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Power Under The Bharatiya Nagarik Suraksha Sanhita, 2023,  
Authored By: Juhi Kumari, Law Student, Law Centre II, Faculty of Law,  
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### **ABSTRACT:**

*“The role of the Public Prosecutor in India has always occupied an uneasy space between executive authority and judicial responsibility. While doctrinally described as an “officer of the court,” the prosecutor in practice often operates within structures that compromise independence. The coming into force of the **Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS)**, replacing the **Code of Criminal Procedure, 1973 (CrPC)**, provides an opportunity to revisit this institutional tension. This article examines whether the reconfiguration of the Directorate of Prosecution under **Section 20 of the BNSS** meaningfully strengthens prosecutorial autonomy or merely reorganizes executive control in a more structured form. Through a close reading of statutory provisions, judicial precedents, and comparative practices, the article argues that while the BNSS introduces procedural improvements and internal hierarchy, it stops short of addressing the core issue—functional independence of the prosecutorial system.<sup>1</sup>”*

### **I. INTRODUCTION: LOCATING THE PROSECUTOR IN THE CRIMINAL PROCESS:**

Any criminal justice system rests on a delicate balance between investigation, prosecution, and adjudication. In India, this balance has historically been uneven. The police investigate, the judiciary adjudicates, but the prosecution—expected to bridge the two—often lacks the institutional strength to act independently.<sup>2</sup> The Public Prosecutor is not meant to be a representative of the police or a spokesperson for the government. Instead, the position carries a higher obligation: to assist the court in arriving at the truth.<sup>3</sup> This duty requires fairness, objectivity, and a willingness to present even those facts that may benefit the accused.<sup>4</sup> However, in practice, this ideal has frequently been compromised. Structural dependence on

<sup>1</sup> The Bhartiya Nagarik Suraksha Sanhita, 2023 (Act 46 of 2023).

<sup>2</sup> Law Commission of India, 197<sup>th</sup> Report on Public Prosecutors' Appointment (2006).

<sup>3</sup> Shiv Kumar v. Hukam Chand, Criminal Appeal No. 1097 of 1999 (1999) 7 SCC 467 (SC).

<sup>4</sup> Id.

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the executive, lack of professional autonomy, and inadequate institutional support have reduced the prosecutor's role to that of a litigation agent rather than a constitutional actor.<sup>5</sup> It is for this reason that multiple Law Commission reports have described the prosecution as the “*weakest link*” in the criminal justice chain.<sup>6</sup> The enactment of the BNSS in 2023, which came into force in July 2024, represents a significant legislative attempt to modernize criminal procedure.<sup>7</sup> One of its central features is the restructuring of the prosecutorial system, particularly through Section 20, which formalizes the Directorate of Prosecution.<sup>8</sup> This raises a fundamental question: does the BNSS transform the prosecutor into a genuine “*minister of justice*,” or does it reinforce executive influence under a new statutory framework?

## **II. FROM CRPC TO BNSS: CONTINUITY AND CHANGE:**

The statutory basis of the prosecutorial system in India lies in procedural law. Under the CrPC, provisions relating to Public Prosecutors were primarily contained in Sections 24, 25, and 25A.<sup>9</sup> The BNSS retains much of this framework but reorganizes it under Sections 18 to 20, with certain modifications aimed at efficiency and accountability.<sup>10</sup>

### **A. APPOINTMENT AND CLASSIFICATION:**

The BNSS continues to recognize multiple categories of prosecutors, including those appointed for High Courts, districts, and specific cases.<sup>11</sup> The process of appointment remains largely executive-driven, with consultation mechanisms involving the judiciary at certain levels.<sup>12</sup> For instance, appointments at the district level still rely on panels prepared by the District Magistrate in consultation with the Sessions Judge.<sup>12</sup> While this appears to introduce

<sup>5</sup> Vidhi Centre for Legal Policy, *The Quest for Prosecutorial Independence* (2020).

<sup>6</sup> Law Commission of India, 154<sup>th</sup> Report on the Code of Criminal Procedure (1996).

