee is actually about one fourth of the prevailing market rate or even less, and is never promptly paid. The approximate average retainer paid to a prosecutor is Tk83,070 (approximately $1,186) per annum.[4]

Strengthening the Prosecutorial Service: Models

Upon independence, Bangladesh, India, and Pakistan inherited the colonial model of the prosecutorial service which had two distinguish-

[1] Statistics as of April–May 2006, Ministry of Law, Justice and Parliamentary Affairs.
[2] The number of prosecutors engaged and the number required is not locally available.
[3] See footnote no. 1.
[4] See footnote no. 1.

ing features. First, the service was usually headed by a professional called the legal remembrancer who prosecuted important cases. Second, the district magistrate had great influence in the appointments relating to the district of which he or she was in charge. However, the three jurisdictions eventually developed their respective prosecutorial services differently. India and Pakistan have established separate services while Bangladesh still lacks a permanent cadre of prosecutors under an organized prosecutorial service. In case Bangladesh decides to pursue a permanent cadre of prosecutors, it may look at various models for guidance.

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The Indian Model

In one of its reports, the Law Commission of India pointed out the inadequacy of public prosecutors and recommended measures to ensure that there are as many prosecutors as there are criminal courts. In the case of *P. Ramachandra Rao* (2002, 4 SCC 578 pr. 20), the Supreme Court of India had occasion to comment that the absence of, or delay in appointment of, public prosecutors caused trial delay. Accordingly, India established its federal legal services under the executive branch and framed Cadre and Recruitment Rules of the Department of Prosecution and Government Litigation. The rules provide for direct recruitment of assistant public prosecutors (APPs) through a qualifying written examination followed by viva voce voting conducted by the Public Service Commission. An APP is required to have a law degree and 2 or 3 years of practice. All other appointments in the service are by promotion. Promotion as senior APP requires a minimum of 5 years of service as APP. Another 5 years of service as senior APP is required for promotion as public prosecutor. The public prosecutor can be promoted to joint director of prosecution after satisfying 3 years of service as public prosecutor. Another 3 years of service as joint director is required to be eligible for promotion to the post of Director of Prosecution.

The Pakistan Model

Pursuant to the Access to Justice Program funded by the Asian Development Bank, reform in a larger but coordinated sector is being undertaken in Pakistan. A good part of it is the separation of the investigative functions of the police from their other duties. This allows the investigation to become more focused, professional, and effective in contributing to the criminal justice system. After examining various models, a model draft acceptable to all four provinces was prepared and presented in their respective provincial assemblies. The objective of the draft Criminal Prosecution Service Law is to establish a Criminal Prosecution Service to ensure prosecutorial independence, effective and efficient prosecution of criminal cases, and better coordination in the criminal justice system. The service is to be headed by a prosecutor general, with additional deputy and assistant prosecutors general as subordinates.

In the districts, there would be district, deputy, and assistant district public prosecutors, and other public prosecutors as the prosecutor general may appoint. Recruitment up to the level of additional prosecutor general would have to be made through the public service commission based on a competitive examination. The police registering the criminal case, the police investigating the case, and the police filing the interim or final report are all placed under the supervision and control of the district public prosecutor. The prosecutor general is required to submit annual reports which are to be laid before the Assembly.

US Model

In the United States, criminal justice is primarily a state subject. The prosecutorial service is completely independent of the police or the executive. Prosecution is conducted by a district attorney assisted by attorneys known as prosecutors. Every county has one district attorney, a lawyer,

elected by the people for 4 years. The district attorney has absolute discretion on whether to prosecute an offender and this decision cannot be contested. The consent of a jury is sought before filing the case in court only when the district attorney is of the opinion that the offender must be prosecuted. Even then, the jury rarely withholds consent.

Selecting the Appropriate Model

As Warren Burger, former chief justice of the US, explained, "[t]he function of the judicial system is to produce justice at the lowest possible cost, the shortest possible time, with the least possible strain on the participants." Thus, the most suitable model would be one that is: (i) a step forward to achieve this goal; (ii) capable of being harmoniously integrated in the existing system; and (iii) affordable for the existing and foreseeable future resources, financial and human, of the country.

Regardless of which model is adopted, however, the greatest challenge is to get the support of the government to implement it. Political will is crucial because there is usually a strong inclination to simply maintain the status quo. The next huge challenge is sustaining and monitoring the implementation of the model, as well as taking timely remedial action where necessary.

Challenges to Strengthening the Prosecutorial Service of Bangladesh

In addition to the two major challenges mentioned above, which are general in nature, three other challenges are specific to Bangladesh context. First, no suitable model has emerged. As such, an examination of the Pakistan model is recommended, as it may be suitable for adoption and modification. Second, adequate funding for implementing such a program of reform is needed. The amount of funds required will depend on the model selected. The Pakistan model entails expenses amounting to at least three times more than the present allocation for the prosecutorial service of Bangladesh. Third is the issue of which—between the Law Department and the Home Department—should administer this agency. However, the answer to this issue can be gleaned from an examination of the current functions, training, and experience of the two departments.

The functions of the two departments have been delineated, one being largely judicial and the other primarily executive. The law department is managed by judicial officers who primarily discharge quasi-judicial functions of legal drafting and giving legal opinion. On the other hand, the constitutional separation of the judiciary requires judges to avoid executive responsibility except and only to the extent necessary for managing their own courts and supervising their subordinates. Moreover, judges are not sufficiently prepared to discharge executive duties. While some judges can perform executive functions very well, most judges are not equipped with managerial skills because their training is legal and judicial.

