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"Prosecutorial Discretion: An Imperative for Effective Prosecution in the Punjab Criminal Prosecution Service"

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ABSTRACT

In a welfare state, the necessity for a certain level of discretion is widely acknowledged. Discretion plays a crucial role in law enforcement practices and is essential for the effective administration of justice. Within international Criminal Justice Systems, prosecutors have a pivotal responsibility in upholding the rule of law. Given their position within the executive branch, prosecutorial discretion becomes imperative. It is vital to observe that discretion itself is not inherently damaging; however, unchecked and absolute discretion can lead to adverse outcomes. The goal should not be the elimination of discretion, but rather its structured implementation. Within the realm of the criminal justice system, where both the law enforcement agencies and the court possess considerable discretion in pursuit of justice, it follows that the prosecution should also possess a degree of discretion. Without equipping the prosecution with essential discretionary tools, the Punjab Criminal Prosecution Service would be unable to effectively fulfill its role in criminal justice system. Consequently, the time has come to empower the prosecution with the necessary discretion it requires, especially the discretion to decide whether to prosecute or not which stands as a vital prerogative that prosecutors must possess to uphold the justice.

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1. Introduction

Prosecutors hold a pivotal role to uphold rule of law in international Criminal Justice Systems (CJS). Prosecutors are part of administrative branch¹. Administration always needs discretion². The exercise of discretion is an omnipresent and valid element within contemporary law enforcement

¹ N. Douglas Wells, "Prosecution as an Administrative System: Some Fairness Concerns," *Capital University Law Review* 27 (1999 1998): 841.

² Anders Molander, *Discretion in the Welfare State: Social Rights and Professional Judgment* (Taylor & Francis, 2016).

practices³. Even in democracies where resources are boundless, criminal codes are rational; use of discretion remains indispensable for effective administration of justice there⁴. Within a welfare state, there is a general consensus that a certain level of discretion will inevitably be required⁵. In transitioning from a Police State to a Welfare State the main emphasis shifts from solely maintaining law and order to prioritizing the well-being of citizens. To effectively achieve this welfare objective, it becomes essential to entrust certain powers to the Executive authorities. These powers aim to address the legal gaps left by the Legislature, and this delegation of authority is encapsulated within discretionary powers, which are indispensable for the purpose of sound governance⁶. Discretion is not inherently negative. It is an inescapable factor in enforcing and prosecuting crimes, capable of being limited to a certain extent but impossible to eradicate entirely⁷. Just as absolute discretion is impermissible, prosecutorial discretion follows the same principle of not being absolute⁸. There is a need not eradicate discretion, but to structure it⁹. Likewise, there is a need not abolition of prosecutorial discretion but structuring it¹⁰.

Attributing the responsibility of acquittals to prosecutors might seem easy; however, the challenge lies in providing them with the necessary tools, resources, and substantial discretionary authority to ensure effective prosecution in Pakistan¹¹. The growing perception in Pakistan that defendants often go unpunished by the judicial system is not without foundation. This notion is reinforced by the country's low conviction rate: it stands at 8.66%, a stark contrast to India's 37.4%, England's 90%, and Japan's remarkable 99.9%. Arif Rajput and Riaz Rajput posit that a contributing factor to Pakistan's low conviction rate is flawed prosecution¹². This perspective is not entirely accurate. While flawed prosecution is a significant factor, it is important to acknowledge that the responsibility cannot rest solely on the prosecution. The investigative phase holds paramount importance in criminal cases: which if conducted carelessly, then prosecution would inevitably struggle to establish its case beyond a reasonable doubt¹³.

The CJS stands as a foundational structure essential for keeping societal peace. This system comprises three pivotal institutions: the police, prosecution, and judiciary. Regrettably, the institution of prosecution within Pakistan's justice administration appears feeble and ineffectual. There are numerous challenges faced by prosecutors. According to a research they find themselves in a vulnerable

3 Simon H. Bronitt and Philip Stenning, "Understanding Discretion in Modern Policing," SSRN Scholarly Paper (Rochester, NY, 2011), <https://papers.ssrn.com/abstract=2611449>.

4 Stephanos Bibas, "The Need for Prosecutorial Discretion" 19 (n.d.).

5 Robert E. Goodin, "Welfare, Rights and Discretion," in *Welfare Law* (Routledge, 2002).

6 Srishti Vaishnav and Karn Marwaha, "Judiciary: A Ladder between Inevitable Administrative Discretion and Good Governance." 02 (n.d.).

7 George C Thomas Iii, "Discretion and Criminal Law: The Good, The Bad, and the Mundane," n.d.

8 David Fisher, "Fifth Amendment--Prosecutorial Discretion Not Absolute: Constitutional Limits on Decision Not to File Substantial Assistance Motions," *Journal of Criminal Law and Criminology* 83 (1993 1992): 744.

9 Anders Molander, Harald Grimen, and Erik Oddvar Eriksen, "Professional Discretion and Accountability in the Welfare State," *Journal of Applied Philosophy* 29, no. 3 (2012): 214–30; William F. West, "Structuring Administrative Discretion: The Pursuit of Rationality and Responsiveness," *American Journal of Political Science* 28, no. 2 (1984): 340–60, doi:10.2307/2110876; Kenneth Culp Davis, "Discretionary Justice," *Journal of Legal Education* 23, no. 1 (1970): 56–62.

10 Carla Sepulveda and Javier Wilenmann, "Structuring Prosecutorial Power," *Legal Studies* 42, no. 4 (December 2022): 680–95, doi:10.1017/lst.2022.14.

11 "Terrorism Prosecution in Pakistan," accessed August 17, 2023, https://www.usip.org/sites/default/files/PW113_Terrorism_Prosecution_in_Pakistan.pdf.

