

Quest for an Independent, Permanent and Efficient Prosecution in Criminal Justice System of Bangladesh

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Abstract

In case of a crime, it's the responsibility of the state to bring the offender to book. The process largely depends on the performance of the public prosecutors. Lawyers appointed by the state to conduct criminal cases on its behalf are called Public Prosecutor. Prosecutors are amongst those influential stakeholders who play a pivotal role in providing justice in criminal cases. Unfortunately Bangladesh is having a prosecution system which suffers from many problems and drawbacks, e.g. disposable nature of the prosecution team, serious flaws in appointment procedure, vesting the prosecutors with a number of powers worth enforcing arbitrarily and want of political will to make the prosecution effective that are bringing out huge miseries for justice-seekers. This paper aims to look into the current state of the public prosecutorial service in Bangladesh with its problems, and make recommendations to improve the situation.

Keywords: Public Prosecutor, Prosecution, Criminal Justice, Bangladesh, Justice

Introduction

Warren Burger, former Chief Justice of the United States said, “*the function of the judicial system is to produce justice at the lowest possible cost, within the shortest possible time, with the least possible strain on the participants.*” Therefore in criminal justice system, a number of offences are considered to have happened against the state and the state takes the responsibility to make sure the justice for the victim and his family. In doing so, state appoints lawyer to prosecute the offenders. In Bangladesh, those lawyers are basically known to be ‘Public Prosecutors’. The provision of appointing lawyers in state’s expense is a pretty good idea, for sometimes victims don’t have enough courage and capacity to proceed with a criminal case especially when the accused is from some influential backgrounds. State has devised the provision of appointing public-sponsored prosecutors so that no crime can go unpunished. Because, if culture of impunity grows up in a society, it conveys a message to the perpetrators of crime to the effect that law is only a paper-tiger having no power of bringing the offenders to back. Since prosecutors play the remarkable role in criminal justice system, they should be knowledgeable, well-paid, non-corrupt and dedicated to their service. In Bangladesh, prosecutors lack these very essential virtues and therefore justice has been in jeopardy yielding very little positive outcome in favor of victims.

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Who are public prosecutors?

Public Prosecutors are state-sponsored lawyers who represent the state in criminal cases throughout the court-process from the first appearance of the accused in court until the accused is acquitted or convicted. Prosecutors review the evidence brought to them by law enforcement agency to decide whether to file charges or drop the case. Prosecutors present evidence in court, question witnesses, and decide whether to negotiate with defendants. They have great discretion or freedom to make choices about how to prosecute the case (West's Encyclopedia of American Law: 2017).

The Code of Criminal Procedure 1898 which is the flagrant law of criminal procedure in Bangladesh defines 'Public Prosecutor' in section 4(1)(t) to be any person appointed under section 492, and includes any person acting under the directions of a Public Prosecutor.

Significance of public prosecutors in ensuring justice

When someone commits a crime of murder, he is considered to have committed the crime against the State. It is the responsibility of the State to make sure the punishment of the offender. Whether the State can successfully perform its responsibility depends largely on the performance of a public prosecutor who represents the State throughout the criminal case.

Functions of the Public Prosecutors

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.

Structure of public prosecution in Bangladesh

The prosecution wing in every district so far as it is related with criminal justice consists of the posts of Public Prosecutor (PP), and Special Public Prosecutor (SPP). All these law officers are accompanied by additional and assistants, whose numbers vary depending on the number of courts they must cover, and the size and population of the district (Ashrafuzzaman, 2008). There are as many as 4,000 public prosecutors as well as additional and assistant prosecutors in Bangladesh (Liton, 2016). They are entrusted 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 can 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.

Duties of Public Prosecutor

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 (Menon, 2006).

The duties of public prosecutor can be divided into three types. The first type refers to duties performed independently, without taking 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.