Further, the Law Department has limited experience in coordinating police investigation and prosecution of a case. Its administrative experience is confined to selecting lawyers as government pleaders or as public prosecutors under a retainer fee system. On the other hand, the Home Department has a long experience of administering uniformed services and of protecting their independence. This department has already been exercising supervision over the police prosecutorial service at the lowest tier. It is therefore best suited to address all the reasonable demands of the prosecutorial service on the investigation wing of the police promptly and effectively, if both are under its administrative control.

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Conclusion

The basic precondition for reform of the prosecutorial service in Bangladesh would necessarily be the separation of investigation work of the police from its other work, as has been done in Pakistan. Without such a separation, any reform of the prosecutorial service will have limited contribution to the improvement of the administration of criminal justice in the country. To be effective, the reform process must change both the institutional and organizational attributes of the prosecutorial service to make it independent, competent, and efficient.

Public Prosecution Service in India: An Institution in Need of Reform

Prof. (Dr.) N.R. Madhava Menon

The prosecution agency is that segment of the criminal justice system responsible for prosecuting people who have been charged by the police with a criminal offense. Under the federal scheme of the Indian Constitution, criminal procedure including prosecution system is an item in List III of the Seventh Schedule to the Constitution, under which both the Federal Parliament and the State Assemblies are entitled to legislate. Article 254 provides for resolution of inconsistency, if any, between laws made by Parliament and laws made by legislatures of states of the Republic.

This paper examines the weaknesses identified in the prosecution system and suggests certain strategies for strengthening the institution.

The Prosecution Service and its Role in Criminal Proceedings

The objective of the prosecution stage of the criminal proceeding is to protect the innocent and seek conviction of the guilty—apparently two conflicting objectives. Given this dual purpose and the adversary nature of criminal proceedings, the role of the prosecutor is value-laden with notions of fairness and justice. The prosecutor is neither motivated by any sense of revenge or desire to get a conviction. Rather, the prosecutor is an officer of the court who should be personally indifferent to the outcome of a case. The duty of the prosecutor is to place all the available evidence before the court, irrespective of whether it goes against or is likely to help the accused. In this sense, the impartiality of the public prosecutor (PP) is as vital and significant as the impartiality of the judge.

The investigation and prosecution are two separate and distinct aspects of administration of criminal justice. Formation of an opinion as to whether a case can be made out to place the accused for trial is the exclusive function of the police. Under Section 173 of the Code of Criminal Procedure (hereinafter called the "Code"), the "police report" (result of investigation under Chapter XII of the Code) is the finding that an investigating officer draws on the basis of materials collected during investigation. Such conclusion can only form the basis of a competent court to take cognizance and to proceed with the case for trial ("police report" is sometimes in popular parlance referred to as a charge sheet). Normally the role of a PP commences after the investigation agency presents the case in the court on culmination of investigation. Of course, it is open to the police to get the best legal opinion, but it is not obligatory for the police to take the opinion of the PP for filing the charge sheet (2000[4] SCC 461).[1] After the Code was promulgated in 1973, the prosecution agency was expected to be completely separated from the police department. The objective of such separation is obviously to ensure that police officers who investigated a case shall have no manner of control or influence over the prosecutors who will prosecute the case. Under the

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[1] SCC here refers to Supreme Court Cases.

scheme of Sections 24 and 25 of the Code, a police prosecutor (of former times) cannot even become eligible to be appointed as assistant public prosecutor (APP)[2] on regular basis (1995 Supp.[3] SCC 37).

The Organizational Structure of the Prosecution Service

Though varying in details, the existing prosecution machineries in the 29 States of the Indian Union are quite similar in organization and function. They are governed by the same provisions of the Code, except for a few states in the northeast region where the separation of the executive from the judiciary is still to be completed. The states in the tribal areas of the North-East region have their customary laws protected under the Constitution until such time that the Parliamentary enactments are extended to such tribal areas. To understand the functioning of the prosecution system, it is necessary to examine the status and structure of the existing system in representative States in the country.

The Prosecution Service of the State of Haryana

Until 1973, all superintendents, assistant and deputy superintendents of police in the State of Haryana were deemed ex-officio PPs (Punjab Police, Rule 27.4) and selected prosecuting inspectors and prosecuting sub-inspectors were also appointed as PPs. The prosecuting agency consisted of a number of gazetted officers, upper and lower subordinates as sanctioned by the Government and the Inspector General of Police (Punjab Police, Rule 27.14). Rule 12.3 of Punjab Police Rules permitted direct recruitment of legal practitioners, not more than 30 years old, as prosecuting sub-inspectors. The Police Rules contained detailed provisions with regard to duties and functions of the prosecuting agency and prosecutors. It consisted mainly of conducting the case in the criminal courts, deciding on appeals in case of acquittals, advising and supervising investigation,

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Dave Pattison / Alamy

It is recommended that the district prosecution agency handle all criminal prosecutions in the district. Personnel constituting this agency should be full-time employees and recruited on merit by the Public Service Commission. The assistant public prosecutors who appear before the courts of magistrates should be given intensive training to develop their professional skills.

[2] APP here refers to Assistant Public Prosecutor unless otherwise indicated.

and preparing the charge sheet upon submission of the police report. Under this scheme, investigators and prosecutors for magisterial courts operated under the unified command of the superintendent of police in the district, eliminating any problem in coordination between the investigating officer and the prosecutor.

Prior to 1 April 1974 (i.e., before the adoption of the Code of Criminal Procedure [Amendment] Act of 1973), the State of Haryana followed the Punjab Police Rules under which the prosecution agency had two wings. The first was in the magisterial courts managed by prosecuting inspectors and prosecuting sub-inspectors. These police officers in turn were under the administrative control of the superintendent of police of the district and the inspector general of police at the state level. The second wing was under the control of the legal remembrancer[3] and consisted of district attorneys and assistant district attorneys selected from among senior practitioners conducting prosecution in the court of session.