12 Muhammad Arif Rajput and Muhammad Riaz Rajput, "Impact of Defective Investigation and Prosecution on Trial," *Social Sciences* 9, no. 6 (2020): 265, doi:10.11648/j.ss.20200906.17.

13 Sawera Malik, "Defective Investigation Leads to Injustice - An Overview of Pakistani Context," *Current Trends in Law and Society* 2, no. 1 (December 31, 2022): 41–54.

position, squashed in amongst two influential entities—the investigating agencies and the court. Prosecution possesses limited power to back justice. This lack of ample authority renders them not only powerless but also subjects them to a spectrum of personal, administrative, and procedural hurdles during their role as prosecutors¹⁴. Prosecutors lack the necessary power of discretion to meet the standards required for the effective prosecution in the administration of justice¹⁵. While the Punjab province introduced the Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act of 2006¹⁶ (CPS Act 2006) with the intention of enhancing prosecutors' authority within the CJS; however, it falls short in conferring sufficient discretion regarding non-prosecution.

Therefore, within a welfare state, the recognition of a certain degree of discretion remains unanimous. This discretion plays an indispensable role in dispensation of justice. Prosecutors are now a main stake holder in CJS, and being part of this system, prosecutorial discretion emerges as an imperative aspect of their role. In the arena of the CJS, where both the law enforcement agencies and the judiciary exercise significant discretion in their pursuit of justice, it logically follows that the prosecution should similarly possess a measure of discretion. Lacking the provision of essential discretionary tools for the prosecution, the criminal prosecution service, as outlined in the CPS Act 2006, would inevitably falter in fulfilling its mandate within the CJS. Hence, time has arrived to endow the prosecution with the indispensable discretion it requires to effectively discharge its responsibilities¹⁷, especially the authority to decide whether to prosecute or not which stands as a crucial prerogative that prosecutors must possess to uphold the justice.

Criticizing the prosecution for its apparent failure in examining facts¹⁸ might be simple, yet what is essential to grasp is that without the authority to exercise prosecutorial discretion¹⁹, they cannot conduct a thorough and effective scrutiny of the facts. It is important part of prosecution²⁰. Though there are numerous critiques²¹ of prosecutorial discretion, yet there are also proponents who strongly favor its utilization. What is needed is not the elimination of prosecutorial discretion, but rather its proper structuring²², and controlling²³. While prosecutorial discretion is often perceived as extensive and unrestricted, in reality, prosecutors frequently ground their decisions in a relatively

14 Iqra Khalil, Ahmed Usman, and Aaisha Amjad, "CHALLENGES FACED BY PROSECUTORS IN THE ADMINISTRATION OF JUSTICE IN PAKISTAN," *PalArch's Journal of Archaeology of Egypt / Egyptology* 18, no. 10 (October 10, 2021): 2641–51.

15 "Globalization of Prosecutorial Justice: An Appraisal by Dr. Muhammad Ramzan Kasuri :: SSRN," accessed August 15, 2023, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4013305.

16 "The Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act 2006," accessed August 17, 2023, <http://punjablaws.gov.pk/laws/483.html>; Shahzada Sultan, "AN APPRAISAL OF PUBLIC PROSECUTION SYSTEM IN PUNJAB," accessed August 17, 2023, https://www.academia.edu/40596712/_AN_APPRAISAL_OF_PUBLIC_PROSECUTION_SYSTEM_IN_PUNJAB_.

17 Bibas, "The Need for Prosecutorial Discretion," n.d.

18 Imran Sajid, Amir Asad, and Uzma Ashiq, "Juvenile Courts in Pakistan: Structure, Processes, and Issues" 12 (January 1, 2020): 45–60.

19 Stephanos Bibas, "The Need for Prosecutorial Discretion" 19 (n.d.).

20 "THE IMPORTANCE OF PROSECUTORIAL DISCRETION," *Longwell Lawyers*, accessed August 19, 2023, <https://www.longwelllawyers.com/blog/2017/september/the-importance-of-prosecutorial-discretion/>.

21 Bruce Green, "Prosecutorial Discretion: The Difficulty and Necessity of Public Inquiry," *Dickinson Law Review (2017-Present)* 123, no. 3 (April 1, 2019): 589.

22 Sara Beale, "Prosecutorial Discretion in Three Systems: Balancing Conflicting Goals and Providing Mechanisms for Control," *Discretionary Criminal Justice in a Comparative Context*, January 1, 2014, 27–58; Celesta A. Albonetti, "Prosecutorial Discretion: The Effects of Uncertainty," *Law & Society Review* 21, no. 2 (1987): 291–313, doi:10.2307/3053523.

23 John H. Langbein, "Controlling Prosecutorial Discretion in Germany," *The University of Chicago Law Review* 41, no. 3 (1974): 439–67, doi:10.2307/1599175; Bruce A. Green and Samuel J. Levine, "Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis," *Ohio State Journal of Criminal Law* 14 (2017 2016): 143.

limited set of legal and quasi-legal considerations²⁴. Moreover, their decision-making is additionally influenced by various contextual factors; they are prescribed in their code of conducts²⁵.

2. Literature review

There is a lot of literary work available on prosecutorial discretion worldwide. Bruce A. Green's profound work on prosecutorial discretion is noteworthy. He delves into their obligation towards neutrality, elucidates their unique position within the CJS, and underscores their duty to ensure justice. Green accentuates the importance of an ethical code of conduct for prosecutors, advocates for prosecutorial accountability, and highlights the imperative duty to prevent wrongful convictions among other aspects²⁶. Empirical research on the functioning of prosecutorial discretion is also being actively pursued by scholars and researchers²⁷. Benjamin Widdicombe, in his doctoral dissertation, delves deep into the decision-making processes within the Crown Prosecution Service, posing the question, "How do prosecutors make case decisions?" Central to his exploration is the "Code for Crown Prosecutors," which he references extensively. This code serves as a guiding document for prosecutors, and Widdicombe's scrutiny of its application offers a nuanced understanding of the decision-making dynamics in prosecutorial settings²⁸. However, there is a limited amount of research available on the subject in Pakistan.