Problems of Bangladesh Criminal Justice System as Regards Prosecution**Serious flaws in appointment**

No particular rules or guidelines are being followed to appoint public prosecutors in Bangladesh. There is a manual titled '*the Legal Remembrancer's Manual 1960*' which is supposed to have legal effect till now and be followed by the executive organ of the State in making recruitment in these vital positions. Clause 17 of the aforementioned manual prescribes the procedures for appointment of Public Prosecutor. It suggests the procedure of inviting application from prospective candidates for the post and giving formal appointment to the most competent applicants for a period of 3 years. The procedure as laid down in this manual is much better than that being followed today.

Currently, the recruitment process is based on the political choice of the ruling political party of the day. The local parliamentarian, influential political leader associated with the ruling party or bar association leader with political affiliations, or perhaps all of these, make lists of lawyers to serve as prosecutors. They send these lists to the Ministry of Law, Justice and Parliamentary Affairs through the office of the local deputy commissioner, who is the *ex-officio* district magistrate, or directly to the ministry by 'selectors', depending on the extent of their power and influence. The government appoints prosecutors from among those recommended.

Under the caretaker government of 2008 led by Fakhruddin, a slightly different type of procedure had been followed. In some cases, interested lawyers had sent applications to the offices of deputy commissioners to seek positions and the government had made its choices after inquiries conducted through intelligence agencies as well as in view of the relationships between the applicants and officials in related agencies. Thus the political affiliations of some prosecutors were less pronounced than before, although they were still screened in order that they were proven reliable for the government's purposes.

The case of Khodad Khan Pitu

The absence of special procedures to screen and appoint prosecutors became all too evident in the case of Khodad Khan Pitu, a lawyer of the Naogaon District Bar Association who was appointed as Public Prosecutor of Naogaon on 13 June 2007. The District Magistrate of Naogaon appointed him without any official permission from the Ministry of Law, Justice and Parliamentary Affairs. It subsequently came to light that Khan was an accused in a criminal case relating the assassination of a leader of a student organization, Azgor Ali, at the Rajshahi University, under trial in the Rajshahi Session Judge's Court. Khan claimed that he was not aware of the murder case against him, although he admitted that he had been discharged from another murder case. Moreover, at the time of appointment Khan was also an accused in another criminal case regarding violation of electoral rules, under trial in the Magistrate's Cognizance Court of Naogaon.

In defence of his boss Sajal Samaddar, Additional District Magistrate of Naogaon, claimed that the district magistrate is able to appoint temporary public prosecutors according to his ex-officio power under section 17 of the Law Report Manual. He maintained that they had been unaware of the cases against Khan at the time of his appointment and only learned about them through the news reports. A probe committee later found the reports to be true (Ashrafuzzaman, 2008).

Disposable Prosecution

There is no permanent prosecution system in Bangladesh. Whenever a party forms the government, all prosecutors are removed and replaced by a new group. Thus the country has been living with a disposable prosecution system.

Public prosecutors are political party playthings. Each time a new government comes to power—that is, each time power rotates from one of the two main parties to the other—all of the public prosecutors and assistant public prosecutors in the country are replaced, from attorney general down. They carry on until the next power flip-flop, and again the other side puts its own people back in. Prosecutors are also thrown out during a government's tenure if they dissatisfy the whims of a local member of parliament, a minister, or some other political leaders.

Scope of delegating prosecuting power may create chaos

The Code of Criminal Procedure 1898 defines the term 'Public Prosecutor' in a manner that may lead one to confusion and chaos. Section 4(1)(t) says 'Public Prosecutor' means any person appointed under section 492, and includes any person acting under the directions of a Public Prosecutor.

