

PUBLIC PROSECUTORS, VICTIMS AND THE EXPECTATION GAP: AN ANALYSIS OF INDIAN JURISDICTION

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Public prosecutors hold a crucial position in the criminal justice system. They act neutrally to assist the court and produce the true picture of crime. Since victims are given a backseat by reducing their status from a ‘party’ to a ‘prime witness’, they rely heavily on the performance of the public prosecutor to win them justice. The paper analyses the standard of public prosecution office in India on the basis of three theoretical models provided by J. Fionda, i.e. operational efficiency, restorative and credibility models. Through this analysis, the paper highlights the deficiencies in the existing public prosecutor office and the resulting expectation gap, followed by suggestions to improve the deficiencies.

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INTRODUCTION

Today's victim is not just a victim of crime but can also be a victim of the apathy of the criminal justice system.

Under domestic as well as international law, the state has a responsibility to protect its citizens. Thus, every crime committed is considered a failure of the state (government) for not preventing its commission.¹ In order to comply with its role as protector of society, the state considers any crime committed to be against itself, and not against the victim alone. It professes to guarantee justice to the victim and society at large by punishing the offender and prosecuting the case under its own name.² By taking over the responsibility of the prosecution, the government seeks to maintain public confidence and faith in its criminal justice system. Public prosecutors represent the state in a criminal trial with a duty to assist the fair trial process and to prevent the misuse of the court process by not letting the citizens directly handle criminal cases for satisfaction of personal vengeance.³ The UN Guidelines on the Role of Prosecutors describe the role of the public prosecutor in detail, stating that prosecutors must strive to use every legitimate means to obtain justice, without resorting to any improper methods which could result in a wrongful conviction.⁴

In this context, the role of the victim gets reduced to that of a prime witness rather than that of an active participant (party) in the trial. However, while placing that trust in the government and the criminal justice system, the victim harbours expectations that their case will be prosecuted with full efficiency and sincerity, the offender will be duly punished, and that he will be kept involved in the trial.

On the other hand, the state's expectation is best described by McDonald, that the crime is one against the state and as a result the damage caused to the victim is treated as incidental, without there being any responsibility of the criminal justice system to redress the victim's damage.⁵ According to him the criminal justice system is not for the individual but for society and by taking over the prosecution, the state tries to protect the interests of society at large.

¹ DANIEL MOECKLI, SANGEETA SHAH AND SANDESH SIVAKUMARAN, INTERNATIONAL HUMAN RIGHTS LAW ch. 6 (2nd ed. 2014).

² R.V. KELKAR AND DR. K.N.C. PILLAI, LECTURES ON CRIMINAL PROCEDURE ch. 2, 9 (4th ed. 2006).

³ Public Prosecution in India: An Argument for Autonomy, Aman Trust, 89 (Apr. 2005), <http://www.amanpanchayat.org/Files/Reports/public-prosecution.pdf>.

⁴ U.N. Secretariat, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, at 188, A/CONF.144/28/Rev., Sales No. E.91.IV.2 (1991). See Articles 10-13 of the Guidelines on the Role of Prosecutors.

⁵ Josephine Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11(5) PEPP. L. REV. 121 (1984).

This leads to a gap between the expectations of the victim, the performance of public prosecution as it currently exists, and the appropriate balance between the expectation of the victim and the role of the public prosecutor as it should be. Because of limited involvement of the victim and ineffectiveness of the public prosecutors who act on behalf of the state, the declared protection of the victim by the state can become a mere pretence. The gap is created when the role of a public prosecutor is interpreted as that of a minister of justice and it is considered that his role is not to secure conviction but to assist the court in arriving at a true and clear picture of the case.⁶

This paper aims to analyse the role of the public prosecutor in India. The analysis is divided into 3 parts. In Part I, it explores how every criminal justice system faces certain challenges in creating a balance between the expectations of the victim and the role of the public prosecutor. The challenges vary - they could be the inefficiency in the public prosecutor's office as it gets tainted with corruption, ignorance, or callousness, or the ineffective accountability system. These challenges affect the expectation of the victim from the role of the public prosecutor. This paper seeks to explore the reasons for the same gap on the basis of three theoretical models. In Part II, the paper offers a few workable suggestions to bridge this expectation gap. It addresses the importance of 'victim representation' in a criminal justice system and explores the viability of private prosecution as a solution to the problem of lack of victim representation while discussing the response of the two jurisdictions to the mode of private prosecution. Part III of the paper concludes the paper with final analysis and suggestions for efficient prosecution.

I. BALANCING EXPECTATIONS OF THE VICTIM AND THE ROLE OF THE PUBLIC PROSECUTOR

A. The three models: A bridge to the 'expectation gap'

Fionda in her comparative study on prosecutorial discretion explores three theoretical models i.e., the operational efficiency model, the restorative model and the credibility model.⁷ The paper uses these three models as a measure to test the effectiveness of the public prosecution as it exists today, in the two jurisdictions. Testing the systems against the models reveals the 'expectation gap'. The paper asserts that conformity with essential features of *all* the three models is indispensable for a criminal justice system to be free from the expectation gap.

The three models and their features have been elaborated below:-

⁶ Meredith Blake and Andrew Ashworth, *Some Ethical Issues In Prosecuting And Defending Criminal Cases*, CRIM. L. REV. 16 (1998).

⁷ JULIA FIONDA, PUBLIC PROSECUTOR AND DISCRETION: A COMPARATIVE STUDY 173 (Clarendon Press, 1995).

(a) The Operational Efficiency Model

As the name suggests, this model reflects the need for administrative efficiency.⁸ In the present context, ‘administrative efficiency’ means that public prosecutors perform their role effectively. To ensure their effective performance, there are various factors which are essential, such as:-

Appropriate mode of appointment: The quality of human resource determines the efficiency of work. The mode of appointment forms an essential feature of an effective public prosecutor’s office since if the appointment process is politicized or ineffective at ensuring the competence of new recruits, then it has a direct impact on the functioning of the criminal justice system. Hence, it is essential that the recruitment process is such that it assesses potential candidates not just on their knowledge and expertise, but also on their experience and calibre to conduct criminal trials.