In the realm of prosecutorial discretion, their functions and challenges within Pakistan, a myriad of scholars have offered their insights. Khalil, Usman, Amjad delve into the "challenges faced by prosecutors in the administration of justice in Pakistan"²⁹, providing a holistic view of the roadblocks faced by legal professionals in their duties. Turning the lens to the issue of terrorism prosecution, Zaidi³⁰ furnishes valuable insights that expand the discourse on this niche but crucial area of the law.

²⁴ Bruce Frederick and Don Stemen, "The Anatomy of Discretion: An Analysis of Prosecutorial Decision Making – Technical Report," n.d.

²⁵ PUNJAB CRIMINAL PROSECUTION SERVICE, *CODE OF CONDUCT FOR PROSECUTORS*, 2016; "The Code for Crown Prosecutors | The Crown Prosecution Service," accessed August 19, 2023, <https://www.cps.gov.uk/publication/code-crown-prosecutors>.

²⁶ Green, "Prosecutorial Discretion"; Green and Levine, "Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion"; Bruce A. Green, "Why Should Prosecutors Seek Justice," *Fordham Urb. LJ* 26 (1998): 607; Bruce A. Green, "Prosecutorial Ethics as Usual," *U. Ill. L. Rev.*, 2003, 1573; Bruce Green and Ellen Yaroshefsky, "Prosecutorial Accountability 2.0," *Notre Dame L. Rev.* 92 (2016): 51; Fred C. Zacharias and Bruce A. Green, "The Uniqueness of Federal Prosecutors," *Geo. LJ* 88 (1999): 207; *ibid.*; Bruce A. Green and Fred C. Zacharias, "Regulating Federal Prosecutor's Ethics," *Vand. L. Rev.* 55 (2002): 381.

²⁷ Megan Wright, Shima Baradaran Baughman, and Christopher Robertson, "Inside the Black Box of Prosecutor Discretion," n.d.; Robert L. Rabin, "Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion," *Stan. L. Rev.* 24 (1971): 1036; Daniel Brice Baker and Shahidul Hassan, "Gender and Prosecutorial Discretion: An Empirical Assessment," *Journal of Public Administration Research and Theory* 31, no. 1 (2021): 73-90; Robert J. Smith and Justin D. Levinson, "The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion," *Seattle UL Rev.* 35 (2011): 795; Lauren O'Neill Shermer and Brian D. Johnson, "Criminal Prosecutions: Examining Prosecutorial Discretion and Charge Reductions in US Federal District Courts," *Justice Quarterly* 27, no. 3 (2010): 394-430; Celesta A. Albonetti and John R. Hepburn, "Prosecutorial Discretion to Defer Criminalization: The Effects of Defendant's Ascribed and Achieved Status Characteristics," *Journal of Quantitative Criminology* 12 (1996): 63-81; Michael Edmund O'Neill, "Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors," *Am. Crim. L. Rev.* 41 (2004): 1439.

²⁸ Benjamin Widdicombe, "Decision-Making in the Crown Prosecution Service : How Do Prosecutors Make Case Decisions?" (Thesis (Ph.D.), St. Edmund's College University of Cambridge, 2021), <https://ethos.bl.uk/OrderDetails.do?uin=uk.bl.ethos.866908>.

²⁹ Khalil, Usman, and Amjad, "CHALLENGES FACED BY PROSECUTORS IN THE ADMINISTRATION OF JUSTICE IN PAKISTAN."

³⁰ Syed Manzar Abbas Zaidi, *Terrorism Prosecution in Pakistan* (United States Institute of Peace Washington, DC, 2016).

For those seeking a broader context, Jamshed's overview on CJS of Pakistan³¹ serves as an essential guide to the intricacies of Pakistan's justice system. Addressing the palpable consequences of procedural lapses, Muhammad Arif Rajput and Riaz Rajput elucidate the "Impact of Defective Investigation and Prosecution on Trial"³², thereby spotlighting the repercussions of sub-par investigative and prosecutorial performance. Diving into the personal dimensions of those who uphold the law, Bilal and Batool³³ unearth the factors of life of Public Prosecutors in Pakistan, adding a human touch to the otherwise stringent discourse. Mashhood Mirza's research focusing on the functions and duties of Prosecutors in Khyber-Pakhtunkhwa Province³⁴ serves as a pointed examination of prosecutorial duties within a specific regional context.

Concluding the survey of pivotal works in this domain, Ramzan Kasuri's contributions stand out for their depth and specificity. His paper offers a forward-looking perspective, emphasizing the proactive functions that public prosecutors can adopt to elevate the administration of justice in the nation³⁵. Furthermore, his exploration titled "Globalization of Prosecutorial Justice: An Appraisal" is an invaluable asset to the body of literature, not only broadening the discourse to a global context but also astutely pinpointing the gap of prosecutorial discretion faced by public prosecutors in Pakistan³⁶. Kasuri's insights undoubtedly play a pivotal role in understanding the nuances and potential reforms for the prosecutorial landscape in Pakistan.

Together, these scholarly contributions substantially enhance the existing literature on prosecutorial discretion, shedding light on the practices, challenges, and broader dynamics within the legal landscape of Pakistan. However, it's notable that the subject of prosecutorial discretion has not been individually addressed in depth by any single work. Consequently, the current research endeavor holds paramount importance in addressing this critical gap and contributing valuable insights to this pivotal aspect of legal proceedings.