Islam emphasizes (2000, 1113) that by dint of this definition, any public prosecutor may engage any person to act under his direction and that person so engaged becomes a public prosecutor derivatively by the definition in section 4(1)(t). If a public prosecutor appointed by the Govt. employs any person as his junior and that junior gets the status of public prosecutor, there must occur some chaos. Because there are plenty of discretionary powers invested to the shoulder of the public prosecutor, he is expected to exercise fairly, impartially and with due diligence. Government may keep such degree of confidence and trust upon public prosecutors as they are

directly chosen and appointed by the government. Same level of trust cannot be invoked upon the juniors of the public prosecutors who have never gone through any sort of screening. If a criminal case is frustrated due to the inability and ineptitude of a junior of a public prosecutor, Government cannot even make that public prosecutor accountable.

Prosecutors suffer from inadequate knowledge

Younger and less-experienced lawyers seek appointment as prosecutors through personal and political channels. Those persons with the right connections can get one for free, but otherwise a down payment is needed, or guarantee of suitable repayments later. Thus, prosecutors often have inadequate knowledge of law and experience in legal practice but are pronounced in their political biases. The devastating impact of poor knowledge reflects on the poor performance and outcome of the prosecution case.

No coordination with investigating agency

The prosecuting and investigating branches are also completely detached. If the police do not investigate a crime, the prosecutor has no responsibility. Most of the time public prosecutors accept charge-sheets prepared by police officers solely because of bribes or other external pressure. They will only challenge the police when there is a direct conflict between the police and their political masters.

As per section 157 and 159 of the *Code of Criminal Procedure 1898*, Public Prosecutors in Bangladesh have no control over the investigation; such control lies with the magistrates. 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. Poor performance of public prosecutors and weakness in police investigation were identified long ago as the major reasons for the low rate of conviction in criminal cases (Liton, 2015).

Prosecutors are not well-paid

Those who are serving as public prosecutors are paid poor remunerations. A Prosecutor, Additional Prosecutor or Special Prosecutor gets just Tk. 500 to represent the government in one case. This is all he gets for a day's work, even if he represents 10 cases that day. Prosecutors cannot submit bill for more than one case a day. They are not allowed to do private practices either. If the court remains open for 20 days a month, a prosecutor can earn an amount of Tk. 13,000 (with additional Tk. 3000 for office expense) of which 15% tax is deducted as a result the net amount of their receipt is between Tk. 10,000-11,000. Assistant Public Prosecutors gets Tk. 200 per day that results the net amount of maximum Tk. 4000 per month. But he can do private practice (Ahmed, 2015).

The fact that their remuneration is poor, appears to be an obstacle to recruit skilled professionals. Because of the lack of facilities and remuneration, senior lawyers are reluctant to serve as prosecutors.

In this given socio-economic condition of Bangladesh, a family can in no way be maintained with this tiny amount. Not only that, such a poor remuneration humiliates the dignity of this position.

Public Prosecutors are informally considered to hold a position equal to that of a Joint Secretary or Asst. Secretary of the Government. But, in case of remuneration the difference is sky and earth. Because of such poor payments, some prosecutors are forced to earn money in dishonest ways giving injustice towards righteous party sometimes.

Role of police as prosecutor creates dilemma

Under sections 492(2) and 495 of *the Code of Criminal Procedure*, the government assigns police to conduct the prosecution in the magistrate's courts, which deal with around 70 per cent of all cases in the country (Ashrafuzzaman, 2008).

District Magistrate may, under section 492(2) of *the Code of Criminal Procedure 1898*, in the absence of the Public Prosecutor, or where no Public Prosecutor has been appointed, appoint any other person, not being an officer of police below such ranks as the Government may prescribe in this behalf to be Public Prosecutor for the purpose of any case. An Indian case (AIR 1930 Sind 156) decides that, the District Magistrate may validly appoint a Sub-Inspector of police as the public prosecutor for the case.

Any Magistrate inquiring into or trying any case may permit the prosecution under section 495 of the Code of Criminal Procedure to be conducted by any person. Here the words 'any person' include persons other than certified pleader. An Indian case (1983 UP Cr. LJ 401) decides in this regard that, no person can claim for it as a matter of right.