Adequate resources and incentives: Once the prosecutors have been selected, it is equally important to provide them with sufficient resources to prepare for the trial without needing to make any compromise on quality and also to award them with incentives by providing recognition and encouragement where necessary. Low salaries and inadequate manual and material resources to assist the office of prosecutors lower the level of input and enthusiasm significantly. Moreover, as rightly observed by Court of Appeal in *R. v. Munaf Ahmed Zinga*,⁹ the effect of paucity of resources for public prosecuting agency is detrimental to the ‘public purse’ since the exponential cost of private prosecution is borne by the victims.

Balance between workforce and workload: While recruiting public prosecutors, an estimate should be made of the number of prosecutors required as against the number of cases. An imbalance between the workforce and workload impacts the quality of the performance directly and affects the outcome of the criminal trial. Any sort of inefficiency can have a grave impact in a criminal trial, whether in the form of a wrongful conviction or the acquittal of a guilty person, so it is essential that public prosecutors can give sufficient time and attention to each case.

Updated code of conduct: There should be detailed guidelines for public prosecutors which must be regularly updated with information regarding the correct exercise of jurisdiction and procedure for trial. These may also be linked with performance assessment reports and may highlight areas where public prosecutors need to improve.

⁸ *Id.*, at 176.

⁹ *R. v. Munaf Ahmed Zinga*, 2014 EWCA Crim 1823.

Performance Assessment: A mechanism for performance assessment serves the dual purpose of monitoring the functioning of public prosecutors and making them accountable. It also provides an overall idea of compliance with the code of conduct and the pattern of use of discretion by prosecutors, which can help in updating the guidelines mentioned above. The complete report of performance assessment over a period of time can reflect the level of effectiveness of the public prosecutor's office in a criminal justice system.

(b) The Credibility Model

This model has two aims. The first aim is to maintain public confidence in the criminal justice system. The public prosecution norm has imbibed in itself the tenets of the legitimate exercise of government power and pursuit of justice.¹⁰ The very fact that criminal prosecutions are brought in the name of the state rather than of the individual parties poses the need for public confidence in the system and the state.¹¹

The second aim of this model is to deter potential criminals. The accountability and efficient functioning of public prosecutors is essential to ensure this. If offenders develop an impression that the prosecution system is weak and inefficient, they will commit offences without much fear of conviction. Judicial review of the discretion used by public prosecutors is essential as both victims and the public at large have an interest in the proper enforcement of laws.¹² For instance, Tyler, while arguing for a self-regulatory approach towards law and criminal justice, weaves the two aims of the credibility model into one thread. He highlights the need for public confidence in the system to ensure its legitimacy, which in turn has a deterrent effect far greater than the risk of punishment.¹³

For the realization of its two aims, the credibility model is dependent on the 'operational efficiency' model. If a criminal justice system operates successfully and efficiently it helps in maintaining public confidence and deters further crime. In addition to the successful implementation of the operational efficiency model, however, this model also requires effective accountability standards.

Accountability Standards: Accountability standards keep a check on the functioning of the prosecutors, and also help secure the efficient functioning which consequently assists in maintaining the faith of the public in the criminal justice system. When the culture of non-accountability and minimal vigilance is allowed to prosper, it results in a gradual deepening of the roots of corruption within the

¹⁰ *R. v. Munaf Ahmed Zinga*, 2014 EWCA Crim 1823, para 435.

¹¹ Roger Fairfax, *Delegation of the Criminal Prosecution Function to Private Actors*, U.C. DAVIS L. REV. 43, 411 (2009).

¹² Chris Hilson, *Discretion to Prosecute and Judicial Review*, CRIM. L. REV. 739 (1993).

¹³ Tom R. Tyler, *Legitimacy and Criminal Justice: The Benefits of Self-Regulation*, 7 OHIO ST. J. CRIM. L. 307–359 (2009).

system. The office of the public prosecutor works with immense discretion, without a corresponding accountability mechanism, which creates an imbalance and increases the potential for abuse of power, misconduct and inefficiency.

Public Information: The office of public prosecutor is a public office, as the name itself suggests. He acts as the representative of the state and the public at large. It is important that the public is kept in confidence with respect to the functioning of the public prosecutor and transparency within the system is maintained. Details such as the code of conduct, mode of appointment, resources employed, incentives awarded, performance assessment report, victim complaint redressal mechanism, etc. must be easily accessible to the public so that they don't feel alienated or clueless about the functioning of the system.

(c) The Restorative Model

This model adopts a victim-oriented approach to restore the victim to the same state as before the crime. There are two aspects of such restoration i.e., punishment of the offender and effective victim representation and involvement. The paper focuses mainly on the latter aspect. This model highlights the injustice suffered by the victim. N. Christie emphasized that the relationship between the victim and the offender begins from the stage the offence has been committed, in the form of a conflict.¹⁴ He describes this conflict as the 'property' of the victim and stresses that the denial of effective participation in solving the case is as much loss to the victim as the loss caused by the actual offence. In the ordinarily heavily offender-oriented process in the criminal justice system, restorative philosophy is essential to impart equal consideration to the victim.¹⁵

For the successful adoption of the restorative model, a criminal justice system should ensure a few essential features such as: -

Appropriate Victim Involvement: In any crime, it is the victim who is the prime witness and is the strongest source of reliable information about the crime. If the victim is not kept involved in the trial on a regular basis, it may not only impact the merits of the trial but also the faith the victim has in the criminal justice system. The victim should, at no point of time, feel alienated from the progress of his case.