<sup>7</sup> The Bharatiya Nagarik Suraksha Sanhita, 2023 (Act 46 of 2023).

<sup>8</sup> Id. s. 20.

<sup>9</sup> The Code of Criminal Procedure, 1973, ss. 24-25A.

<sup>10</sup> The Bharatiya Nagarik Suraksha Sanhita, 2023 (Act 46 of 2023).

<sup>11</sup> Id.

S. 18. <sup>12</sup>

Id.

<sup>12</sup> Id.

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a degree of judicial input, the ultimate authority remains with the executive. This dual structure reflects an attempt to balance administrative control with judicial oversight, though the balance is not always equal. A significant safeguard retained in the BNSS is the prohibition on appointing police officers involved in investigation as prosecutors in the same case.<sup>13</sup> This separation is essential to prevent bias and to maintain the distinction between investigation and prosecution.

## **B. PROCEDURAL EFFICIENCY AND TECHNOLOGICAL INTEGRATION:**

One of the more practical improvements introduced by the BNSS relates to procedural timelines. Under the earlier regime, delays in supplying documents to the accused were a major cause of trial inefficiency.<sup>14</sup> Section 230 of the BNSS addresses this by mandating that relevant documents be furnished within fourteen days.<sup>15</sup> Additionally, the recognition of electronic communication as valid service reflects an attempt to align procedural law with contemporary technological realities.<sup>16</sup> While these changes may not directly impact prosecutorial independence, they contribute to a more efficient system within which prosecutors operate.

## **III. SECTION 20 BNSS: THE DIRECTORATE OF PROSECUTION:**

The most notable structural reform introduced by the BNSS is the formalization of the Directorate of Prosecution under Section 20.<sup>17</sup> While the CrPC had earlier introduced a similar concept through Section 25A, its implementation remained uneven across states.<sup>18</sup> Section 20 attempts to provide a clearer institutional framework by establishing a hierarchical structure within the Directorate.

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<sup>13</sup> Id. s. 19.

<sup>14</sup> Law Commission of India, 239<sup>th</sup> Report (2012).

<sup>15</sup> The Bharatiya Nagarik Suraksha Sanhita, 2023 (Act 46 of 2023).

<sup>16</sup> Id.

<sup>17</sup> Id. s. 20.

<sup>18</sup> The Code of Criminal Procedure, 1973, s. 25A.

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### **A. HIERARCHICAL STRUCTURING:**

The BNSS introduces a tiered system within the Directorate, distinguishing between different levels of responsibility based on the seriousness of offences.<sup>19</sup> At the top is the Director of Prosecution, followed by Deputy Directors and Assistant Directors. This classification is not merely administrative; it is intended to ensure that cases are monitored at appropriate levels of expertise. Serious offences involving severe punishment fall under higher levels of scrutiny, while less serious cases are handled at subordinate levels.<sup>20</sup> In theory, this structure allows for better supervision, filtering of weak cases, and more informed decision-making. It also reflects an attempt to professionalize the prosecutorial system by introducing specialization.

### **B. ENHANCED QUALIFICATION REQUIREMENTS:**

Another important feature is the increase in eligibility criteria for senior prosecutorial positions. The BNSS raises the required experience for leadership roles, aligning them more closely with judicial standards.<sup>21</sup> This move can be seen as an effort to ensure that prosecutorial decisions are taken by individuals with sufficient legal expertise and experience. However, qualifications alone cannot guarantee independence; institutional safeguards are equally necessary.

### **C. THE QUESTION OF INDEPENDENCE:**

Despite these structural improvements, Section 20 does not resolve the central issue of prosecutorial independence. The Directorate continues to function under the administrative control of the Home Department.<sup>22</sup> This arrangement creates an inherent tension. The same department that oversees the police—who conduct investigations—also exercises administrative authority over prosecutors. This raises concerns about whether prosecutors can genuinely act independently, particularly in politically sensitive cases. The absence of a

<sup>19</sup> The Bhartiya Nagarik Suraksha Sanhita, 2023, s. 20.