3. Advent of the CPS Act 2006

Criminal proceedings always commence with the filing of an F.I.R. Once a criminal case is registered, police initiates an investigation to uncover the truth. The core responsibility of an Investigating Officer is evidence collection³⁷. In Nadeem alias Deema's case the court observed that historical examination of police investigation methods in criminal cases reveals that the outcomes often lack legal justification. Courts have frequently expressed concern in their judgments, recognizing that investigation's sole purpose is to gather evidence supporting allegations. And it is vital to observe here that an Investigating Officer's view does not determine an accused person's guilt or innocence; their role is confined to evidence collection. However, police frequently lean towards declaring an accused person innocent or guilty, leading to consequences and hardships for the prosecution due to these biased declarations. To prevent such failures and to better serve public welfare by enhancing

31 Jibrán Jamshed, "Criminal Justice System of Pakistan: An Overview," SSRN Scholarly Paper (Rochester, NY, March 30, 2018), <https://papers.ssrn.com/abstract=3152735>.

32 Arif Rajput and Riaz Rajput, "Impact of Defective Investigation and Prosecution on Trial."

33 Syeda Shahida Batool Ahmed Bilal, "Determinants of Quality of Life of Public Prosecutors in Pakistan," October 4, 2022, doi:10.5281/ZENODO.7145403.

34 Mashhood Mirza, "Role and Responsibilities of the Public Prosecution A Case Study of Khyber- Pakhtunkhwa Province," n.d.

35 Dr Muhammad Ramzan Kasuri, Ata Ullah Khan Mahmood, and Ghufraan Ahmed, "Proactive Role of Public Prosecutors in the Administration of Criminal Justice: A Way Forward for Pakistan," SSRN Scholarly Paper (Rochester, NY, 2021), <https://papers.ssrn.com/abstract=4020045>.

36 "Globalization of Prosecutorial Justice: An Appraisal by Dr. Muhammad Ramzan Kasuri :: SSRN."

37 Jibrán Jamshed et al., "ROLE OF POLICE INVESTIGATION IN THE CRIMINAL JUSTICE SYSTEM OF PAKISTAN," *International Journal of Management Research and Emerging Sciences* 10, no. 2 (June 1, 2020), doi:10.56536/ijmres.v10i2.97.

investigation quality through timely legal guidance, the necessity for an independent Prosecution agency became evident³⁸. Furthermore, to counter this narrow perspective adopted by the police and their tendency to consider individuals guilty until proven innocent, the Government has intervened by introducing the Prosecution institution. This step was first taken in 1992 with the Code of Criminal Procedure (Amendment) Act XXV of 1992³⁹. But this step too was insufficient⁴⁰.

In this perspective, Justice Ijaz Ahmad Chaudhary, had had the view that the Pakistani judicial system encourages improved performance in allied departments to support efficient justice delivery. Offices like the Attorney-General and advocate-General have effectively collaborated with the judiciary in the past. But as criminal cases surged, creating a challenge, it led to an independent prosecution institution, with an aimed at enhancing independence of prosecution and coordination within the CJS, safeguarding the innocent and holding offenders accountable. This effort culminated in the Act, 2006⁴¹: under the CPS Act 2006, the Punjab Government have established the Service⁴². This Service is comprised of roles ranging from the Prosecutor General to Assistant District Public Prosecutors. While the government holds superintendence over this Service, its administration rests with the Prosecutor General⁴³.

4. Role of Prosecutor in the CPS Act 2006

In the Syed Maqbool Shah case⁴⁴, Justice Rooh-ul-Amin Khan observed on the prosecutor's position within the CJS, that a Prosecutor serves as the legal representative of the prosecution, entrusted with the task of presenting the case against the accused during a criminal trial. The central function of a Prosecutor is to uphold the principles of justice. Operating as an officer of court, his primary obligation is to aid the court in uncovering the truth by presenting all pertinent evidence on behalf of the prosecution. In the discharge of these responsibilities, the Public Prosecutor is obligated to act equitably towards the court, the investigative agencies, and the accused. He must strike a balance that ensures fairness and integrity throughout the legal proceedings. And according to the United Nations' Guidelines on the Role of Prosecutors, they are mandated to actively engage in various aspects of criminal proceedings. These responsibilities include initiating prosecutions and, if permitted by law or local norms, participating in crime investigations. They are also tasked with supervision of investigations, supervising the execution of court rulings, and carrying out other duties as representatives of the public interest⁴⁵.

The Act 2006 provides a range of powers to Prosecutors, enabling them to take action from the very moment an FIR is registered at a police station. The preamble of the Act explicitly establishes the creation of the prosecution department, with the distinct goal of achieving independent status to facilitate efficient prosecution in criminal cases. The Act's Chapter 3 outlines the powers and functions attributed to Prosecutors. Section 12(a) stipulates that the officer in charge of a police station must promptly notify the District Public Prosecutor of the registration of cases. This obligation imposed on

38 Ijaz Ahmad Chaudhary, C.J., *Nadeem alias Deema v District Public Prosecuotr Sialkot*, 2012 PCrLJ 1823 (n.d.).

39 Muhammad Amjad Rafiq, J, *Muhammad Usman Ghani v the State*, PLD 2023 Lahore 291 (n.d.).

40 Justice (R) Dr Munir Ahmad Mughal, "Law as to the Public Prosecutors in Pakistan: Cases and Materials [Part IX, Ch. Xxxviii, Ss. 492-495 of the Code of Criminal Procedure, 1898]," SSRN Scholarly Paper (Rochester, NY, September 10, 2014), doi:10.2139/ssrn.2494632.

41 Ijaz Ahmad Chaudhary, C.J., *Nadeem alias Deema v District Public Prosecuotr Sialkot*, 2012 PCrLJ 1823.

42 The Punjab Criminal Prosecution Service.

43 "The Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act 2006."