However, the provisions of this section apply to the conduct of a case before a trial court and they cannot be extended to an appeal. The permission to conduct prosecution cannot be granted to one who is an officer of police below the rank to be prescribed by the Government in this behalf. Any such police officer having permission of the Magistrate to conduct prosecution shall have the like power of withdrawing the prosecution as is provided by section 494, and the provisions of that section shall apply to any withdrawal by such officer. An officer of police shall not be permitted to conduct the prosecution if he has taken any part in the investigation into the offence with respect to which the accused is being prosecuted.

A police officer at the rank of sub inspector normally deals with the prosecution of cases before the court, although these officers do not have law degrees or training in prosecution; they are just transferred from a police station to the job, sometimes as punishment. In cases that are tried with police as prosecutors, the battle is imbalanced because the prosecution either fails to prove the charges or the accused are convicted on faulty evidence and reasoning and are acquitted on appeal.

The case of Abul Kalam Azad

The acute problems associated with having police served the dual role of prosecutors can be seen clearly in the case of Md. Abul Kalam Azad (Ashrafuzzaman, 2008).

Azad, a 33-years-old small businessman having two shops selling household aluminum goods in Khalishpur, Khulna city, was tempted by the field officers of an NGO-based bank, BRAC Bank, to take a loan to improve his business. Following frequent offers by the officials of the BRAC Bank, Azad agreed to mortgage the deed of his home, which had an approximate value of 600,000 Taka (USD 8500), for which he received a 300,000 Taka loan on 10 April 2005 under a 'Medium-Term Loan' programme. Before granting the loan the bank insisted that Azad put his signature on two blank checks, despite having the deed of his house as security.

After receiving the loan, Azad was asked to repay it by monthly installments of 17,700 Taka. He calculated that the money to be repaid to the bank would be at an interest rate of nearly 38 per cent and insisted that the bank limit the interest rate to the agreed rate of 15 per cent.

In response, the BRAC Bank lodged charges of deception and breach of trust against him under sections 406 and 420 of the Penal Code on 13 December 2005, at the Gulshan police station in Dhaka, although the loan dealings were under the jurisdiction of Khulna city, more than 300 kilometers away. In the complaint, Md. Mizanur Rahman, an officer of the bank, alleged that Azad received money from the Head Branch of the BRAC Bank situated under the Gulshan police station in Dhaka and was refusing to repay. Sub Inspector Anisur Rahman submitted an investigation report with the Chief Metropolitan Magistrate's (CMM) Court (now Chief Metropolitan Judicial Magistrate's Court) on 28 January 2006, bringing the charges against Azad, who had meanwhile been paying money to the bank without knowing about the case against him and in 19 installments had repaid 336,300 Taka.

On 25 September 2006, the Khalishpur police arrested Azad at his shop, following an arrest warrant issued by the CMM Court of Dhaka. He was detained in the Khulna District Jail for 23 days and then transferred to the Dhaka Central Jail where he was detained for five days. During the period of 28 days in detention he submitted a petition for bail; however, the court did not grant it: only on October 23 did the CMM Court of Dhaka grant bail.

Having been released from jail, Azad paid a further 85,736 Taka to the bank. According to his lawyer, this should have discharged him from the charge; however, the police who were serving as the prosecution did not understand the legal points. The Magistrate was also ignorant about the application. The court has lingered on the case by using the excuse that the complainant, who had by then switched his job from the BRAC Bank to a governmental department, has to appear. Azad was meanwhile has been forced to commute from Khulna to Dhaka for the ongoing hearings. Neither the police investigation report nor prosecution police has at any point suggested that it may not have been Azad who had lied but rather that it may have been the BRAC Bank, nor have they raised any questions about the fact that the incident occurred far outside the jurisdiction of the Gulshan police station.

Azad has had to sell one of his shops in order to pay the expenses associated with the trial. The case is still pending with the court. Although the case could be closed at any time, the lack of

legal knowledge among both the prosecuting police and the lack of interest and ability of the magistrate have caused it to be prolonged indefinitely (Ashrafuzzaman, 2008).