<sup>20</sup> Id.

<sup>21</sup> Id.

<sup>22</sup> Id. s. 20(3).

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requirement for judicial concurrence in key appointments further strengthens executive influence.<sup>23</sup> While efficiency may improve, independence may not.

#### **IV. CONSTITUTIONAL POSITION OF THE PROSECUTOR:**

The role of the Public Prosecutor cannot be understood purely in statutory terms. It is deeply connected to constitutional principles, particularly those relating to fair trial and due process. Article 21 of the Constitution guarantees the right to life and personal liberty, which has been interpreted to include the right to a fair trial.<sup>24</sup> The prosecutor plays a crucial role in ensuring that this right is not compromised. Judicial decisions have consistently emphasized that the prosecutor is not a partisan advocate. Instead, the role is to assist the court in arriving at justice.<sup>25</sup> This includes presenting all relevant evidence, regardless of whether it supports the prosecution's case.

##### **A. PROSECUTOR AS AN OFFICER OF THE COURT:**

The Supreme Court has repeatedly clarified that the Public Prosecutor is an officer of the court and not a representative of the investigating agency.<sup>26</sup> This distinction is critical. It places the prosecutor within the judicial process rather than the executive hierarchy. However, this doctrinal position often conflicts with administrative realities. When prosecutors are appointed, transferred, and controlled by the executive, their ability to act independently may be constrained.

##### **B. FAIR TRIAL AND PROSECUTORIAL CONDUCT:**

The concept of a fair trial extends beyond the rights of the accused. It also includes the interests of victims and the broader societal expectation that justice will be done.<sup>27</sup> The prosecutor must balance these competing considerations without bias. This balancing role becomes particularly

<sup>23</sup> See generally Law Commission of India Reports (supra).

<sup>24</sup> Maneka Gandhi v. Union of India, W.P.(C) No. 490 of 1977, (1978) 1 SCC 248 (SC).

<sup>25</sup> Zahira Habibulla H. Sheikh v. State of Gujarat, Criminal Appeal Nos. 446-499 of 2004, (2004) 4 SCC 158 (SC).

<sup>26</sup> Shiv Kumar v. Hukam Chand, supra note 3.

<sup>27</sup> Zahira Habibulla H. Sheikh v. State of Gujarat, supra note 26.

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important in decisions such as withdrawal from prosecution. The law requires that such decisions be taken in the interest of justice, not for political or administrative convenience.<sup>28</sup>

## **V. EXECUTIVE CONTROL AND ITS IMPLICATIONS:**

The central tension in the prosecutorial system lies in the relationship between the executive and the prosecution. While administrative control may be necessary for coordination and accountability, excessive control can undermine independence. Under the BNSS, this tension remains unresolved. The Directorate of Prosecution, despite its structured framework, continues to operate within the executive domain.<sup>29</sup> ***This raises several concerns:***

- *Whether prosecutors can act independently in cases involving government interests*
- *Whether decisions such as withdrawal from prosecution are influenced by political considerations*
- *Whether the institutional design allows for meaningful accountability*

Judicial decisions have attempted to address these concerns by emphasizing the independent role of the prosecutor. However, without structural reform, these principles may remain aspirational.

## **VI. WITHDRAWAL FROM PROSECUTION: A TEST OF INDEPENDENCE**

The power to withdraw from prosecution is one of the most sensitive aspects of prosecutorial discretion. Under the earlier law, this power was contained in Section 321 of the CrPC, and it continues under Section 360 of the BNSS.<sup>30</sup> Courts have consistently held that the prosecutor must exercise independent judgment in such matters.<sup>31</sup> The decision cannot be dictated by the government; it must be based on an objective assessment of the case. However, in practice,

<sup>28</sup> Rajender Kumar Jain v. State through Special Police Establishment, Criminal Appeal No. 37 of 1979, (1980) 3 SCC 435 (SC)

<sup>29</sup> The Bharatiya Nagarik Suraksha Sanhita, 2023, s. 20.