44 Rooh-ul-Amin Khan, J, *Syed Maqbool Shah v the State*, 2021 YLR 1517 (n.d.).

45 "Guidelines on the Role of Prosecutors," *OHCHR*, accessed August 18, 2023, <https://www.ohchr.org/en/instruments-mechanisms/instruments/guidelines-role-prosecutors>.

police officers is not merely a procedural formality; rather, its purpose is to ensure the active involvement of the Public Prosecutor from the very outset. Moreover, the Prosecutor General and the District Public Prosecutor, as indicated by Section 10(2) of the Act, hold the authority to refer to the competent body to initiate proceedings against any official involved in defective investigation. Furthermore, comprehensive powers have also been listed in Section 9 of the Act⁴⁶.

Furthermore, Sohail Nasir, J, remarked in the Shagufta Sarwar, ADPP case that the role of a Prosecutor transcends that of a mere post office. Instead, their responsibility extends to overseeing the actions of investigating officers at the opportune time and place. This is vital due to the fact that Prosecutors bear the ultimate accountability for ensuring the effectiveness of the prosecution process. It remains undeniable that the authority to concur or dissent with the opinion ultimately rests with the court. However, it is essential to emphasize that the court's jurisdiction does not include the ability to infringe upon the powers of the Prosecutors⁴⁷.

Chapter-III of the CPS Act 2006 outlines the 'Powers and Functions of the Prosecutors'. Within this chapter, section 9 specifically addresses the Conduct of prosecution. And section 10, the CPS Act 2006, defines the Powers of Prosecutor. Here Prosecutor is also empowered to call record from any agency regarding an investigation. With the court's consent, a Prosecutor also can withdraw from prosecuting, either generally or for specific offenses. Moreover, during a trial, the Prosecutor also has the power of *nolle prosequi*. In such cases, proceedings against the accused persons are halted, leading to their discharge⁴⁸. According to the Act, the investigating officers are also required to transmit the investigation report to the relevant Prosecutor: in legally stipulated timeframe. Furthermore, the investigating officer is mandated to adhere to the Prosecutor's directions and rectify any deficiencies pointed out by them in their reports⁴⁹. Notwithstanding, the Public Prosecutor's duty is not to pursue convictions only, but to present all available evidence to the court⁵⁰.

5. Discretion to prosecute under the CPS Act 2006

Researchers assert that prosecutors in Pakistan come across a range of problems. The prosecution institution is perceived as feeble and inadequate in administering justice within the country. Their research reveals that prosecutor in Pakistan grapple with a sense of vulnerability; sandwiched between the police and judiciary. They lack substantial authority to enhance access to justice. Not only are they devoid of influence, but they also confront numerous personal, administrative, and procedural challenges during their role as prosecutors⁵¹. And the primary hurdle hindering prosecutors in Pakistan from fulfilling their expected active role is the absence of authority to make the decision on whether to initiate prosecution preceding to the commencement of the trial⁵². The role of prosecutors in Pakistan is inherently demanding⁵³, marked by various challenges. Struggling to effectively tackle these issues, they experience stress that not only impacts their job satisfaction but also

46 Sohail Nasir and Ahmad Nadeem Arshad, *Shagufta Sarwar ADPP v Special Judge Anti Terrorism Court*, 2022 PCrLJ 1594 (n.d.).

47 *Ibid.*

48 Section 10 of "The Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act 2006."

49 "The Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act 2006."

50 Mirza, "Role and Responsibilities of the Public Prosecution A Case Study of Khyber- Pakhtunkhwa Province."

51 Khalil, Usman, and Amjad, "CHALLENGES FACED BY PROSECUTORS IN THE ADMINISTRATION OF JUSTICE IN PAKISTAN."

52 Jibran Jamshed, "Criminal Justice System of Pakistan: An Overview," SSRN Scholarly Paper (Rochester, NY, March 30, 2018), <https://papers.ssrn.com/abstract=3152735>.

53 Mirza, "Role and Responsibilities of the Public Prosecution A Case Study of Khyber- Pakhtunkhwa Province."

diminishes their overall quality of life⁵⁴.

Section 9(5)⁵⁵ of the CPS Act 2006 holds significance for our discussion. This clause mandates prosecutors to meticulously review police reports and determine their appropriateness for court submission. Alternatively, they can send back reports for rectification of shortcomings, which could encompass matters such as proper charges or specific evidence⁵⁶. Nonetheless, this section does not address the course of action if the case is not fit for court submission. This concern was also highlighted by Muhammad Ramzan Kasuri. The challenge pertains to the prosecutor's limited power to give binding advice to the police during the investigation stage. Under the CPS Act 2006 Prosecutor is lacking the authority to issue authoritative directives. Despite possessing the ability to voice objections, return files to the police for amendments, and communicate issues to the investigation head regarding flawed investigations, the prosecutor is obligated to forward the report (under section 173 CrPC) to the courts. This leaves them unable to withhold or dismiss cases at their discretion. The genuine authority to decide whether to prosecute or not is not vested in the prosecutor within Pakistan⁵⁷.

In CJS of Pakistan, the core responsibility for administering the justice lies with the police, prosecution, and judiciary. And the Prosecutor's main role is "Gate-keeping⁵⁸"; in the context of prosecution, gate-keeping signifies its control over criminal cases, spanning from investigation to trial stages, ensuring adherence to standards⁵⁹. The query whether prosecutors in Pakistan hold a gate-keeping role remains unanswered. In the current framework, the police conduct investigations, and after reviewing police reports, the prosecution forwards these to the court, which assesses the case, provides a judicial determination, and makes a final decision. While the prosecutor does offer their opinion after evaluating evidence, they lack the authority to terminate, suspend, or halt prosecution. Furthermore, the courts too do not accord adequate weightage to the opinions provided by prosecutors during trial⁶⁰. Despite this, Amjad Rafiq, J., highlights that the purpose of the scrutiny conducted by prosecutors serves a dual role. Firstly, it assists the police in rectifying legal flaws in their reports; secondly, it provides courts with a preliminary and provisional evaluation of the evidence on record. The requirement outlined under section 9(7) of the CPS Act 2006, obligating prosecutors to present their assessment outcome to the court regarding the relevancy, and admissibility of evidence and the applicability of charges against any accused, unequivocally indicates that prosecution should not be recommended if evidence is inadequate or the offence does not made out⁶¹. However, the judgement is silent what to do? Notwithstanding, the judge further observed that in cases where prosecutors find evidence present but not against all accused, they can recommend the discharge of a specific individual to streamline the process for prompt disposal of the case. However, their opinions are suggestive in nature. They are not binding on courts. This is a lacuna.