Representing private party creates unhealthy atmosphere

Except the public prosecutors, many additional and assistant public prosecutors do their private practices side by side. Thus, they use their positions to advance their private practices. Whenever they appear before the courts for their personal clients, it creates unseemly events in court such as the appearance of a group of witnesses without any prosecutor on hand to examine them or prosecutors who have not prepared for a hearing who confuse and intimidate their own witnesses. Unsurprisingly, such cases result in acquittals. There are also frequent complaints against prosecutors (especially SPPs) who having won a hearing in the lower court where they pleaded for the state reappear in the appellate court representing the other party as a private lawyer. Ironically, one cause of public prosecutors' ill discipline and tendency to engage in private practice when they are supposed to be working for the state is that they are not accountable for their actions. They cannot be sanctioned or punished if they fail to appear at their offices or in court. Only assistant and additional prosecutors are liable to their immediate superiors.

No scope of engaging Private Pleader vis-à-vis Public Prosecutor

If a victim cannot be satisfied with the level of legal knowledge and sincerity of a particular Public Prosecutor, he can engage a Private Pleader in his case to help Public Prosecutor in discharging his duties in that particular case. But the rule is as per section 493 of *the Code of Criminal Procedure 1898*: if any private person instructs a pleader to prosecute in any Court, the Public Prosecutor shall conduct the Prosecution, and the pleader so instructed shall act therein, under his directions.

The pleader instructed by a private individual may act in the case subject to the overall supervision of the public prosecutor. An Indian case (1951 MB 84) decides that, such a pleader can conduct the examination, cross-examination, re-examination and will address the Court as apparent from the language of the section.

As per an Indian case (AIR 1952 Pat), the two can work together in harmony. If they do not, the pleader may retire, or the prosecutor may claim to keep the further conduct of the case solely to himself. But as per another Indian case (AIR 1959 Andh. Pra 659), if in a particular case it happens that the very conduct of the prosecution is completely left in hands of the pleader for the private party, the provisions of the Code must be deemed to have been violated.

Having no chance of conducting prosecution independently even by a victim-financed private pleader is a serious obstacle to get justice. Corrupt Public Prosecutors may and are abusing this very provision to exploit the victim. Neither they are conducting the case properly with due care and diligence, nor are they allowing the victim or victim's family to employ a skilled private pleader without unlawful monetary transaction.

Consequence of Inefficient Prosecution

Frustration of prospect of justice

Appointing lawyers who belong to the ruling party as public prosecutors and government pleaders has now become a convention. Through this practice, the party in power favors its sympathizers at district levels by appointing them as the State's law officers. Loyalty to the ruling party is considered the topmost qualification to get the appointments. Efficiency and professionalism are of little value here. Due to their inefficiency, they cannot properly represent the government when any case is filed by or against the government. Their failure to perform makes the government the biggest loser. Similarly, they cannot perform their due role when they need to stand against their party men in criminal cases. This destroys the prospect of justice (Liton, 2015).

Rate of conviction in prosecution case is terribly low

A recent report of *the Daily Sun* claims that, crimes of corruption, sexual harassment, rape and abduction have been on the increase (*Violence against women-children on the rise*, 2016). Nevertheless the success rate of the prosecution in making sure the conviction of the criminals is very low for many reasons *inter alia* the lack of knowledge and sincerity from Public Prosecutors' side. Because of the poor performance of prosecution, only 25 to 30 percent cases see conviction (Liton, 2016). In 2005, the then law minister said inefficiency of the prosecution led to the quashing of some 70 percent cases (Liton, 2016).