The Law Commission of India (1958) recommended the constitution of a separate department of prosecution under the director of public prosecution, who shall have control over all types of prosecutors in the State. Further to this, the Code sought to separate the prosecution service from the police and to create a cadre of APPs, PPs, and special public prosecutors. Section 24 (4) provides that the district magistrate shall, in consultation with the sessions judge, prepare a panel of names, who are, in their opinion, fit to be appointed PPs or additional public prosecutors for the district. Similarly, the Central/State Government, after consultation with the High Court, appointed a PP and one or more additional public prosecutors for conducting any prosecution, appeal, or other proceeding on behalf of the Central/State Government. An advocate with at least 7 years of practice is eligible for appointment as PP. Section 25 of the Criminal Procedure Code provided for APPs to conduct cases in the courts of magistrates. While only an advocate with at least 7 years of practice can be appointed PP, there is no such stipulation for appointment of an APP. In exceptional cases, a police officer may also function as an APP but no police officer can be appointed as PP. As no qualifications have been laid down for appointment to APP, technically speaking an APP need not even be a law graduate. Prosecution by private individuals is also possible under the Code (Section 301 [1]) though such pleaders are to act under the direction of the PP or APP, as the case may be.

Table 1. Directorate of Prosecution of the State of Haryana

Position	Number of Staff	Compensation
Director of Prosecution	1	Rs.15,100–18,300
Joint Directors	5	Rs.13,500–17,250
District Attorney	50 (20 in courts and 30 in other departments)	Rs.10,000–15,000 + special pay
Deputy District Attorney	131	Rs.8,000–13,500
Assistant District Attorney	344	Rs.6,500–10,500 + special pay

Source: Syndicate Paper of National Police Academy, Hyderabad.

The salary offered to public prosecutors is comparable to that offered to judicial officers (civil judge junior division) when they are inducted into the State judicial service.

Pursuant to the 1973 amendment to the Code of Criminal Procedure, the State of Haryana set up the Directorate of Prosecution under the Department of Justice and all prosecutors were brought under the Directorate's control. Thus, the Directorate brought about the unification of the two wings of prosecution and rationalized the cadres of PPs and APPs. Besides conducting prosecution in the courts, the Directorate renders legal advice to various government departments. At the headquarters, the Director of Prosecution is assisted by a number of law officers including two joint directors and several administrative personnel.

The district prosecution machinery in Haryana now consists of the assistant district attorneys/APPs and the district attorneys/deputy district attorneys. Assistant district attorney/APPs conduct cases in the courts of judicial as well as executive magistrates while district attorneys/deputy district attorneys conduct cases before sessions judges and additional sessions judges. The district attorneys guide, supervise, and control the deputy attorneys and assistant attorneys posted in their respective districts. For important cases, senior practitioners from the Bar may be engaged, with the sanction of the State Government, as special pros-

[3] An officer of the rank of a Secretary to Government to advise on legal matters.

ecutors. The key auxiliary staff such as the "Naib Court" and "Malkhana" staff are provided by the police department. The Directorate, in turn, sends some legal professionals on temporary deputation to the police department to give legal advice and handle legal work. With the experience gained in the legal department of police, these officers on re-deployment in the Directorate prove to be more effective prosecutors. The Directorate also sends law instructors to the Haryana Police Academy to train police personnel.

The Director of Prosecution used to come from the police until the High Court invalidated the appointment of police officers as Director of Prosecution and directed the State to fill the post only by appointing a senior officer belonging to the prosecution agency, having sufficient experience of actual working as a PP. The Supreme Court concurred with the opinion of the High Court quoting an earlier judgment (1995 Supp[3] SCC 37). As regards compensation, the salary structure of government employees is not uniform throughout India. The salary offered to PPs is comparable to that offered to judicial officers (civil judge junior division) when they are inducted into the State judicial service.

The Prosecution Service of the State of Andhra Pradesh

To get a complete picture of the prosecutorial service in India, one might look into the prosecution scenario in a southern State as well. The State of Andhra Pradesh had a similar prosecution machinery like the one in Haryana before 1974. The Directorate of Prosecution, created on May 1986, serves under the Law Department and performs the following functions:

(i) acts as legal advisor to the Director General of Police and Inspector General of Police;
(ii) tenders advice to other departments like Excise, Commercial Taxes, etc.;
(iii) supervises the work and exercises control over all the PPs in the State except the PP of the High Court;
(iv) advises the Government where necessary with regard to filing of appeals in criminal cases; and
(v) scrutinizes charge sheets in cases where innocent persons are believed to have falsely been implicated and renders advice to the concerned PPs.

Nearly 400 officers in different ranks form the prosecuting machinery in the State. The prosecuting agency consists of seven categories of ranks: (i) Director of Prosecution; (ii) Additional Director of Prosecution; (iii) PPs/Joint Directors; (iv) Additional Public Prosecutor-Grade I/Deputy Director; (v) Additional Public Prosecutor-Grade II; (vi) Senior APP; and (vii) APP.

The duties of the APPs include:

(i) prosecuting cases filed not only by the police but also by other departments such as Excise, Commercial Taxes, Forest, Food and Drug Administration, etc.;
(ii) providing opinion when sought by the police or other departments on matters pending before the court or are under investigation;
(iii) prosecuting criminal cases pending before collectors/assistant collectors;
(iv) ensuring that the charge sheet is legally sound and rendering advice on whether more information or further probe is necessary on any matter;
(v) ensuring that the witnesses attend the court and non-bailable warrants are executed in time by approaching the special prosecutor if the SHO is not prompt in the assignment;
(vi) expediting resolution of pending cases in consultation with SHO and other officials;
(vii) maintaining cordial relations with the police, the courts, department officials, and members of the Bar;
(viii) assisting the court in a fair and impartial manner by giving considered views;
(ix) submitting periodic statements of work, attending meetings held by the directorate for review of work, furnishing required information, and appraising problems encountered; and
(x) rendering advice to officials to determine whether a case is fit for appeal, giving detailed reasons.