Complaint mechanism for victims: The importance of accountability has already been discussed earlier. In addition to an effective internal accountability system, there is also a need for an external accountability mechanism, which in part can be achieved by a sound complaint mechanism for victims. The details about the complaint mechanism should be lucidly available on a public forum

¹⁴ Nils Christie, *Conflicts as Property*, 17(1) BRITISH J. CRIMINOLOGY 1-15 (1977).

¹⁵ *Id.*

and should be layman friendly. It is equally important for timely redressal of the complaints for it to have the desired impact. This will not only keep the prosecutors accountable and vigilant about their performance but will also maintain the involvement and representation of the victims in the criminal justice system.

In this context, the paper will now analyse the features of the public prosecutor's office as it currently exists in India. With the analysis, the challenges that result in the 'expectation gap' will be identified. It is beyond the scope of the paper to discuss each and every challenge in detail. However, the analysis to measure the system against the models will reflect the wholesome picture of the existing challenges.

B. Public Prosecution and the existing challenges in India

In India, after commission of a crime, the police, which is the investigative authority, investigates the case and files the charge sheet, subsequent to which the public prosecutor prosecutes the case. Prior to the Code of Criminal Procedure, 1973 ('CrPC') public prosecutors were linked to the police and were accountable to the Deputy Superintendent of the Police ('DSP').¹⁶ Since 1973, however, the assistant public prosecutors are not under the direct control of the DSP and are detached completely from the control of the police.¹⁷ Instead, they are now answerable to the District Magistrate at the district level and to the Director of Prosecutions at the state level.

This shift has led to a few problems, which are an impediment to an effective functioning of the system and have lingered on till date. At the pre-trial stage, the files are at times sent to the assistant public prosecutors by the police for their opinion but since they are no longer answerable to the police authorities the opinions are often found to be perfunctory. Moreover, once the case reaches the court, the district police remain unaware about the status of the case. M.L. Sharma raises these concerns and stresses upon the need for proper coordination between the police and the prosecution.¹⁸ He suggests that DSP should be given certain powers of review of the prosecutor's performance in the case. He also recommends that the DSP prepare a report of the performance of each assistant public prosecutor and send it to the district magistrate to keep a check on their performance and assist in the accountability mechanism.

¹⁶ Madan Lal Sharma, *Role and Function of Prosecution in Criminal Justice*, Resource Material Series No. 53, 107th International Training Course Participants' Papers, United Nations Asia and Far East Institute, 187 (1997), http://www.unafei.or.jp/english/pdf/RS_No53/No53_21PA_Sharma.pdf.

¹⁷ *Id.*, at 196.

¹⁸ *Id.*, at 197.

The role of the public prosecutor was defined by the Supreme Court in *Sheonandan Paswan v. State of Bihar*¹⁹ as:

a duty to represent the executive for trying the offender. While broadly his responsibility is to see that the trial results in conviction, but he need not be overenthusiastically concerned about the outcome of the case. He acts as the officer of the court and is duty bound to assist them and ensure that the accused is not unfairly treated. He may withdraw from a case for reasons like public interest, paucity of evidence and can never surrender this power to withdraw to anyone else.

As per the provisions of the CrPC, the public prosecutor's duty at the investigation stage involves getting the arrest/search warrants issued for the accused.²⁰ Once the investigation is complete, the police in consultation with the public prosecutors prepares the charge sheet and then sends the charge sheet to the court. However, in the 197th Law Commission Report, the view of the Supreme Court in *R. Sarala v. T.S. Velu*²¹ was quoted to stress that the role of the public prosecutor should be limited to the post investigation stage as they are the officers of the court and their work is inside the court, which consequently removes their role or responsibility in the investigation stage.²² The paper now discusses the challenges existing in the Indian criminal justice system.

C. Challenges in the Indian Criminal Justice system

(a) Mode of appointment

There are various categories of public prosecutors in India and the mode of appointment differs between categories. The ones who are responsible under the Director of Prosecutions deal with cases in the Magistrate Courts and are selected on the basis of a competitive exam held by the State Public Service Commission. In the Sessions court, cases are prosecuted by a different set of public prosecutors who are selected by the District magistrate in consultation with the Sessions judge and are subsequently appointed by the state government. Such direct appointment from the Bar with consultation of the Sessions judge has been justified by the logic that the advocates who have been working in the Sessions Court have better experience and knowledge of the functioning of such courts and the nature of the cases tried therein.²³ At the High court level, the state government appoints public prosecutors under section 24 of the CrPC in consultation with the High court. These rules are alterable by the respective states. However,

¹⁹ *Sheonandan Paswan v. State of Bihar*, (1983) 1 SCC 438: AIR 1983 SC 194.

²⁰ CODE CRIM. PROC. §§ 67, 83 & 182.

²¹ *R. Sarala v. T.S. Velu*, (2000) 4 SCC 459: AIR 2000 SC 1731.

²² PUBLIC PROSECUTOR'S APPOINTMENTS, L. COMMISSION OF INDIA REP. NO. 197 (2006).

²³ *Id.*, at 26.

this might encourage politicization of the process since the government in each state undergoes fresh elections every five years and each political party has its wing of lawyers as supporters who might be favoured, to the prejudice of others. In order to gain political support, offering such benefits in the form of appointments to important positions is a very common phenomenon.²⁴ As was rightly stated by Sairam Sanath Kumar and Dr. V. Krishna Ananth, the appointment of public prosecutors seems to be determined, to a great extent, by political affiliations, than by merit.²⁵ To avoid the risk of political manipulations, there could be a separate entrance exam for public prosecutors in the Sessions Court and High Court with eligibility of fixed minimum tenure of experience as a lawyer in the respective courts as this will ensure transparency as well as practical exposure to the functioning of these courts.

Additionally, the quality of entrants in the prosecution agency is not impressive. Though the selection at the basic level is through an exam, the candidates appearing for it are not competent.²⁶ In *Elango v. State*,²⁷ the Madras High Court expressed the expectation of the judiciary from a public prosecutor to maintain the honour and dignity of being true to the court. The court stated that the prosecutor should not become a mouthpiece of police and must reflect allegiance to the higher cause. The court went further to discuss the Guidelines on the Role of Prosecutors laid down in a United Nations Congress meeting at Havana where the importance of appropriate qualifications for a prosecutor was highlighted, owing to the essential position they hold. Moreover, stress was laid on a method of recruitment that ensures quality and competence.