Another recent study can be motioned here. It is reported that the Anti-Corruption Commission could not prove more than half of its cases at the trial stage for four years between 2012 and 2015. The commission statistics show that the trials of 662 cases were completed in several courts and the accused got acquittal in 411 of the cases between 2012 and 2015. Acknowledging the low success rate, the commission secretary, Abu M Mustafa Kamal, said that they pinpointed some faults of the commission investigators and prosecutors by scrutinizing the verdicts of some recent cases. The commission lost 62 per cent of its cases for flawed investigation and inquiry, lack of skill of its panel lawyers and legal loopholes, they said (Foyez, 2016).

Filing politically motivated cases and indiscriminate withdrawal

Section 494 of the Code of Criminal Procedure 1898 empowers the public prosecutor to withdraw the name of any accused from prosecution. Under this section, any public prosecutor may, with the consent of the court, before the judgment is pronounced, withdraw from the prosecution any person either generally or in respect of any one or more of the offences for which he or she is tried. Thus the public prosecutor is invested with a general executive power to withdraw from prosecution subject to the court's consent, which may be determined on many possible grounds. The law gives the prosecutor a real discretion in the matter. There is no indication in section 494 of CrPC in respect of the grounds on which public prosecutors may make the application, or the consideration on which the court is to give the consent to withdraw a case.

As the politically appointed prosecutors feel themselves bound to protect the interest of the ruling party, they exercise this statutory power of withdrawal and indiscriminately withdraw a huge number cases filed against the ruling party men.

In Bangladesh, withdrawal of criminal cases by the public prosecutors has become a matter of great public debate since 2001. After BNP-led alliance was voted to power in 2001, reportedly it withdrew around 5,888 cases to release around 73,541 persons having been politically affiliated with the BNP and its allies. At the same time names of party supporters, who were accused in around 945 criminal cases, were also withdrawn by the government. Similarly, the present government (Awami League-led alliance) took steps to release large numbers of accused persons by executive action on the basis that these cases are fabricated due to political reasons. The ruling Awami League led 14-party alliance government has withdrawn a total 7,173 criminal cases (Sarker, 2014) including several sensational murder cases (The Daily Prothom Alo, 2014) filed during the military backed caretaker government and BNP-Jamaat-e-Islami led four-party alliance government. The withdrawal released more than 1,00,000 accused. Such practice is not consistent with the concept of rule of law and of the independence of the judiciary.

Suggestion to Make Things Better

Independent & permanent prosecution system

The difficulties arise because of appointment of public prosecutors on the basis of political affiliations. Appointment to such vital offices should not be allowed on the basis of political party preferences. But even today, government distributes these offices among their sympathizers. And after assuming office many incumbents feel that they need to look after the interests of the ruling party.

Public prosecutors must not be appointed on the basis of political consideration or affiliation. An independent and permanent prosecution system is the demand of the time and if such a system can be introduced, a number of vices will go away from the sphere of judiciary including filing cases for political harassment.

The reaction and opinion of Dr. Shahdeen Malik, one of the leading law-experts of Bangladesh is worth mentioning in this regard. In an interview he said, in every country of this world a few top-most law-officers including Attorney General are appointed on political basis that are disposable with the change of political regime. Except that, all other officers get permanent appointment upon competitive exam. He suggested that Bangladesh Judicial Service Commission may be empowered to take exams for recruiting public prosecutors. Implementation of this policy can produce skilled law-officers who can conduct prosecution with sufficient strength of knowledge, courage and confidence (Hossain, 2014).

He further pointed out that every organization of our country except the state appoints permanent lawyer to protect its interest. Therefore, in a case battled between private organization and the

state, the former wins most time. He claimed in 90 cases out of 100, the State becomes looser because of the inefficiency of the prosecution system.

Functional collaboration between investigators and the prosecution

A functional collaboration between investigators and the prosecution is needed for higher rate of conviction to ensure justice and punishment of the offenders. Hardened crimes and cruelty of criminality were increasing in Bangladesh where prosecution success rate was very low due to the investigators' failure to collect proper evidence and prosecution's failure to analyze the evidences and documents supporting their cases. Collaboration of investigators and prosecution is needed to get better result in convicting the offenders as success in the cases depends on adequate evidence. Nepal is exemplary in this regard. There the conviction rate jumped to 81 per cent in two years from 41 per cent only for collaboration of investigators and the prosecution (*Teaming up of investigators, prosecution stressed for justice*, 2016).