It is interesting to note some of the deficiencies of the prosecution machinery in Adhra Pradesh:

(i) The case records continue in the custody of police even after filing the charge sheet. These are brought to court on the day of hearing. This denies the prosecutor the opportunity to go through statements or to brief the witnesses.
(ii) The library facilities available to prosecutors are inadequate.

The amendment to the Criminal Procedure Code in 1973 changed the situation and weakened the effectiveness of the system of coordination between the police and the prosecution.

(iii) There is no proper accommodation or support service in the court complex.
(iv) Lack of separate courts for criminal cases leads to prosecutors remaining idle when the courts conduct civil cases. There is a need for more exclusive criminal courts.
(v) As PPs cannot be involved in advising investigation, there is a need to appoint legal advisors to guide special prosecutors in the investigation of serious criminal cases.
(vi) Service of summons on witnesses by police personnel leads to considerable delay.
(vii) There is no training given to the prosecutors.

What Ails the Prosecution?

Given the current organizational setup of the prosecution and its sensitive dynamic with the police, the prosecution machinery suffers from multiple disabilities, some systemic and some incidental. The Committee on Reforms of Criminal Justice System appointed by the Government of India in its report (March 2003) identified, *inter alia*, some weaknesses in the prosecution machinery and its functioning.

Insufficient Coordination between the Prosecutor and the Investigating Officer

Prior to the Criminal Procedure Code (Amendment) Act, 1973, prosecutors appearing in the courts of magistrates functioned under the control of the police department. Prosecutors used to scrutinize police papers and advise the police on legal issues before filing them in court. The prosecutor used to keep a close watch on the proceedings in the case, inform the jurisdictional police to bring the witnesses on dates of trial, refresh the memory of witnesses where necessary with reference to their police statements and examine them lengthily. As a result of close monitoring and careful preparation, very few witnesses would dare turn hostile. In case they did, the prosecutor expertly exposed them through effective cross-examination.

The amendment to the Criminal Procedure Code in 1973 changed the situation and weakened the effectiveness of the system of coordination between the police and the prosecution. The 14th Report of the Law Commission observed that it was not possible for PPs to exhibit that degree of detachment necessary for fair prosecution if they were part of the police organization. Consequently the prosecution wing was separated from the police department and placed under a Directorate of Prosecution (Sections 24 and 25, CrPC). The Supreme Court also reiterated this position and directed the States to place the prosecution wing administratively and functionally under the direct control of the State Government (AIR 1995 SC 1628). Thus, the police and the prosecution were made totally independent of each other. Whereas there used to be unity of control and cooperation between them in prosecuting cases, with separation, this cooperation disappeared substantially and accountability got diluted. While in some states the Directorate of Prosecution functions under the administrative control of the Home Ministry, in others it is under the Law Department. The decision was left to the discretion of the Council of Ministers of the State Government. Similarly, while in some states the Director of Prosecution is an officer of the higher judicial service (district and sessions judge), in others it is a police officer of the rank of Inspector General or Additional Director General. The impartiality of the PPs is largely dependent upon who controls the agency.

Most police officers as well as some administrators and judges believe that the lack of coordination caused by the separation has resulted in falling conviction rate, falling disposal rate, poorly investigated cases being filed, indifferent management of trial proceedings including bail, and lack of effective review particularly at the district level. There is no doubt that the police-prosecution interface is in need of immediate remedial action, but giving the prosecution back to the police is neither desirable nor practical.

Inadequate Professional Competence and Commitment

The professional competence and commitment of PPs and APPs is another factor contributing to the weakness of the system. PPs and APPs are appointed under the provisions of Sections 24 and 25 of the Criminal Procedure Code which envisages a regular cadre of prosecuting officers in every State. Unfortunately, such a cadre does not exist in many States. Since no specific guidelines for appointment of APPs are set in Section 25 of the Criminal Procedure Code, it has become a matter of political patronage rather than merit.

There is no attempt to professionalize the prosecution service systematically. The selection is neither merit-based nor competitive. Remuneration and conditions of service are not attractive to the talented members of the profession. There is

[4] The deputy commissioner simultaneously acts as the district and sessions judge.

no system of education and training for prosecutors and assistant prosecutors. Because of this, the morale of the service is very low and prosecutors become easy victims of temptation to bribery and corruption.

Strategies to Strengthen the Prosecution System

Elements of Good Governance

Good governance in an organization, including the prosecution agency, depends primarily on three essential elements working in perfect coordination in pursuit of common objectives.

First, norms and standards, as well as duties and functions, should be carefully laid out for governing the conduct and management of the agency. This is the function of the substantive and procedural law on the subject. In seeking strategies for reform, one should therefore analyze the existing law and the principles sustaining it and find out whether the law itself is the problem rather than its solution.

The second element in efficient functioning of an organization is the set of institutions envisaged under the law and the structures and procedures provided to manage them. In the present instance, it is the Directorate of Prosecution and the offices associated with it and their management that require scrutiny.

The third and most important element in efficient and effective implementation is the set of personnel who will manage the institutions according to the laws. Who are they and what are their qualifications, competence, and motivation? How are they selected and what are their service conditions? What training should they receive and how is their work monitored and supervised? What are the accountability mechanisms which regulate their behavior? These and related aspects are so critical that even if the laws are inadequate and the institutions are improper, the system can still work if the personnel are competent and committed.