<sup>30</sup> Id. s. 360; The Code of Criminal Procedure, 1973, s. 321.

<sup>31</sup> Rajender Kumar Jain, supra note 29.

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this power has often been subject to executive influence. Instances of withdrawal in politically sensitive cases have raised questions about the integrity of the process. The BNSS attempts to introduce safeguards by requiring that the victim be heard before withdrawal is permitted.<sup>32</sup> While this is a positive step, it does not fully address the underlying issue of executive control.

## **VII. REIMAGINING THE VICTIM'S ROLE: FROM SPECTATOR TO STAKEHOLDER:**

One of the more noticeable shifts under the new procedural framework is the attempt to reposition the victim within the criminal process. Traditionally, criminal law in India has been structured around the State versus the accused, with the victim occupying a marginal and often symbolic role. The BNSS seeks to disturb this arrangement, though not without raising fresh concerns.<sup>33</sup>

### **A. ASSISTANCE TO THE PROSECUTION: A QUALIFIED RIGHT:**

Under Section 18(8) of the Bharatiya Nagarik Suraksha Sanhita, the court may permit the victim to engage an advocate to assist the prosecution<sup>35</sup>. This is not an absolute right; it remains subject to judicial discretion. The wording itself is cautious— “assist” rather than “conduct”— which indicates that the Public Prosecutor continues to retain primary control over the case. This provision can be read in two ways. On one hand, it acknowledges that the victim’s voice has historically been sidelined and attempts to correct that imbalance. On the other hand, it introduces the possibility of parallel narratives within the courtroom. Where the prosecutor is expected to act objectively, a privately engaged counsel may pursue a more adversarial approach, potentially complicating the coherence of the prosecution’s case. The effectiveness

<sup>32</sup> The Bhartiya Nagarik Suraksha Sanhita, 2023, s. 360 proviso.

<sup>33</sup> The Bhartiya Nagarik Suraksha Sanhita, 2023 (Act 46 of 2023). <sup>35</sup> Id. S. 18(8).

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of this reform will therefore depend less on the statutory text and more on how courts manage this shared space between the prosecutor and the victim's counsel.<sup>34</sup>

### **B. RIGHT TO INFORMATION: BRIDGING THE GAP:**

Another feature of the BNSS is the requirement that victims be informed about the progress of investigation within a prescribed time frame.<sup>35</sup> This addresses a long-standing issue where complainants were left unaware of the status of their own cases. Information, however, is not the same as participation. While periodic updates may enhance transparency, they do not necessarily translate into influence over prosecutorial decisions. The real test lies in whether victims can meaningfully engage with the process, particularly at critical stages such as filing charges or withdrawal.

### **C. HEARING BEFORE WITHDRAWAL: A LIMITED CHECK:**

The requirement that the victim be heard before withdrawal from prosecution introduces an additional procedural safeguard<sup>36</sup>. It ensures that the decision is not taken entirely behind closed doors. However, the final decision still rests with the court, and the prosecutor continues to act as the formal applicant. This creates an interesting dynamic. The victim can oppose withdrawal but cannot compel continuation of prosecution. The prosecutor can seek withdrawal but must justify it before the court. The court, in turn, must balance competing considerations without overstepping into the domain of executive policy. In this triangular arrangement, the independence of the prosecutor becomes even more critical. If the prosecutor is not genuinely autonomous, the safeguard risks becoming procedural rather than substantive.<sup>37</sup>

<sup>34</sup> Shiv Kumar v. Hukam Chand, Criminal Appeal No. 1097 of 1999, (1999) 7 SCC 467 (SC).

<sup>35</sup> The Bharatiya Nagarik Suraksha Sanhita, 2023, s. 193(3)(ii).

<sup>36</sup> Id. s. 360 proviso.

<sup>37</sup> Rajender Kumar Jain v. State through Special Establishment, Criminal Appeal No. 37 of 1979, (1980) 3 SCC 435 (SC).