Guideline on withdrawal of cases must be incorporated

In a case of withdrawal from prosecution under section 494 of the Code of Criminal Procedure, if the prosecutor takes a fair and independent step to withdraw a case then the court should accept this and permit withdrawal. However, the prosecutor must satisfy the court with regard to the reasons and circumstances justifying the withdrawal from prosecution (Akkas, 2010).

In the case *Sikandar Ali Sikdar Vs. State & Others* (31 DLR AD 135), the Appellate Division of Supreme Court of Bangladesh held that, the power of withdrawal of cases must be exercised in the interest of the administration of justice. It is not sufficient for the public prosecutor to merely say that it is not expedient to proceed with the prosecution. He has to make out some grounds namely prosecution suffer from scarcity of evidence, prosecution is not well-founded and other circumstances. But the paramount consideration is the administration of justice.

Private Pleader should not be intervened by Public Prosecutor

It has been pointed out earlier that a victim of criminal case may appoint private pleader if he doesn't have enough confidence upon the Public Prosecutor. But that private pleader must act staying within the boundary set by the Public Prosecutor and in case of objection raised by Public Prosecutor against private pleader, the later must stop or retire. This provision is seriously flawed. Bangladesh Law Commission's Final Report on *the Draft of the Code of Criminal Procedure (Amendment) Bill 2013* recommended that this Section of the Code should be amended to allow the concerned private parties to employ their own advocates to submit and take part in the proceedings without the permission of public prosecutor.

Independent Prosecution System: Experiences of Overseas

Upon independence, Bangladesh, India, and Pakistan inherited the colonial model of the prosecutorial service which had two distinguishing 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 (Rahman, 2006).

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 2002, in the case of *P Ramachandra Rao* (2002, 4 5CC 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 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 APR. 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 (2002, 4 5CC 578 pr. 20).

The Pakistan Model

As a result of the Access to Justice Program funded by the Asian Development Bank, reform in a larger but coordinated sector has been 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 (Rahman, 2006).

The 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 (Rahman, 2006).

Selecting the Appropriate Model

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.

How can an Independent Prosecution System be Implemented in Bangladesh**Move to form permanent prosecution ignored in every regime**

There has always been demand for reforming the prosecution system with professional lawyers who are supposed to dispense justice. But the successive governments have not paid any heed to the demand.

In December 2003, the then law minister Moudud Ahmed at a workshop on strengthening the criminal justice system had proposed the formation of an independent public prosecution service (*Permanent public prosecution system soon for speedy disposal of criminal case*, 2005). But there was no progress in this regard. The party that was in power back then had not lost the opportunity to appoint its leaders public prosecutors.

The past caretaker government led by Fakhruddin Ahmed in 2008 had done the groundbreaking work of enacting a law through the promulgation of an ordinance to set up a government attorney department. The law made through the ordinance had mandated that an individual must have certain qualifications to get appointed as a public prosecutor. The law ministry had also sent a proposal to the establishment ministry for creating more than 3,000 posts for the attorney department. Lawyers had welcomed the caretaker government move to stop politicization of the public prosecution services. But as soon as the tenure of the caretaker government ended in early January 2009, the move was reversed.

The Awami League that came to power in January 2009 had opted for retaining the system of appointing party men to the prosecution wing, allowed the law made by the caretaker government

to cease to have any effect. On July 5, 2015, Chief Justice of Bangladesh Mr. Surendra Kumar Sinha himself decried the existing system of appointing ruling party men as public prosecutors as well as the faulty investigation by police. He also spoke about their poor knowledge on criminal laws. But nothing has changed yet (Liton, 2016). The government continues to form its prosecution team in every district with partisan people. The AL-led government has never made any move to reform the public prosecution system (Liton, 2015).