An improved prosecution system would mean better quality of work and increased productivity in terms of case disposal. It would further mean a higher degree of fairness and impartiality in decision-making, upholding the rule of law in all circumstances, untouched by external or internal influences. Finally, it means better accountability in the management of prosecution on behalf of the State in order to give greater security to citizens by guaranteeing freedom from crime. If this is what is meant by strengthening the prosecution machinery, the strategy lies largely in selecting the right personnel, providing them the best training, and giving the leadership and motivation through correct policies and service conditions.

Strategies for Strengthening Personnel

Under Section 26 (6) of the Criminal Procedure Code, if a regular cadre of prosecuting officers exists in the State, the appointment of PPs and APPs can be made from persons constituting that cadre. However, where the State Government believes there is no suitable person available in such a cadre, the Government may appoint someone as a PP or APP from the panel of names recommended by the district magistrate (in consultation with the district judge).

To build a cadre of prosecutors, open and competitive selection of young advocates is required. Option may be given to candidates to choose either service (judicial or prosecution) on the basis of their ranks. This will raise the status of the prosecutorial service and attract more competent people to the post of APPs. All prosecutors should be "gazetted officers" who shall not be allowed to engage in private practice. Eligibility to take the prosecutor's selection test should be a degree in law, preferably with some years of practice in criminal courts. Opportunities for promotion to higher positions in the prosecution service/judiciary should be available to cadre officers. Therefore, Sections 24 and 25 of the Criminal Procedure Code need to be amended accordingly. APPs on selection must be given intensive training at the judicial academies/police academies on both theory and practice to improve their professional skills. There should also be periodical in-service training to upgrade their professional skills continuously.

The Need for a Unified Prosecution Agency

If the prosecution at the district level is to function efficiently and impartially, it is not only es-

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sential to have a proper system of selection and training but also a closer supervision and monitoring mechanism particularly at the junior levels. This would require a unified integrated structure which may be functionally separate in terms of the tasks of investigation and prosecution. While the prosecutor should not be dependent on the police, he or she should be able to seek closer cooperation with the investigating officer. The investigating officer's intimate knowledge of facts can certainly help the prosecutor in countering the defense. At the same time, the investigator will gain immensely from the expert legal knowledge of the prosecutor. Since the functions are integral and complementary to one another and the personnel employed in the two agencies cannot meaningfully work in isolation, a total divorce is undesirable. Some degree of unification of control is necessary for effectiveness in prosecution. To achieve this mutual cooperation without subordination of one to the other and without impinging upon the independence of either, an arrangement should be worked out to have a common center of control and accountability.

To sum up, the unified structure contemplated here involves an effective prosecution organizationally separate from the police but functionally complementary to it. To achieve this, the Committee on Criminal Justice Reforms (2003) recommended that a senior police officer with the requisite qualification of the rank of Director General may be appointed as the Director of Prosecution in the State in consultation with the Advocate General. This should become a cadre post. He or she should be able to bring about proper coordination without affecting the independence of the prosecutors. The Criminal Justice Reforms Committee also recommended that the Director function under the guidance of the Advocate General of the State. The duties of the Director of Prosecution, *inter alia*, shall be to facilitate effective coordination among the investigating and prosecuting officers, and review the working of the PPs, additional public prosecutors and APPs, and investigators.

Re-organized District Prosecution Agency

The district prosecution agency should handle all criminal prosecutions in the district. Personnel constituting this agency should be full-time employees and recruited on merit by the Public Service Commission. The APPs who appear before the courts of magistrates should be given intensive training to develop their professional

While the prosecutor should not be dependent on the police, he or she should be able to seek closer cooperation with the investigating officer. The investigating officer's intimate knowledge of facts can certainly help the prosecutor in countering the defense. At the same time, the investigator will gain immensely from the expert legal knowledge of the prosecutor.

skills. Section 24 (6) contemplates a cadre of prosecuting officers in the State. The system of preparing panels by the district magistrate in consultation with the district judge is a poor and inadequate substitute to a cadre-based system. When any cadre is constituted, opportunities for promotion to some higher positions should be provided to give proper incentive.

At the State level will be the Directorate of Prosecution constituted under Section 25A of the Code of Criminal Procedure to whom the District Prosecution Agency will be subordinate. The Committee on Criminal Justice Reforms was also of the view that the Director may call for reports in any case which ends in acquittal, from the prosecutor who conducted the case and the Superintendent of Police of the district to review the work of the prosecutor and of the investigation. This would bring greater accountability to the system.

The recommendations of the Committee regarding the district prosecution agency may be summed up as follows:

(i) All appointments to APPs shall be through competitive examination held by the Public Service Commission.

(ii) Half of the vacancies in the posts of PPs and APPs at the district level in each State shall be filled up by selection and promotion on seniority-cum-merit basis. The remaining half shall be filled by selection from a panel prepared in consultation with district magistrates and district judges.

(iii) No person appointed APP or promoted to PP shall be posted in the home district to which he or she belongs, or where he or she was practicing.

(iv) PPs appointed directly from the Bar shall hold office for a period of 3 years. However, the State may appoint as special public prosecu-

tor any member of the Bar for any class of cases for a specified period.

(v) In appointing PPs and APPs to various offices, sufficient representation shall be given to women.

(vi) Intensive, continuous training is to be given to all APPs.

(vii) Promotional avenues should be given to prosecutors in institutions of the police and judiciary.

(viii) The Director of Prosecution must ensure accountability by calling reports on all acquittal cases from both the prosecutor and the Superintendent of Police.

(ix) All prosecutors should work in close cooperation with the police department and render advice and assistance from time to time for efficient performance of their respective duties.

(x) Provision may be made for posting PPs and senior APPs at the offices of the police commissioner and district superintendent of police for rendering legal advice.

(xi) The Commissioner of Police and the special prosecutor may be empowered to hold monthly review meetings of PPs and APPs for ensuring proper coordination and efficient functioning of the prosecution system.