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## **VIII. COMPARATIVE PERSPECTIVES: LESSONS BEYOND THE INDIAN MODEL:**

Reform of prosecutorial systems cannot be assessed in isolation. Comparative analysis offers valuable insights into how different jurisdictions structure the relationship between investigation, prosecution, and adjudication.<sup>38</sup>

### **A. FRANCE: JUDICIAL CONTROL OVER INVESTIGATION:**

The French system represents a model where investigation is not left entirely to the police. Instead, a judicial officer—the investigating magistrate—plays a central role in serious cases<sup>39</sup>. This structure ensures that evidence is collected under judicial supervision, reducing the risk of bias or manipulation. The advantage of this model lies in its neutrality. Since the investigation is guided by a judicial authority, the distinction between prosecution and adjudication becomes less adversarial. The objective shifts from securing conviction to uncovering the truth.<sup>40</sup> For India, adopting such a model in its entirety may not be feasible due to structural and resource constraints. However, the underlying principle—that investigation should not be exclusively controlled by the executive—remains relevant.

### **B. JAPAN: PROSECUTORIAL DOMINANCE WITH ACCOUNTABILITY:**

In contrast, Japan places significant authority in the hands of prosecutors. They not only conduct prosecutions but also play a decisive role in investigations.<sup>41</sup> The decision to prosecute is taken after careful scrutiny of evidence, resulting in a system where only cases with a high likelihood of conviction proceed to trial. This model is often associated with efficiency and high conviction rates. However, it also raises concerns about concentration of power. To address this, Japan has developed mechanisms such as review bodies that can question

<sup>38</sup> G. Selvi, “Comparative Study of Investigative Autonomy,” (2025) IJNRD.

<sup>39</sup> Id.

<sup>40</sup> Id.

<sup>41</sup> Id.

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prosecutorial decisions.<sup>42</sup> The key takeaway here is not the structure itself, but the emphasis on accountability mechanisms. Power, whether vested in the police or the prosecutor, must be balanced by institutional checks.

### **C. IMPLICATIONS FOR INDIA:**

The Indian system continues to follow a police-led investigation model. The BNSS, despite its reforms, does not significantly alter this arrangement. Prosecutors remain largely reactive—they step in after the investigation is complete.<sup>43</sup> A more effective model may involve greater prosecutorial involvement at earlier stages, particularly in serious cases. This could help filter weak cases before they reach the courts, reducing delays and improving the quality of prosecutions.<sup>44</sup>

## **IX. INSTITUTIONAL CONSTRAINTS: LAW ON Paper VS LAW IN PRACTICE:**

No discussion of legal reform is complete without examining the realities of implementation. The effectiveness of the BNSS will depend not only on its provisions but also on the conditions within which prosecutors operate.<sup>45</sup>

### **A. CASELOAD AND INFRASTRUCTURE:**

Prosecutors in India often handle an overwhelming number of cases. This affects not only efficiency but also the quality of decision-making. When time and resources are limited, the ability to scrutinize evidence thoroughly or exercise independent judgment is inevitably compromised<sup>46</sup>. The introduction of hierarchical structures under Section 20 may help distribute workload more effectively. However, without a corresponding increase in personnel and infrastructure, the problem is unlikely to disappear.

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<sup>42</sup> Id.

<sup>43</sup> Vidhi Centre for Legal Policy, *The Quest for Prosecutorial Independence* (2020).

<sup>44</sup> Id.

<sup>45</sup> Prashant Kumar & Monika Rastogi, (2025) *Lec Localis*.

<sup>46</sup> Id.