The 197th Law Commission Report on the appointment of the public prosecutors stressed that a mode of appointment which sacrifices on the quality of the prosecution or allows the state to appoint the prosecutor of their own choice without due consideration to their qualification, experience or integrity, will lead to arbitrariness.²⁸ The Report raised the concern that cases should only be dealt with by the police or the by the CBI prosecution since there is no accountability on the part of the state public prosecutors who are selected mostly on political recommendations. They further stressed that if public prosecutors are to be dealing with the case then they should be selected through Public Service Commission exams rather than political recommendations. While the suggestion of selection through exams is agreeable, the observation of the report that the cases should only be dealt by the police or the CBI doesn't seem to be the correct approach, as in India, even the police and CBI are facing similar challenges of political influ-

²⁴ V. RADHA KRISHNA KRUPA SAGAR, THE ROLE OF PUBLIC PROSECUTOR IN CRIMINAL JUSTICE SYSTEM 174-175 (2013).

²⁵ Sairam Sanath Kumar and V. Krishna Ananth, *The Prosecutorial System in our Criminal Justice Administration – A Close Look*, NUALS L.J. 2, 14 (2008).

²⁶ Sharma, *supra* note 16, 198.

²⁷ *Elango v. State*, (1998) 1 LW (Cri) 32.

²⁸ PUBLIC PROSECUTOR'S APPOINTMENTS, *supra* note 22, at 19.

ence and low accountability.²⁹ Instead, attempts should be made to strengthen the efficiency of the public prosecutor's office.

(b) Accountability mechanism

Practically, there is no accountability system in place. Public prosecutors at the district as well as sessions level are answerable to the District Magistrate, who is too burdened with cases to act as an effective check on prosecutors.³⁰ Further, in 2005, the Aman Trust Report revealed shocking facts about the lack of accountability and review mechanisms for the performance and conduct of public prosecutors. It discussed the *Rules/Guidelines for Constitution of Panels of Government Counsels for Conducting of Cases for and on behalf of Delhi Administration*³¹ framed by the Delhi Government and how the guidelines fail to mandate review on a timely and regular basis. Instead they require the review of the performance by the Secretary as and when required, thus providing a lot of discretion to the Secretary. There is no systematic or well-developed mechanism for such review. Moreover, the interviews with the public prosecutors reflect that none of the public prosecutors in the High court have been subjected to any disciplinary enquiry.³² In a very recent judgment, the Supreme Court of India mandated strict accountability on part of public prosecutors and ordered the Home Department of every State to examine the reasons for the failure of each prosecution case.³³ This was done in the light of the high number of cases where accused of heinous crimes were acquitted due to lack of evidence and improper investigation.

(c) Excessive workload, lack of resources and incentives

While the number of pending cases can be known, there is no data for the total number of public prosecutors and the number of cases per public prosecutor to assess the workload. However, the state of affairs certainly suggests that there is a major mismatch between the number of public prosecutors and the cases, thereby overburdening the public prosecutors.³⁴

The quality of performance is not just dependent on the expertise and workload but also on the incentives that are provided to the public prosecutors. The pay scale and the resources for public prosecutors at the district level and the honorarium paid at the session level are both inadequate. The Aman Trust Report

²⁹ R.K. Raghavan, *The Indian Police: Problems and Prospects*, 33(4) EMERGING FED. PROCESS IN INDIA 119-133 (Autumn, 2003).

³⁰ Sharma, *supra* note 16, at 199.

³¹ *Rules/Guidelines for Constitution of Panels of Government Counsels for Conducting Cases for and on Behalf of Delhi Administration*, Government of Delhi, <http://law.delhigovt.nic.in/rules.html>.

³² Aman Trust, *supra* note 3, at 37.

³³ *State of Gujarat v. Kishanbhai*, (2014) 5 SCC 108.

³⁴ *State of U.P. v. Ajay Kumar Sharma*, (2014) 3 SCC 568.

on the public prosecution in India highlights the lack of resources and low salary provided to the public prosecutors.³⁵ There is a serious dearth of assistant staff, stenographers, clerks and other infrastructure such as proper library, stationery, etc. The report cites the Bawa Committee report's analysis that such lack of facilities leads to low morale of the public prosecutors. It also affects their performance, as they have to compete against the defence lawyers who have adequate personal infrastructure to work with. The salary of the standing counsel is as low as ₹ 7000-10000 per month, whereas for the additional public prosecutors, the situation is worse, as there is no fixed monthly remuneration at all. Instead they are paid only when they are dealing with a case, at a rate of ₹ 450 per day with a maximum limit of ₹ 1200.³⁶ This disregard and apathy results from wage payment which is fixed on a daily basis and only for a limited tenure. This is also one of the major factors which dissuades efficient and competent lawyers from taking up public prosecution.

(d) Distracting part time private practice

The Indian criminal justice system allows part time private practice to a certain category of public prosecutors. In the High Court, only a part time prosecutor can prosecute criminal cases. Such prosecutors are paid only a consolidated quantum of fee and are not put on the regular pay scale. They are allowed to engage in their private practice simultaneously, but are not allowed to contest any case, civil or criminal, against the state for the duration of their tenure.³⁷ This means, however, that the public prosecutor's attention is, for the most part, engaged in establishing his usually more lucrative private practice, which consequently affects his role as a public prosecutor. This is further exacerbated by the fact that their salary and tenure is fixed, thus providing them no incentive to perform efficiently to secure their position or to gain a raise in the salary. Consequently, they tend to focus more on their private practice and remain in conflict between their public and private duties. Not only is he unable to give full focus and time to his role as a public prosecutor, but also he is expected to prosecute the case with his limited 'part' time experience as a public prosecutor as against a specialized defence lawyer. This affects the quality of case preparation and prosecution and hampers the interest of the victim and the society at large.³⁸

(e) Victim representation

The Indian criminal justice system as a whole suffers from problems such as a large quantum of cases and poor quality of case preparation resulting in failed

³⁵ Aman Trust, *supra* note 3, at 32.