Enlisting Cooperation of Witnesses

It is unfortunate that witnesses who constitute an important element of the administration of justice are usually either indifferent, afraid of or so influenced by criminals that they either turn hostile or do not come forward with the truth. Inordinate delay in trials adds to the problem. During interrogation, the witness is bound to answer all the questions of the police, but he or she is not bound to answer them truthfully. Despite being criminalized, perjury is not taken seriously because the rules provide that no court shall take cognizance of the offense of perjury except on the complaint in writing of that court or of the court to which that court is subordinate. Before such a complaint can be made, a preliminary inquiry must be conducted. Although the Indian Parliament has introduced amendments to allow the court to try such cases summarily, increase the punishment for perjury, and administer the oath and caution witnesses to speak the truth at the pain of penal sanctions, witnesses can still take the plea that the statement recorded is not the same as he or she gave. Thus, the inspection officer is never sure if witness related the true facts of the case. This situation tends to weaken the prosecution. Furthermore, an influential accused can easily win over witnesses during the period between their examination by the police and their actual appearance in court.

On the other hand, by giving evidence relating to the commission of the offense, a witness performs a duty of assisting the court to discover the truth. Witnesses have no private stake in the decision of the court when they are neither the accused nor the victim. They perform an important public duty and devote their time to assist the court. They might incur the displeasure of the persons against whom they give evidence. They submit themselves to cross-examination and cannot refuse to answer questions. They take all this trouble and risk not for any personal benefit but to advance the cause of justice. Therefore, witnesses should be treated with respect and protected. Unfortunately, what is happening is just the reverse. Witnesses are not even adequately compensated for travel and other incidental expenses. Worse, their safety and that of their families' are not secured. The court should be made duty-bound to give necessary protection to witnesses.

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Recognition of Victim's Rights

Of all the parties in a criminal proceeding, it is the victim who has the greatest interest in the truth and the punishment of the guilty. However, under existing criminal law and procedure, only the prosecutor appointed by the State is considered the proper authority to plead on behalf of the victim. At best, a private counsel is given a limited role to assist the prosecutor with the permission of the court and may also submit written arguments after the closure of evidence in the trial.

Victims have a right to testify as prosecution witness. However, victims often fall prey to threats and harassment by criminals, dissuading them from testifying freely and truthfully. Absence of a victim protection law thus tends to weaken the prosecution system. The Committee on Criminal Justice Reforms has recommended changes in the law recognizing rights of victims in the conduct of criminal trials to accord them their rightful place in proceedings pertaining to their injury and ensure that the prosecution does not fail to perform its role due to neglect, incompetence, and corruption. The recommendations, *inter alia*, include:

(i) The victim—and a legal representative, if the victim is deceased—shall have the right to be impleaded as a party in every criminal proceeding where the offense is punishable with 7 years imprisonment or more;

(ii) In select cases notified by the appropriate government, an approved voluntary organization shall also have the right to intervene in court proceedings with the permission of the court;

(iii) The victim has a right to be represented by an advocate of his or her choice, provided that an advocate shall be provided at the cost of the State if the victim is not in a position to afford a lawyer;

(iv) The victim's right to participate in criminal trial shall, *inter alia*, include the right to: (a) produce oral or documentary evidence with leave of the court, and/or to seek directions for production of such evidence; (b) ask the witnesses questions or suggest to the court questions which may be put to witnesses; (c) know the status of investigation and move the court to issue directions for further investigation on certain matters; (d) be heard in respect of the grant or cancellation of bail; (e) be heard whenever the prosecution seeks to withdraw and to offer to continue the prosecution; (f) advance arguments after the prosecutor has submitted arguments; and (g) participate in negotiations leading to settlement of compoundable offenses.

(v) The victim shall have the right to prefer an appeal against any adverse order passed by the court acquitting the accused, convicting for a lesser offense or imposing inadequate sentence.

Lessening the Burden of Proof

Under the adversarial system of criminal justice, the accused is presumed to be innocent and the burden is on the prosecution to prove guilt beyond reasonable doubt. The accused also enjoys the right to silence and cannot be compelled to reply to questions. The judge under the system acts like an umpire letting the parties advocate their respective positions. The parties effectively determine the scope of the dispute and the evidence to be presented to the court. To appear neutral, the judge seldom takes any initiative to discover the truth. The system is heavily loaded in favor of the accused and can sometimes be insensitive to the legitimate rights of the victim.

Unless the system operates fairly for both sides, it is unlikely to serve the objective of punishing the guilty. The weaknesses of the prosecution, technicalities of procedure, and sheer manipulation of the rules of evidence can result in the acquittal of a guilty accused. The Committee on Reforms in the Criminal Justice System (2003) revisited the standard of proof required in criminal proceedings, opining that the burden of proof has to be shared in appropriate circumstances. As such, the committee made several recommendations for the reform of the law of evidence and procedure in order to be fair to the prosecution under the adversarial proceeding and to enable the judge to take an active role in discovering the truth. First, the committee desired to redefine the standard of proof in criminal cases which ought to be higher than "preponderance of probabilities" but lower than "proof beyond reasonable doubt." What is required is "clear and convincing" proof to convince the judge. Defining it in terms of "doubt" and "reasonableness" is inviting confusion, whereas leaving it to the conviction of the judge is in tune with the existing provisions of evidence law the world over. Thus, the standard of proof now is "the court being convinced that it is true" instead of "proof beyond reasonable doubt."

The committee also recommended the active involvement of the judge in the search for truth irrespective of the prosecution's failure to

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perform its assigned duties. Thus, the judge can now give directions to the investigating officers and prosecution agencies in the collection and submission of evidence. Section 311 of the Criminal Procedure Code was sought to be amended to let any court at any stage summon any person as a witness and reexamine any person already examined as it appears necessary for discovering the truth in the case. Section 482 was sought to be revised to clarify that every court shall have inherent power to make such orders as may be necessary to discover the truth or to prevent abuse of the process of the court or otherwise to secure the ends of justice.