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## **B. SERVICE CONDITIONS AND PROFESSIONAL AUTONOMY**

Another issue relates to the service conditions of prosecutors. In many states, prosecutors do not enjoy the same level of institutional security as members of the judiciary. Transfers, promotions, and disciplinary actions are often controlled by the executive.<sup>47</sup> This creates a subtle but powerful form of influence. Even in the absence of direct interference, the possibility of administrative consequences may affect decision-making. For prosecutorial independence to be meaningful, it must be supported by structural safeguards such as security of tenure and transparent appointment processes.<sup>48</sup>

## **C. TRAINING AND SPECIALIZATION:**

Modern criminal law involves complex issues ranging from digital evidence to financial crimes. Prosecutors require continuous training to keep pace with these developments.<sup>49</sup> While the BNSS introduces structural reforms, it does not directly address the need for capacity building. Without investment in training and specialization, even the most well-designed institutions may struggle to function effectively.

## **X. RETHINKING SECTION 20: TOWARD MEANINGFUL INDEPENDENCE:**

Section 20 of the Bharatiya Nagarik Suraksha Sanhita represents a step toward institutional organization. However, organization is not the same as independence.<sup>50</sup> ***For the Directorate of Prosecution to function as intended, several changes may be necessary:***

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<sup>47</sup> Id.

<sup>48</sup> Law Commission of India, 197<sup>th</sup> Report (2006).

<sup>49</sup> Vidhi Centre Report, supra.

<sup>50</sup> The Bharatiya Nagarik Suraksha Sanhita, 2023, s. 20.

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### **A. SEPARATION FROM THE HOME DEPARTMENT:**

One of the most significant reforms would be to place the Directorate outside the administrative control of the Home Department.<sup>51</sup> This would reduce the overlap between investigation and prosecution, allowing each to function more independently.

### **B. JUDICIAL INVOLVEMENT IN APPOINTMENTS:**

Introducing a greater role for the judiciary in appointments could enhance credibility. While complete judicial control may not be necessary, a system of checks and balances would help ensure that appointments are based on merit rather than discretion.<sup>52</sup>

### **C. PRE-CHARGE CONSULTATION MECHANISMS:**

Allowing prosecutors to review investigations before charges are filed could improve the quality of cases reaching the courts. This would also align the Indian system more closely with international practices.<sup>53</sup>

### **D. CLEAR GUIDELINES ON WITHDRAWAL:**

The law relating to withdrawal from prosecution requires greater clarity. While judicial oversight exists, clearer statutory guidelines could help prevent misuse.<sup>54</sup>

## **XI. CONCLUSION: BETWEEN REFORM AND REALITY**

The transition from the CrPC to the BNSS marks an important moment in the evolution of Indian criminal procedure. By reorganizing the prosecutorial system and introducing new safeguards, the BNSS attempts to address long-standing concerns.<sup>55</sup> Yet, the core issue remains unresolved. The prosecutor continues to operate within a framework that is structurally linked to the executive. Without meaningful independence, the ideal of the prosecutor as a “*minister*

<sup>51</sup> Vidhi Centre Report, supra.

<sup>52</sup> Law Commission of India, supra.

<sup>53</sup> G. Selvi, supra.

<sup>54</sup> Rajender Kumar Jain, supra note 39.

<sup>55</sup> The Bharatiya Nagarik Suraksha Sanhita, 2023.

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*of justice*” risks remaining rhetorical.<sup>56</sup> The true success of the BNSS will depend not on the text of Section 20 alone, but on how it is implemented in practice. If the reforms lead to greater autonomy, professionalism, and accountability, they may strengthen the criminal justice system. If not, they may simply reorganize existing problems in a new form. In the end, the question is not whether the law has changed, but whether the institution has.