³⁶ Aman Trust, *supra* note 3, at 40.

³⁷ KRUPA SAGAR, *supra* note 24, at 165.

³⁸ KRUPA SAGAR, *supra* note 24, at 183-184.

prosecutions and delays.³⁹ In the current Indian legal system, the space for victims is quite limited and they have the status of a mere prosecution witness. There is a need for a victim and witness service which besides maintaining the integrity and autonomy of the public prosecutor, will also provide a platform to the victims to connect with their case and play an essential role.⁴⁰

In *Anil Kumar Tiwary v. State of Jharkhand*,⁴¹ the victim expressed dissatisfaction with the public prosecutor as he didn't produce all the relevant evidence in the court which were essential for the judgment. The court in the case stated that the prosecutor cannot be biased towards any party and has to act as a sincere agent of the court. His service should not be to cause intentional detriment to the accused and neither should he do injustice to the victim. In another case, *Laxman Rupchand Meghwani v. State of Gujarat*⁴² where a complaint was raised against the public prosecutor for deficiency of work, the court highlighted that it seemed as if the public prosecutor behaved like a defence counsel, instead his duty is to be fair and neutral. There should not be any thirst to either convict the accused or acquit him, and the prosecutor should be true to the court and act like an agent.

The Malimath Committee report expressed that India should take inspiration from the steps taken in England with respect to rights of the victims such as Victim's Code of Practice, Victim's Commissioner, Victim's Personal statement, right of the victim to be informed about the progress of the case, etc.⁴³ The committee also recommended the implementation of the right of the victim to be represented by a lawyer of his own choice, provided that the state bears cost of the lawyer in cases where the victim cannot afford one; right to participate in the proceedings which includes right to advance arguments after the prosecutor, right to know about the progress of the investigation and right to move to the court to ask for further investigation, *inter alia*.⁴⁴

An increased role of the complainant has been emphasized at various intervals, including in the Malimath Committee Report. The other option available to the victims when they are dissatisfied with a public prosecutor is to resort to private prosecution. But the 'option' of private prosecution in India is misleading. This is because the function of a public prosecutor takes upon itself a judicial nature.⁴⁵ While the CrPC allows for private prosecution, a private prosecutor is

³⁹ DR. SYED MOHAMMAD AFZAL QADRI, CRIMINOLOGY AND PENOLOGY ch. 17, 596 (Eastern Book Company, 6th ed. 2009).

⁴⁰ Bikram Jeet Batra, *Public prosecution- in need of reform*, INDIA TOGETHER (July 5, 2005), <http://indiatogether.org/prosecute-government>.

⁴¹ *Anil Kumar Tiwary v. State of Jharkhand*, (2013) 3 JLJR 195.

⁴² *Laxman Rupchand Meghwani v. State of Gujarat*, (2016) 2 GLR 1671.

⁴³ JUSTICE V.S. MALIMATH, COMMITTEE ON REFORMS OF CRIMINAL JUSTICE SYSTEM REP., ¶ 6.9.7, 84 (2003).

⁴⁴ *Id.*, at 270-271. See recommendation 6.

⁴⁵ *Samsher Singh v. State of Punjab*, (1974) 2 SCC 831.

permitted to work only under the direction of the public prosecutor.⁴⁶ Section 302 of the CrPC permits private prosecution with the permission of the Magistrate and this has been considered satisfactory to address the issue of victim participation.⁴⁷ However, it is questionable whether this is enough in an adversarial system where the accused is presumed to be innocent and the burden of proof is on the prosecution, with the standard of proof being that of ‘beyond reasonable doubt’. In such a situation, if the prosecution suffers from inefficiency then it affects the victim as well as society’s interest at large.⁴⁸

It can be concluded that the challenges lay a direct impact on the victims’ interest and expectations. Moreover, there has not been much research in the Indian literature that would address the concern of victim representation and the expectation gap due to the prevailing challenges.⁴⁹ The analysis with respect to the three models reflects how alarming the expectation gap in India is.

II. VICTIM REPRESENTATION, JUSTICE AND PRIVATE PROSECUTION

The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 recognized the rights of victims of crime and asked states to make laws and schemes which fulfil the aim of the declaration. However, the question is the extent to which the jurisdictions have been successful in fulfilling the aim of the declaration. One aspect is to frame such laws and rights which satisfy the requirement of recognizing the victims’ rights and the other aspect is how far these rights are actually able to materialize themselves in effect.

When a crime is committed it leads to violation of the victim’s rights, thereby creating an imbalance between the victim and the offender.⁵⁰ As a result, victims should have a central position and the aim of the criminal prosecution should be to rectify the violation caused to the victim’s rights by the defendant.⁵¹ N. Christie points out that in any crime the victim is the biggest loser- not only does he suffer mentally, physically and materialistically but also loses participation in his own case.⁵² On similar lines, Fionda pointed that the victim plays a very essential role in the effectiveness of a criminal justice system.⁵³ Every legal

⁴⁶ K.N. Chandrasekharan Pillai, *Public Prosecution in India*, ARTICLE 2 (December 24, 2008), <http://alrc.asia/article2/2008/12/public-prosecution-in-india/>.

⁴⁷ THE CODE OF CRIMINAL PROCEDURE, 1973, L. COMMISSION OF INDIA REP. NO. 154 (1996).

⁴⁸ JUSTICE V.S. MALIMATH, *supra* note 43, at ¶2.3, 24.

⁴⁹ KRUPA SAGAR, *supra* note 24, at 2.