Conclusion

The failure of prosecution is not always of its own making. While it is important to select prosecutors properly, give them adequate training, and constitute an independent directorate for professionalizing the system, it is equally necessary to study the systemic and structural weaknesses in the law and criminal law practice. After all, effective investigation and successful prosecution are the basic guarantees that the State has promised to victims of crime. Strengthening the system consistent with the rights of the accused is a condition *sine qua non* for fair and impartial justice.

Strengthening the Public Prosecutorial Service in Pakistan

Justice Shafiur Rahman

In Pakistan, public prosecution is a provincial subject. Thus, matters pertaining to administration and financial control of the prosecution service are within the purview of the provincial government. On the other hand, matters pertaining to rules of procedure and duties of prosecutors at criminal trials are governed by the Criminal Procedure Code of 1898.

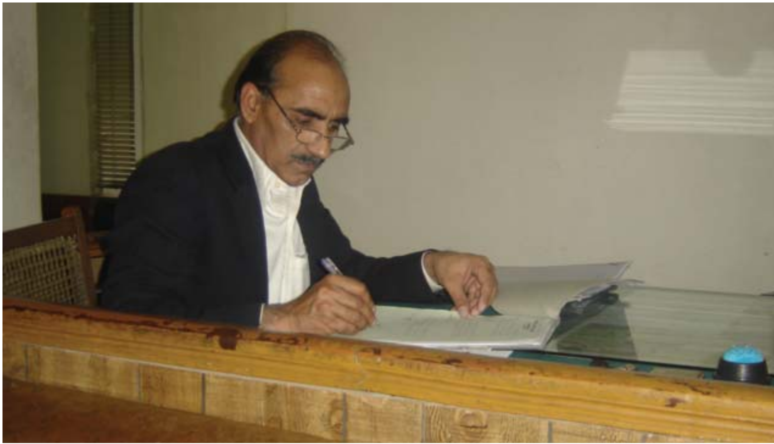
The prosecutorial service had two kinds of prosecutors. The first category included prosecutors appointed by the Government. These were public prosecutors for the district, for special cases, and public prosecutors *ex officio*. The other category included public prosecutors appointed by the district magistrate. In the district, there were four types of prosecutors: (i) district public prosecutor, (ii) deputy public prosecutor, (iii) deputy superintendent of police (legal), and (iv) inspector of police (legal). Due to having two categories of prosecutors, administrative control over and funding of the prosecutorial service were fragmented. While the Home Department had sole authority to confer powers on all categories of prosecutors, administrative control belonged to different departments. Police prosecutors were under the administrative control of the Home Department, whereas all other prosecutors were under the Solicitor wing of the Law Department. Consequently, funding for the prosecutorial service also came from these two departments. The conflict did not end here. Having police prosecutors also gave rise to other issues.

The main function of the police is to prevent the commission of crime by (i) collecting relevant information, (ii) providing security to localities, (iii) registering crimes, (iv) preserving evidence, and (v) identifying and protecting the witnesses of crime. On the other hand, investigation of a crime should be performed by a more professional and specialized agency. In the case of police prosecutors, delineation of police and prosecutorial duties are blurred and police prosecutors are burdened with a daunting combination of functions. This situation led to a prosecutorial service beset with institutional, organizational, human resource, and budgetary problems which hampered its efficiency, competence, and professionalism.

The gravity of the prosecutorial service problems in Pakistan can be perceived from the situation in Punjab, where greater statistical data are available. There are 45 district attorneys, 34 sessions courts, 175 deputy district attorneys, 145 assistant attorneys (doing only civil work as government pleader), 251 additional sessions judges, 46 deputy superintendents of police (legal), and 529 inspectors for 688 magistrate courts.[1] Thus, there are 575 police prosecutors under the administrative control of the Home Department and only 336 non-police prosecutors under the administrative control of the Solicitor wing of the Law Department. Of the total number of district attorneys, 75% are recruited from deputy district attorneys and 25% from deputy superintendents of police. Among the deputy district attorneys, 75% are recruited from assistant district attorneys and 25% by initial recruitment. The posts of deputy superintendent-legal are gained only by promotion, with no additional qualifications required, while the post of legal inspector is occupied only by initial recruitment. A legal inspector must have a law degree.

No standard is provided for regular assess-

[1] High-Powered Committee Report (1978); Report of Supreme Court of Pakistan (2000); 2001 Statistics of the Ministry of Justice; and Annual Report of High Court (2005).



Anamul Haque Anam

At present, there is no organized and integrated prosecutorial service in Bangladesh. The solicitor wing of the Ministry of Law, Justice and Parliamentary Affairs handles the prosecutorial function. The Ministry appoints prosecutors from among practicing lawyers or from the police for a short term, usually for the duration of one case.

ment of the performance of the public prosecutors. The closest form of assessment is an adverse remark in court judgments or opinions of the district magistrate. The statistics of Faisalabad (previously known as Layalpur), a district in Punjab, shows that, in 2002, 17,588 criminal cases were registered, of which (i) 15,960 were filed in court, (ii) 588 cancelled, (iii) 1,040 remained untraced, (iv) 4,073 resulted in conviction, and (v) 1,083 ended in acquittal. There are no available data on the average time required to take a case to the court for trial after its registration. Such data would reflect the quality of investigation.