## **XII. DOCTRINAL CONSOLIDATION: JUDICIAL POSITION ON PROSECUTORIAL INDEPENDENCE:**

The debate surrounding prosecutorial independence in India is not new. Long before the enactment of the Bharatiya Nagarik Suraksha Sanhita, the judiciary had repeatedly emphasized that the Public Prosecutor occupies a position distinct from that of the investigating agency. The consistent thread running through judicial pronouncements is the insistence that the prosecutor must act fairly, objectively, and independently. In *Shiv Kumar vs. Hukam Chand*, the Supreme Court clarified that a Public Prosecutor is not a representative of the investigating agency but an officer of the court.<sup>57</sup> The Court underscored that the prosecutor’s duty is not to secure conviction at all costs, but to ensure that justice is done.<sup>58</sup> This formulation moves the role of the prosecutor away from adversarial excess and situates it within the broader framework of fairness. A similar position emerges from *Zahira Habibulla H. Sheikh vs. State of Gujarat*, where the Court emphasized that a fair trial must balance the interests of the accused, the victim, and society.<sup>59</sup> The prosecutor, in this context, acts as a mediator between competing claims, rather than as an advocate for a single side. Perhaps the most direct articulation of prosecutorial independence is found in *Rajender Kumar Jain vs. State*, through Special Police Establishment. The Court held that the Public Prosecutor cannot function as a

<sup>56</sup> *Zahira Habibulla H. Sheikh v. State of Gujarat*, (2004) 4 SCC 158 (SC).

<sup>57</sup> *Shiv Kumar v Hukam Chand*, Criminal Appeal No. 1097 of 1999, (1977) 7 SCC 467 (SC).

<sup>58</sup> *Id.*

<sup>59</sup> *Zahira Habibulla H. Sheikh v. State of Gujarat*, Criminal Appeal Nos. 446-449 of 2004, (2004) 4 SCC 158 (SC).

<sup>62</sup> *Rajender Kumar Jain v State through Special Police Establishment*, Criminal Appeal No. 37 of 1979, (1980) 3 SCC 435 (SC).

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mere post office of the government and must exercise independent judgment, particularly in matters such as withdrawal from prosecution under Section 321 of the Code of Criminal Procedure.<sup>62</sup> This principle becomes especially relevant in light of the BNSS, where structural control continues to vest in the executive. These decisions collectively establish a doctrinal baseline: prosecutorial independence is not a matter of administrative convenience but a constitutional requirement flowing from the guarantee of fair trial under Article 21, as expanded in *Maneka Gandhi v. Union of India*.<sup>60</sup>

### **XIII. SECTION 20 BNSS IN LIGHT OF JUDICIAL DOCTRINE:**

When Section 20 of the BNSS is read against this judicial backdrop, a tension becomes apparent. On paper, the provision introduces structure, hierarchy, and professionalization within the Directorate of Prosecution.<sup>61</sup> In substance, however, it does not fully align with the principles articulated by the judiciary. The continued placement of the Directorate of Prosecution under executive control raises concerns about whether the independence emphasized in cases like *Rajender Kumar Jain* can be sustained in practice.<sup>62</sup> While courts have insisted that prosecutorial decisions must be taken independently, the institutional design does not always facilitate such independence. This disconnect between doctrine and structure is not unique to the BNSS. It has existed under the earlier regime as well, particularly under Section 25A of the Code of Criminal Procedure.<sup>63</sup> However, the BNSS presented an opportunity to address it more directly—an opportunity that appears only partially realized.

<sup>60</sup> *Maneka Gandhi v. Union of India*, W. P. (C) No. 490 of 1977, (1978) 1 SCC 248 (SC).

<sup>61</sup> The Bharatiya Nagarik Suraksha Sanhita, 2023 (Act 46 of 2023), s. 20.

<sup>62</sup> *Rajender Kumar Jain*, supra note 62.

<sup>63</sup> The Code of Criminal Procedure, 1973, s. 25A.

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#### **XIV. RECONCILING VICTIM PARTICIPATION WITH PROSECUTORIAL NEUTRALITY:**

The introduction of victim participation raises another layer of complexity. On the one hand, it seeks to correct historical imbalance. On the other, it risks altering the character of prosecution itself. The prosecutor is expected to remain neutral, even while presenting the case against the accused. The victim's counsel, by contrast, may adopt a more adversarial stance. The coexistence of these roles within the same proceeding requires careful judicial management. If not handled properly, this could lead to fragmentation of the prosecution's case. Different narratives, strategies, and priorities may emerge, potentially weakening the overall coherence of the trial process. At the same time, excluding the victim entirely is no longer tenable. The Bharatiya Nagarik Suraksha Sanhita, particularly through Section 18(8), attempts to strike a middle path by allowing participation without displacing The prosecutor's central role.<sup>64</sup> The requirement of hearing the victim before withdrawal under Section 360 further strengthens this participatory framework.<sup>65</sup>