⁵⁰ Gittler, *supra* note 5, at 138.

⁵¹ Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL’Y, 389 (1986).

⁵² Christie, *supra* note 14, at 7.

⁵³ Fionda, *supra* note 7, at 186.

system relies on victims as a major foundation for the evidence of the crime, reporting of the incidents and seeks their cooperation till the end to achieve justice. Ashworth has expressed that the interest of the victim is of core value to any sound criminal justice system and their role is important in the prosecutorial sentencing.⁵⁴ But only recognizing the importance of victims is not sufficient. It is equally essential to give material effect to their importance by providing them their due representation and participation. Sanders argues that there is a need to enhance the freedom of the victims and that can be done if their concerns are taken seriously. In his words the ‘clear commitment’ to explain the action of the agencies to the victims is a far better approach than the ‘lukewarm commitment’ to consult which hardly gets practiced or is enforceable.⁵⁵

The need for victim representation and participation has been duly acknowledged in all the jurisdictions. The Runciman Commission report in 1993 reflected the need to protect the interest of the victims and the way they are treated. It recommended that since the communication between the CPS and the victims is also at stake at many instances, the victim’s view must be taken into consideration and they should be kept informed of the crucial decisions in their case.⁵⁶

More aptly, in the Auld report, it was highlighted that for every crime there is a victim, either in the direct or the indirect form - but until recently the focus has been primarily on the accused-defendant rather than on the victim.⁵⁷ This was further substantiated by the survey report of British Crime Survey of 2000 which highlighted that the victims felt themselves to be the ‘forgotten party’, with majority of them not being confident about the fact that the criminal justice system was meeting their needs. The mid-70s marked the advent of victim support movements. However, it took quite a long time for the government to recognize the need for victim involvement and representation and the steps required in furtherance of it. It was further recognized in the report that it is in everybody’s interest that the victim must be treated in a civilized manner and that one of the main reasons for giving the victims increased involvement and recognition is to enable them to have a say in their own matter.

The House of Commons Justice Committee, 2009, rightly reiterated that the public prosecutors’ role is often misunderstood as the impression put forward by the government to the public is such that the public prosecutors are the champions for the victims whereas in practicality, they are not able to perform the same

⁵⁴ ANDREW ASHWORTH, THE CRIMINAL PROCESS: AN EVALUATIVE STUDY ch. 2 (Oxford Clarendon Press, 1994).

⁵⁵ ANDREW SANDERS ET AL., CRIMINAL JUSTICE (4th ed. 2010).

⁵⁶ VISCOUNT RUNCIMAN, ROYAL COMMISSION ON CRIMINAL JUSTICE REP., 79 (1993).

⁵⁷ LORD JUSTICE AULD, A REVIEW OF THE CRIMINAL COURTS OF ENGLAND AND WALES, 495-499 (2001), <http://webarchive.nationalarchives.gov.uk/+//www.criminal-courts-review.org.uk/auldconts.html>.

role as is performed by a defence counsel for the defendant.⁵⁸ The extent of the public prosecutor's individual discretion must be balanced with public accountability.⁵⁹ Kirk J. Nahra in his work on role of victims in the American context, points out that the prosecutorial discretion and power has constitutional as well as public policy support.⁶⁰

The role of the victim in a criminal justice system is very crucial since it provides the beginning point for any case and acts as the prime witness. Victims' participation is not just crucial but is also desirable. If any policy in a criminal justice system, limits such role and participation, then it may affect effective law enforcement.⁶¹ Further, Cardenas stressed that the victim of today feels victimized not just by the crime but also by the judicial procedure.⁶² The surveys with victims reflect their alienation with the criminal justice system and dissatisfaction. He further stated that the impact of the victim advocacy movements will lead to reformation of the objective of the criminal justice system and that the recognition of victim's legitimate interest in the process, can eliminate the trend of their neglect.⁶³

It is clear from the above reflection on the importance of victim representation that there is a need to address the concern of suffered representation to protect the interest of the victim. The paper now focuses on the aspect of private prosecution to address the question of whether it is a viable option to protect victim representation in cases of ineffective public prosecution, or where the victim wishes to opt for private prosecution.

III. PRIVATE PROSECUTION: A VIABLE SOLUTION?

The right to initiate private prosecution appears to coexist insufficiently along with the stabilized and well recognized system of public prosecution.⁶⁴ Private prosecution has suffered from not being regarded as a constitutional safeguard and its importance has lacked due recognition.⁶⁵ In Cesare Beccaria's view, as quoted by Cardenas, crime is not a matter of private concern between the offender and the victim. Instead it is a social concern, and since the criminal justice system is obligated to secure the interest of the society, it should not allow private prosecution.⁶⁶ The general perception about private prosecution has been

⁵⁸ THE CROWN PROSECUTION SERVICE: GATEKEEPER OF THE CRIMINAL JUSTICE SYSTEM, HOUSE OF COMMONS JUSTICE COMMITTEE, ¶83 (2009).

⁵⁹ Fionda, *supra* note 7, at 60.

⁶⁰ Kirk J. Nahra, *The Role of Victims in Criminal Investigations and Prosecutions*, 33(4) PROSECUTOR 28 (1999).

⁶¹ *Id.*

⁶² Cardenas, *supra* note 51, at 389.

⁶³ Cardenas, *supra* note 51, at 357-358.

⁶⁴ L.H. Leigh, *Private Prosecutions and Diversionary Justice*, CRIM. L. REV. 289 (2007).

⁶⁵ *Id.*

⁶⁶ Cardenas, *supra* note 51, at 369.

well expressed as being a right of questionable value, which can be used to act in a way which is damaging to the public interest.⁶⁷ It is feared that with private prosecution there will be wrongful convictions and frivolous prosecutions without any accountability mechanisms in place to curb this practice. However, Fairfax in his article suggests an accountability mechanism for private prosecution. He suggested the requirement of 'public reporting' by the prosecutor of all the cases that they have handled and the discretion they used. Simultaneously, he also suggested 'community review boards' wherein a panel reviews the series of cases handled by the prosecutor and observes if the prosecutor had been complying with the guidelines in handling the cases and in application of the discretion.⁶⁸ Private prosecution has always existed as a part of the system but since the initiation of public prosecution system, it has been given a backseat in the criminal justice system. The paper will now explore the possibility of private prosecution in India.