Challenges to Strengthening Prosecutorial Service of Bangladesh

There are some challenges specific to Bangladesh context Strengthening Prosecutorial Service. 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 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 prosecution 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.

Temporary solution may even be found in existing framework

The Legal Remembrancer's Manual 1960, Clause 17 prescribes the procedures for appointment of Public Prosecutor. The procedures contained in that clause and quoted below are still valid *mutatis mutandis*, but it is highly doubtful whether these procedures are at all adhered to while selecting and appointing Public Prosecutors. The clause 17 goes as below:

- (i). *Whenever the office of the Public Prosecutor becomes permanently vacant, the District Magistrate in consultation with the Session Judge, shall inform the Legal Remembrancer whether sufficient suitable candidates are*

available locally or whether application of candidates from outside the district should also be called for.

- (ii). *If the Legal Remembrancer decides that no suitable candidate is available locally, he may, in consultation with the District Magistrate, recommend to the Governor to fill the vacancy by transferring any other public prosecutor who is willing to accept the post.*
- (iii). *If the vacancy is not filled by transfer, the District Magistrate shall be asked to advertise the vacancy, either generally or locally as the case may be.*
- (iv). *When the vacancy is advertised generally all applications shall be submitted to the District Magistrate of the district in which the applicant usually practises who shall forward them to the District Magistrate of the district where the vacancy occurs with his recommendations after consultation with the District Judge as to the fitness of the applicant for the post. Applications from the candidates practising on the appellate side of the High Court shall be submitted to the Deputy Superintendent and Remembrancer of the Legal Affairs, East Pakistan. All such applications shall be forwarded to the Magistrate of the district when the vacancy occurs with the recommendations of the respective officers.*
- (v). *All applications in respect of such advertisement shall be received by the District Magistrate, who shall forward them through the Commissioner to the Legal Remembrancer together with the recommendation of himself and the Sessions Judge.*
- (vi). *After the Legal Remembrancer has considered all the applications he shall forward a list showing in order of preference the names of four most suitable candidates with his recommendations to the Government in the Judicial Department by whom the appointment shall be made.*
- (vii). *All appointments made after the appointed day shall be for a period of three years and may be renewed for further period if the incumbents are found fit and efficient.*
- (viii). *Incumbents will receive their letters of appointment through the Legal Remembrancer.*
- (ix). *No person shall be deemed to be qualified for appointment as a Public Prosecutor until he has practised for five years as a pleader, advocate or a barrister.*

If the Government finds it difficult to introduce an Independent Public Prosecution Service immediately, there is no problem standing in the way of sticking to the existing procedure as prescribed by the Legal Remembrancer's Manual. A glance at the procedure will show that the existing system, if acted upon, will eliminate scope for political intervention to a great extent, which is now ruling such appointments as divulged, again, by the Law Minister, and ensure appointment of suitable candidates for these positions (Khan, 2003).

Conclusion

The present system continues to worsen the situation, jeopardizing the prospect of providing victims with justice. Establishment of an independent and permanent prosecution service and recruiting competent prosecutors through a transparent process are now the only ways to get rid of the present crisis. To make the prosecution system effective and efficient, the reform process must change both the institutional and organizational attributes of the prosecutorial service. It's recommended to establish an independent and permanent prosecution service rather than a disposable one under executive control and train all persons recruited to it. Specific rules should be made on recruiting of prosecutors to the service through an independent and transparent process. A system to monitor and assess the performance of prosecutors should be designed and further improvements to the service should be made. Prosecutors should be provided with adequate remuneration, equipment and support. An internet network and public information database may be established with access to documents relevant to ongoing trials for the parties to those cases and with general information on events and issues of public importance. An audio-visual documentation system may be set up for prosecutions and the proceedings of trials. Close circuit cameras (CCTV) can be installed to monitor activities of court staff and record malpractices and corrupt dealings.

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