In 2003, pursuant to the Access to Justice Reform Project, the provinces decided, after examining all the available models, to have an independent prosecution service operating under a statute functioning independently subject to policies of transparency and accountability. A draft law, the Criminal Prosecution Service (Constitution, Functions and Powers) Act, was proposed with the objective of establishing a criminal prosecution service to ensure prosecutorial independence, effective and efficient prosecution of criminal cases, and better coordination in the criminal justice system. The draft law, which would be more appropriately referred to as a model law, provides for (i) independence of the prosecutorial service; (ii) exclusive exercise of investigative functions by a separate wing of the police; (iii) effective mechanism of supervision, monitoring, and evaluation; and (iv) transparency in recruitment and accountability to civil society.

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As an independent statutory body, the prosecutorial service will not be subject to the control or direction of the executive department in which it is under. The department's role will be confined to that of a coordinator, facilitator, and resource provider. By placing the entire prosecutorial service under the Home Department, the draft law resolves the issue of duality of administrative control. Separation of investigative functions of the police would improve efficiency, competence, and professionalism. In addition, the draft law provides for effective consultation and supervision within the proposed prosecutorial service and by an independent outside agency called the Inspectorate of the Prosecution Service.[2] The recruitment to the service is to be done through an open competitive examination conducted by the Public Service Commission, a credible recruitment body for all the services of the province. As a means of evaluating and monitoring performance, the prosecutor general will be required to submit annual reports which are to be laid before the Assembly and made available to the public.

The prosecutorial service is to be headed by a prosecutor general, with additional deputy and assistant prosecutors general. In the districts, there would be district public prosecutors, assistant district public prosecutors, and such other public prosecutors as may be appointed by the Government or prosecutor general from time to time. Their duties would extend beyond conducting cases in courts to supervising and guiding their colleagues and subordinates and the officers investigating the cases. Recruitment up to the level of additional prosecutor general will have to be made through the Public Service Commission on the basis of competitive examination. The police registering the criminal case, the police investigating the case, and the police filing the interim or final report will all be placed under effective

[2] Section 13 of the draft law.

supervisory control of the district public prosecutor. The district public prosecutor is to act as member of the Criminal Justice Coordination Committee constituted under Article 110 of Police Order 2002. This would enable the representative of the agency to effectively participate in the collegiate functioning of the district administration.

The draft law was intended to override all other laws related to the same matter. Its outstanding features are (i) primacy of its provisions over all related laws (Section 21); (ii) non-extendable secure tenure of 4 years to the director general of prosecution, with protection of emoluments, etc. (Section 7); (iii) initial recruitment at the lowest tier through a transparent and established procedure (Section 6); (iv) reporting to the Assembly within 2 months of the submission of annual report to the Government which makes the report a public document, to reflect accountability to the Parliament and to the people (Sections 12 and 18); (v) provision for periodical independent monitoring and evaluation of the service (Section 13); (vi) collegiate cooperative functioning for achieving common goals (Section 12 [9]); (vii) reactivation of the magisterial functions under Sections 156 and 157 of the Criminal Procedure Code; and (viii) effective oversight over investigation (Sections 8 and 9).

This draft law has now been enacted into law in the provinces: (i) Punjab enacted the Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act 2006 (Act III 0f 2006) on 8 April 2006; (ii) Sindh promulgated the Sindh Criminal Prosecution Service (Constitution, Functions, and Powers) Ordinance 2006 on 26 July 2006; (iii) Balochistan promulgated the Balochistan Prosecutorial Service (Constitution, Functions, Powers) Act VI of 2003 on 17 October 2003; and (iv) North-West Frontier Province (NWFP) promulgated the North-West Frontier Province Prosecution Service (Constitution Functions And Powers) Act of 2005 on 29 January 2005. The laws enacted by Balochistan, NWFP, and Punjab incorporated most of the provisions of the draft law except for Section 13 of the draft law.

Clearly, Pakistan is on its way to reform in the right direction. However, as with any reform effort, bottlenecks are to be expected. It is, therefore, necessary to prepare for potential issues and obstacles so that the reform can proceed. As such, several recommendations are made here.

First, it is crucial to have strong-willed leaders who would really implement the reform agenda and a vigilant society who would exert sufficient pressure on their leaders. In theory, separation of the investigation from the executive and protocol duties of the police has taken place but, in practice, this has yet to be fully implemented. It is, therefore, essential that all the authorities, the Solicitor wing of the Law Department, the prosecution service, the Home Department, the police, the courts administering criminal justice, and civil society cooperate to carry this reform through.

Second, there is a need to build capacity. Inasmuch as the separation of the prosecutorial service and the police is both a cause and an outcome of specialization of functions, both agencies must increase their respective capacities to perform their functions ably. Crime is becoming so sophisticated and technical that training and education should be made a part of the new system.

Third, the reform process should be monitored closely for at least 2 or 3 years. In this way, not only the individuals involved get guidance,

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Muhamman Bilal

Pakistan has police prosecutors, which gives rise to various issues. The delineation of police and prosecutorial duties is blurred, and police prosecutors are burdened with a daunting combination of functions. This situation led to a prosecutorial service beset with institutional, organizational, human resource, and budgetary problems.

but the whole system is also improved. Sufficient provision has been made for reporting and oversight within the department but this has to be intensified as a departmental practice during the first 2 or 3 years.

Fourth, all the provisions of the draft law and procedure directed toward securing transparency and accountability should be strictly enforced and new methods of achieving it should be devised. Such transparency and accountability should not be limited to superiors within the department but should extend to civil society. One way of doing this would be through the issuance of semiannual press releases on its performance without, of course, encroaching on privacy or court processes.

Fifth, the system should encourage performance beyond the call of duty and instill the willingness to improve skills. This can be done through a system of recognition and reward.

Apart from the foregoing, other issues are likely to surface in the course of implementing the reform agenda. While not all issues can be anticipated, addressing issues that can already be foreseen beforehand would serve as safety nets when new issues arise.