The Indian criminal justice system faces multiple challenges, including corruption, paucity of resources, delayed justice and lack of accountability mechanisms. The phrase 'today's victim is not just a victim of crime but can also be a victim of the apathy of the criminal justice system' fits aptly in the Indian context. The victims after the commission of the crime, face their second round of victimization at the hands of the police, prosecution and the judiciary i.e., the three wings of the criminal justice system. As has been highlighted before, the politicized mode of appointment and lack of incentives, leads to poor quality of appointments to the essential post of public prosecutor. With the high number of pending cases on a daily basis, there is a huge imbalance between the number of prosecutors and the workload. With no accountability system in place, the victim is left at the mercy of the prosecutors who are mostly unapproachable and unanswerable for any of their acts.

There is no established public forum where the details of the code of conduct, complaint mechanism, resource allocation or annual statistical reports are published. If a victim is dissatisfied with the performance of the public prosecutors, he is left with virtually no recourse. Even if he follows the complaint mechanism as prescribed for the government employees in general, there is no guarantee of timely redressal of the complaint. The question and the concern raised by Pradeep Kumar Roy, regarding the victim's right to engage the lawyer of his choice is very relevant in the existing state of affairs.⁶⁹ Where the accused is given the right to engage his own lawyer, the victim is left at the peril of the public prosecutor with whom he has very little communication and helplessly depends on the case diaries to know the progress of his case. Victim orientation theory indicates that there should be more involvement of the victim in the

⁶⁷ *Jones v. Whalley*, (2007) 1 AC 63; (2006) 3 WLR 179.

⁶⁸ Fairfax, *supra* note 11, at 453.

⁶⁹ Pradeep Kumar Roy, *Why not the Right to prosecute by a lawyer of victim's own choice?*, 1 CRIMES 897 (1992).

investigative and prosecution stage along with a right to choose his own lawyer.⁷⁰ Radha Krishna refutes this stating that the history of Indian criminal justice system suggests that when private prosecutions were allowed it led to frivolous cases being brought to the court with the added risk of important cases being left if the victim chooses not to bring them to the court thereby leaving the criminals free in the society. Moreover, when the prosecutor is paid by the victim it endangers his ability and capacity to act properly in the public interest and shifting the monetary burden to the victim is not morally correct.⁷¹

Currently, the role of the private prosecutors has been kept restricted since, as stated by the Supreme Court, it is feared that, if given a free hand they would seek to get conviction at any cost without due attention to the fairness and public interest.⁷² In *Kedar Nath Sen v. Amulya Ratan Sanyal*,⁷³ the court stated that the provision for private prosecution has been created to safeguard the victims from harassment to some extent. It may not be effective to a large extent due to the limited involvement, but certainly will have some impact. Section 302 of the CrPC does provide for a provision wherein at the discretion of the Magistrate the trial can be allowed to be conducted by the private prosecutor. However, there are no guidelines as to the circumstances under which this extraordinary power can be exercised by the Magistrate.⁷⁴ However, the Supreme Court stated in a case, that such permission may be granted if the court finds that by allowing private prosecution, justice would be served better.⁷⁵ In an earlier case, the Kerala (State) High Court stated that the mere apprehension that the public prosecutor will not work efficiently in the case is not enough justification for the magistrate to allow the complainant to conduct the prosecution personally.⁷⁶ However, such is not the case in case of Sessions court as there only the public prosecutor can prosecute the case, thereby removing any possibility of private prosecution.⁷⁷

The question addressed regarding whether or not private prosecution can be a viable solution to ineffective victim representation seems promising in the Indian context. With the option of private prosecution, victims will be able to engage the lawyer of their own choice and will not be forced to suffer injustice due to the inefficiency of the public prosecutor. Moreover, with the alternative mode of private prosecution, the monopoly in the hands of public prosecutors is likely to reduce as if they continue to perform inefficiently then more and more private prosecutors will pave their way to the criminal trials. While this result might seem dubious in the England, Wales, and U.S. context as the costs of engaging private lawyers is quite high for them to be engaged on such a large scale,

⁷⁰ Sairam Sanath Kumar, *supra* note 25, at 14.

⁷¹ KRUPA SAGAR, *supra* note 24, at 157-158.

⁷² *Shiv Kumar v. Hukam Chand*, (1999) 7 SCC 467.

⁷³ *Kedar Nath Sen v. Amulya Ratan Sanyal*, 1941 SCC OnLine Cal 156: AIR 1942 Cal 79.

⁷⁴ KRUPA SAGAR, *supra* note 24, at 150.

⁷⁵ *J.K. International v. State (Govt. of NCT of Delhi)*, (2001) 3 SCC 462: 2001 AIR SCW 907.

⁷⁶ *Babu v. State of Kerala*, 1984 SCC OnLine Ker 3: 1984 Cri LJ 499.

⁷⁷ KRUPA SAGAR, *supra* note 24, at 151.

this might seem possible in the Indian context where with the large number of lawyers registering in the Bar Council every day, the costs are quite low.⁷⁸ But with the option of private prosecution, comes a very serious threat which must be addressed. Where in the current state of affairs, the state is unable to maintain accountability mechanism for the public prosecutors; it is unwise to expect them to keep an accountability mechanism on the private prosecutors by mandating performance assessment reports. Such lack of accountability coupled with the urge to establish practice amidst the heavy competition with large number of lawyers, private prosecutors might easily engage in unethical conduct leading to wrongful convictions.