54 Ahmed Bilal, "Determinants of Quality of Life of Public Prosecutors in Pakistan."

55 Section 9 (5) "The Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act 2006."

56 Sagheer Ahmad Qadri, J, Azizullah Khan v S.H.O. Police Station Sadar Mianwali and 4 others, 2013 PCr.LJ 1411 (n.d.); Muhammad Amjad Rafiq, J, Muhammad Usman Ghani v the State, PLD 2023 Lahore 291.

57 Ramzan Kasuri, Mahmood, and Ahmed, "Proactive Role of Public Prosecutors in the Administration of Criminal Justice."

58 Andrew Ashworth, "Prosecution, Police and Public - A Guide to Good Gatekeeping," *Howard Journal of Criminal Justice* 23 (1984): 65.

59 Gabriela Knaul, "Report of the Special Rapporteur on the Independence of Judges and Lawyers," n.d., https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/RegularSession/Session20/A.HRC.20.19_En.pdf.

60 Ramzan Kasuri, Mahmood, and Ahmed, "Proactive Role of Public Prosecutors in the Administration of Criminal Justice"; "Globalization of Prosecutorial Justice: An Appraisal by Dr. Muhammad Ramzan Kasuri :: SSRN."

61 Muhammad Amjad Rafiq, J, Muhammad Usman Ghani v the State, PLD 2023 Lahore 291.

However, Justice Fazal Karim, in his book⁶², opined that although there is no explicit provision in the CPS Act 2006 that grants the power not to prosecute, the use of the word "may" in section 9(5)⁶³ appears to provide prosecutors with the requisite discretion to refrain from submitting a case to court for trial, if the case is deemed unfit for trial. He accurately noted that it's not only unjust to convict an innocent person, but it's also unjust to prosecute⁶⁴ in the absence of evidence⁶⁵. It is against the dignity of an innocent accused person⁶⁶.

6. Discretion to prosecute under Code of Conduct

According to Section 17 of the CPS Act 2006, the Prosecutor General is responsible for issuing a code of conduct for prosecutors, subject to the Punjab Government's prior approval. This code guides prosecutors in assessing evidence. Paragraph 3 outlines the General Principles of Prosecution, emphasizing that the decision to prosecute is an important decision, impacting suspects, victims, witnesses, and the public. This decision must be made with utmost care, always prioritizing justice over obtaining convictions. Prosecutors are obligated to familiarize themselves with case details, ensuring the correct person are charged with the appropriate offense. Proper application of the law, presentation of relevant evidence, and fulfillment of disclosure obligations are also essential. Furthermore, prosecutors must evaluate whether a trial is the most suitable resolution⁶⁷. Justice Tariq Saleem Sheikh succinctly summarized paramount principles, indicating that prosecutors lack the authority to direct or meddle in police investigations. The determination to prosecute is reached when a prosecutor concludes that a case is suitable for trial against one or multiple suspects. Conversely, a decision not to prosecute arises when a prosecutor deems a case unsuitable for trial against one or more suspects. Importantly, a decision regarding prosecution must be made following the conclusion of a review of the police case. Prosecutors are empowered to decide only if they are content that the comprehensive extent of the criminal matter has been established, enabling an informed assessment⁶⁸.

7. Full Code Test

In cases where prosecutors lack sufficient information for such a determination, the investigation must persist, and the decision should be made later, following the Full Code Test. This test embraces two sequential assessments: the Evidential Test and the Public Interest Test.

The Full Code Evidential test is employed when investigation concludes, and all crucial evidence is gathered. Subsequently, the Public Interest test is conducted if a case meets the requirements of the Full Code Evidential Test. If a case fails the evidential stage, regardless of its seriousness or sensitivity, it should not proceed⁶⁹. Prosecutors adhere to standards for evidence, such as the prima facie case (51% Rule) and the realistic prospect of conviction. These standards are less rigorous than the court's

⁶² Fazal Karim, *The Law of Criminal Procedure* (Pakistan Law House, 2010).

⁶³ 9(5) "The Prosecutor shall scrutinize the report or the request and may, (b) if it is fit for submission, file it before the Court of competent jurisdiction".

⁶⁴ Mike Stenhouse, "POLICY BRIEF - Protecting Citizens from Unjust Prosecution" (RICFP: Rhode Island Center for Freedom and Prosperity, 2013), <https://policycommons.net/artifacts/3676912/p-olicy-b-rief/4482754/>.

⁶⁵ Karim, *The Law of Criminal Procedure*.

⁶⁶ Nicholas Cowdery, "Dying with Dignity," *Living Ethics*, no. 86 (December 23, 2020): 12-13, doi:10.3316/ielapa.774456112334050.

⁶⁷ Ch. Fawad Ahmad and others v Government of the Punjab and others, 2023LHC3967 (n.d.); Muhammad Amjad Rafiq, J, Muhammad Usman Ghani v the State, PLD 2023 Lahore 291.

⁶⁸ Ch. Fawad Ahmad and others v Government of the Punjab and others, 2023LHC3967.

⁶⁹ PUNJAB CRIMINAL PROSECUTION SERVICE, *CODE OF CONDUCT FOR PROSECUTORS*.

standard of proof, which requires that an accused be proven guilty beyond a reasonable doubt⁷⁰.