#### **XV. THE STRUCTURAL QUESTION: INDEPENDENCE VS ACCOUNTABILITY:**

Any discussion of prosecutorial reform must grapple with a fundamental dilemma: how to ensure independence without sacrificing accountability. Complete insulation from the executive may lead to lack of oversight. Excessive control, on the other hand, undermines independence. The solution lies somewhere in between—a system of checks and balances that allows the prosecutor to function autonomously while remaining answerable to institutional norms. Scholarly and policy analyses, including reports of the Law Commission of India and independent policy institutions, have repeatedly highlighted this structural dilemma in the Indian context.<sup>66</sup> The challenge is not merely doctrinal but institutional. Comparative models

<sup>64</sup> The Bharatiya Nagarik Suraksha Sanhita, 2023, s. 18(8).

<sup>65</sup> Id., s. 360.

<sup>66</sup> Law Commission of India, 197<sup>th</sup> Report on Public Prosecutors' Appointments (2006); Law Commission of India, 154<sup>th</sup> Report on the Code of Criminal Procedure (1996).

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suggest different approaches to this problem. Some rely on judicial supervision, others on internal hierarchies, and still others on independent oversight bodies. The BNSS, in its current form, leans toward hierarchical control within an executive framework.<sup>67</sup> Whether this model can achieve the desired balance remains to be seen.

## **XVI. THE WAY FORWARD: STRENGTHENING THE PROSECUTORIAL INSTITUTION:**

If the objective is to move beyond the characterization of prosecution as the “weakest link,” reform must go beyond statutory drafting. It must address the deeper institutional issues that shape prosecutorial behaviour. First, there is a need to rethink administrative control. Locating the Directorate of Prosecution outside the Home Department would be a significant step toward reducing conflict of interest and enhancing functional independence.<sup>68</sup> Second, appointment processes must be made more transparent and merit-based. Greater involvement of the judiciary could enhance credibility and reduce perceptions of bias. Third, prosecutors must be given a more active role during the investigation stage, particularly in serious cases. Early involvement would allow them to shape the evidentiary record and prevent weak cases from proceeding to trial. Finally, continuous training and professional development must be prioritized. A modern criminal justice system requires prosecutors who are not only legally competent but also institutionally equipped to handle complex forms of criminality.<sup>72</sup>

## **XVII. CONCLUSION:**

The enactment of the Bharatiya Nagarik Suraksha Sanhita marks an important moment in the evolution of criminal procedure in India. By restructuring the Directorate of Prosecution and

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<sup>67</sup> Vidhi Centre for Legal Policy, The Quest for Prosecutorial Independence (2020).

<sup>68</sup>

Id.

<sup>72</sup>

Id.

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introducing victim-oriented reforms, the legislation attempts to address long-standing concerns.<sup>69</sup> However, structural change does not automatically translate into functional transformation. The prosecutor continues to operate within an executive framework that may limit independence.

Judicial doctrine, as reflected in decisions such as *Shiv Kumar vs. Hukam Chand and Rajender Kumar Jain vs. State*, through Special Police Establishment, demands a higher standard—one that places fairness and objectivity at the centre of prosecutorial conduct.<sup>74</sup> The success of the BNSS will ultimately depend on whether this doctrinal vision can be realized in practice. If the prosecutor is able to function as a true officer of the court, the reforms may achieve their intended purpose. If not, the system risks reproducing existing limitations under a new statutory framework. The transformation of prosecution, therefore, is not merely a question of law, but of institutional will.

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<sup>69</sup> The Bharatiya Nagarik Suraksha Sanhita, 2023 ( Act 46 of 2023). <sup>74</sup> Shiv Kumar, supra note 59; Rajender Kumar Jain, supra note 62.