Hence, for the Indian criminal justice system, private prosecution seems to be a viable solution to ineffective victim representation, only if there is an effective accountability system in place which monitors the performance of the private prosecutors and their compliance with the practicing guidelines.

IV. CONCLUSIVE ANALYSIS

Part I established the ‘expectation gap’ that exists. In such a scenario, option of private prosecution becomes important. There might be a situation, where the victim loses his confidence in the public prosecutors’ office due to their inefficiency and prefers to have his case handled by a private prosecutor. In such a situation, if the criminal justice system places a barrier, either by banning private prosecution (as in few U.S. states), putting limitations which discourages victims to opt for private prosecution (as in England and Wales) or curtails their participation in criminal trials (as in India), it affects victim representation. Every criminal justice system should permit private prosecution as a viable option available to the victim, in case he chooses to opt for it. Because if that is not the case, victims are ‘forced’ to continue with public prosecution despite the potential inefficiency.

The issue of risks involved with private prosecution and its efficiency should not take away the ‘option’ of private prosecution from the victim altogether. The paper acknowledges that the ‘expectation gap’ can arise with private prosecution as well and is aware of the risks involved as highlighted by Fairfax (as discussed above), but its detailed discussion is beyond the scope of this paper. Irrespective of the mode of prosecution whether public or private, the few elements such as accountability mechanism, mode of appointment, etc. are essential to ensure their effective performance. However, the availability of the option of private prosecution gives support to victim representation and is a viable option in those cases where it has suffered.

⁷⁸ *R. v. Munaf Ahmed Zinga*, 2014 EWCA Crim 1823, paras 43-45.

Suggestions to bridge the ‘expectation gap’

The existing state of relation between public prosecutors and victims across jurisdictions can be best summarized in the words of Justice Committee of House of Commons, “telling a victim that their views are central to the criminal justice system, or that the prosecutor is their champion, is a damaging misrepresentation of reality”.⁷⁹ It is unfair to raise the expectations of the victims by giving them false hope, as it adds to their disappointment and tampers with their faith in the system.

The following suggestions are offered to meet the identified common challenges which results in the expectation gap as per the above analysis:

(a) *Sound accountability system*

Considering the discretionary and the decision making powers in the hands of public prosecutors, it is highly essential to have a sound accountability system in place. But what is meant by a sound accountability system? While designing any accountability mechanism, its practical feasibility and effectiveness must be taken into consideration. In a large jurisdiction like India, it is not feasible to have a one-to-one accountability mechanism on a daily basis. One of the models that seem effective is: community review board and public reporting, wherein the public prosecutors are obligated to submit a report of the cases they have dealt with over a fixed period of time (two or three years).⁸⁰ In the report, they must highlight the outcome of the case and the manner in which they exercised their discretionary and decision making power. The report must also include the extent of victim involvement in the case and whether the opinion of the victim was considered before the exercise of decision making power.

This mechanism will not just make the public aware of the performance of the public prosecutors in the system but will also help the governing body analyse the performance of the public prosecutors on a collective basis and help them identify the positives and negatives of the functioning of their public prosecution wing. The analysis of these reports can also help in framing a code of conduct and guidelines, which are required to ensure that public prosecutors exercise their powers in an efficient way.

(b) *Effective mode of appointment*

All the other measures and attempts to make the office of public prosecutor will be meaningless if the prosecutors are not competent for the role. It is extremely important to have an effective mode of appointment, which is able to

⁷⁹ THE CROWN PROSECUTION SERVICE, *supra* note 58.

⁸⁰ Fairfax, *supra* note 11, at 453.

identify the appropriate candidate with required experience, expertise and calibre to hold the post of a public prosecutor. One of the most reliable options for the appointment is an entrance exam which can examine the knowledge (expertise) of the candidate. One of the assessments could be designed to assess the decision-making ability of the candidate as it will be required in their role as a public prosecutor. The final parameter of experience can be ensured by setting a minimum limit of experience required in the legal field. This consistent mode of appointment will ensure certainty about the quality of the public prosecutors to a great extent.

(c) Reasonable victim involvement

The victims in the criminal trial must be given the status of a 'party' to the trial. By the term 'party', the implication is that the victims must be informed about the developments of the case. This information should not be given subject to inquiry by the victim; instead it should be treated as a part of the duty of public prosecutor's office to intimate the victim about every progress in his case. The victim must also be consulted in the decision making process of the case. It is often argued that excessive involvement of the victim in the day to day proceedings will hamper the performance of the prosecutors and affect their independence. The point to be noted here is that there could be a balance between the two extreme approaches - granting a right of full participation and control over the decision-making process at various stages of the proceedings, or no involvement whatsoever except for the mere right to seek the information regarding the progress of the case.⁸¹ A balanced solution could be that in case of any disagreement with the victim, the authority to make final decision is given in the hands of the public prosecutors subject to consultation with higher authorities. This will help provide an opportunity to the victim to be involved in his case and will also retain the independence of the public prosecutor in decision making.

V. CONCLUSION

In addition to the issues discussed in the paper, on a concluding note, the paper leaves the readers with the following observation: There is a need to revisit the interpretation of the role of the prosecutors as it exists today. It is often stated that the prosecutors are the ministers of justice and have to assist the court with the true picture of the case without any aim of securing conviction. This interpretation hampers victims' interest and representation directly. The view maintained by the North Carolina Court in *State v. Westbrook* about the role of the prosecutor presents the ideal interpretation.⁸² It states:

⁸¹ Gittler, *supra* note 5, at 177.

⁸² *State v. Westbrook*, 279 NC 18 (1971).

The role of the prosecutor while discharging its duty of representing the state is to secure the objective of the state. That objective should not be to secure the conviction regardless of the guilt; instead it is to secure conviction of the guilty and acquittal of the innocent. To perform this role, the prosecutor 'need not act as neutral'; he is the advocate of the state and must perform that role.

This approach for the role of prosecutors along with the suggestions (as proposed in the paper) can hopefully succeed in bridging the 'expectation gap'.