8. The Evidential Test

The Evidential Test involves an unbiased appraisal of the record along with the evidence, including somewhat defense or additional material presented by the suspect. Based on this assessment, the Prosecutor concludes whether a judge or magistrate, upon hearing the case, is more inclined to convict the accused on the charge. This evaluation occurs during the scrutiny of the police case. When applying the Evidential Test, the Prosecutor considers several factors: the reliability of evidence, its sufficiency, and the defense perspective.

9. The Public Interest Test

Subsequently, the Public Interest Test is conducted. In instances where sufficient evidence justifies prosecution, the Prosecutor proceeds to assess if prosecution serves the public interest. Factors encompassing this test are outlined in the code of conduct and encompass:

- a) The gravity of the offense
- b) The degree of suspect's culpability
- c) Victim's circumstances
- d) Offender's age and situation
- e) Impact on the community
- f) Remorse or corrective actions by the offender
- g) Proportionality of prosecution as a response

The introduction of these tests unmistakably demonstrates the fulfillment of the constitutional assurance of equal protection. This procedure, outlined above, is designed to safeguard individuals subjected to criminal proceedings from potential hardships. Prosecutors should adhere to this process when presenting their reports under section 9(7) of the CPS Act. Within this framework, Prosecutors have an option to recommend the discharge of an accused if evidence is inadequate⁷¹. But their recommendations are not binding⁷².

10. Discretion to prosecute under Code for Crown Prosecutors

The Crown Prosecution Service adheres to the Code for Crown Prosecutors⁷³ as a framework for exercising prosecutorial discretion. The inaugural code was released in 1986, and it was succeeded by subsequent versions in 1992, 1994, 2000, 2004, 2010, 2013, and 2018. Throughout all editions, the Code Test has remained consistent.

11. The Code Test

The Full Code Test partakes two phases:

- (i) the evidential stage; succeeded by
- (ii) the public interest stage.

This protocol is put into effect after all realistic and rational guidelines drafted by prosecutor

⁷⁰ Muhammad Amjad Rafiq, J, Muhammad Usman Ghani v the State, PLD 2023 Lahore 291.

⁷¹ Ibid.

⁷² Ramzan Kasuri, Mahmood, and Ahmed, "Proactive Role of Public Prosecutors in the Administration of Criminal Justice."

⁷³ "The Code for Crown Prosecutors | The Crown Prosecution Service."

have been diligently followed, or alternatively, before the enquiry concludes if he deems that additional evidence is improbable to influence the execution of the Full Code Test. Furthermore, prosecutors ought to first assess the presence of adequate evidence for prosecution before deliberating on whether pursuing the case aligns with the public interest.

12. The Evidential Stage

The initial phase of the test is evidential one. In this phase, the prosecutor's task is to ascertain if there exists "adequate evidence to form a realistic chance of securing a conviction". Prosecutors are tasked with evaluating the reliability, credibility, and sufficiency of the evidence. This pivotal "realistic prospect of conviction" assessment forms the cornerstone of this stage⁷⁴. When determining the adequacy of evidence for prosecution, prosecutors look for admissibility, reliability, and usage of evidence in court, besides any further material that could potentially impact the sufficiency of the evidence⁷⁵.

13. The Public Interest Stage

Subsequent to their initial evaluation, prosecutors then assess if pursuing a prosecution aligns with the public interest. In this assessment, they weigh various factors, together with the gravity of offences, degree of blame, victim's situation and resultant harm, the age and maturity level of suspect, the repercussions on the public, and if the prosecution serves as a balanced response.

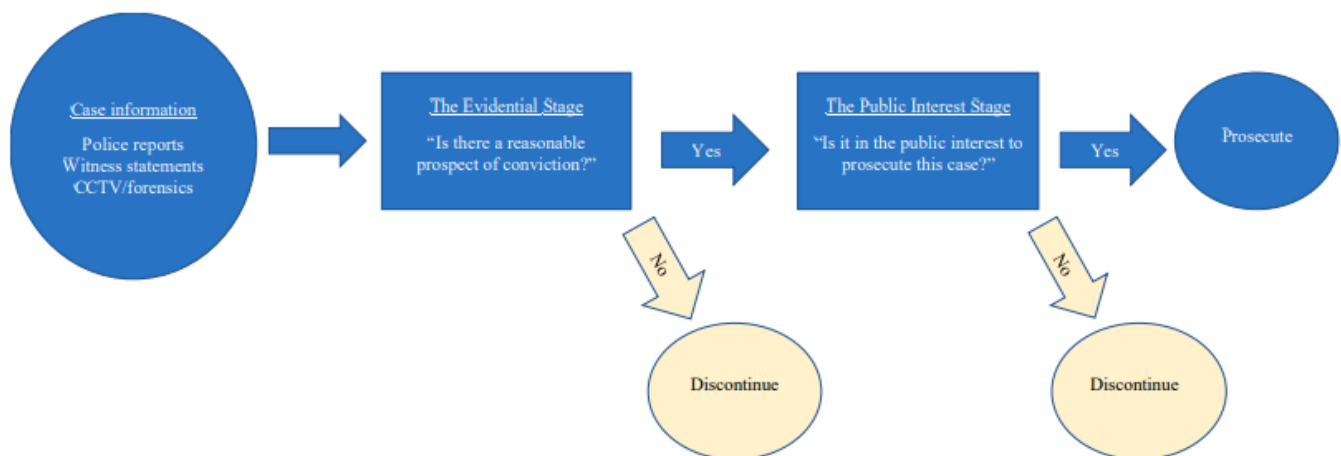
14. Similarities between the codes of Pakistan and the Crown Prosecution Service.

Upon closer examination, one can identify similarities between the codes of Pakistan and the Crown Prosecution Service.

The Code Test in Crown Prosecution Service.

Diagram 1

Diagram 1: The Code Test

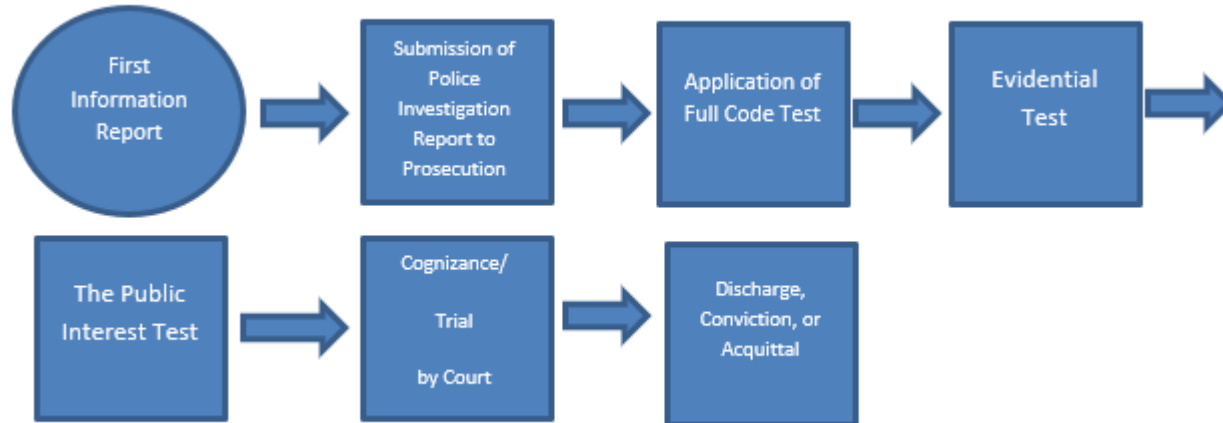


⁷⁴ Widdicombe, "Decision-Making in the Crown Prosecution Service : How Do Prosecutors Make Case Decisions?"

⁷⁵ "The Code for Crown Prosecutors | The Crown Prosecution Service."

The Full Code Test in Punjab Criminal Prosecution Service.

Diagram 2



The only difference is that the Punjab Criminal Prosecution Service does not have the power to resolve whether or not to prosecute and to drop a charge at the stage of the application of the Full Code Test, as is done by the Crown Prosecution Service.

15. Conclusion & Recommendations

Uttering the phrase “poor prosecution⁷⁶” is simple, yet empowering⁷⁷ them proves to be a difficult task⁷⁸. A low conviction rate cannot always be attributed to prosecution⁷⁹. In Pakistan, the inadequacy of evidence gathered by investigating officers is a primary contributing factor to such outcomes⁸⁰. Pakistan needs reforms for effective CJS⁸¹. There is also a common belief which suggests that individuals struggle to excel as prosecutors due to an adherence to punitive methods that result in extensive incarceration⁸². In this context, the prevailing CPS Act 2006 emphasizes stringent policies that seek to imprison as many individuals as feasible. In Pakistan, the absence of prosecutorial discretion to abstain from prosecution could lead to an influx of prisoners and hinder the pursuit of justice. Whereas, in all over the world, public prosecution service serves a dual role in the CJS. On one

⁷⁶ “Poor Prosecution Plays Havoc with Judicial System,” accessed August 18, 2023, <https://www.thenews.com.pk/print/104661-Poor-prosecution-plays-havoc-with-judicial-system>.

⁷⁷ Ramzan Kasuri, Mahmood, and Ahmed, “Proactive Role of Public Prosecutors in the Administration of Criminal Justice.”

⁷⁸ “The Plight of Prosecution,” *The Nation*, September 12, 2022, sec. National, <https://www.nation.com.pk/12-Sep-2022/the-plight-of-prosecution>; “Problems with Prosecution | Shehr | Thenews.Com.Pk,” accessed August 19, 2023, <https://www.thenews.com.pk/tns/detail/754133-problems-with-prosecution>.

⁷⁹ Dr Tansif ur Rehman, Mehmood Ahmed Usmani, and Dr Sajida Parveen, “POLICE AND PROSECUTION’S PERSPECTIVE ON LOW CONVICTION RATES IN PAKISTAN,” *Pakistan Journal of International Affairs* 5, no. 1 (March 23, 2022), doi:10.52337/pjia.v5i1.404.

⁸⁰ Muhammad Aslam Sager, Afzaal Afzal, and Maqsood Anwar, “IMPACTS OF POLICE INVESTIGATION ON LOW CONVICTION RATE & CRIMINAL JUSTICE SYSTEM: A STUDY OF DISTRICT FAISALABAD, PUNJAB, PAKISTAN,” *Criminal Justice*, n.d.; Abdul Ghani, Zainal Amin Ayub, and Mukhriz Mat Ras, “Innocent Until Proven Guilty: Addressing Problem of Criminal Investigation in Pakistan: 10.2478/Bjlp-2022-002083,” *Baltic Journal of Law & Politics* 15, no. 3 (November 30, 2022): 1193–1208.

⁸¹ Muhammad Arif Rajput and Farid Samir Benavides-Vanegas, “Reformation of Criminal Justice System of Pakistan,” *European Scientific Journal, ESJ* 18, no. 5 (February 21, 2022): 87–87, doi:10.19044/esj.2022.v18n5p87.

⁸² Angela J Davis, “The Progressive Prosecutor: An Imperative for Criminal Justice Reform,” n.d.

hand, it is responsible for obtaining convictions for those proven guilty in disputed criminal cases. On the other hand, it's also tasked with preventing unjust prosecution, conviction, or punishment of innocent individuals⁸³. This crucial responsibility relies on the availability of prosecutorial discretion in deciding whom to prosecute.

Public prosecution services globally have undergone rapid evolution in recent years, including in England. Established in 1986, the English Crown Prosecution Service⁸⁴ has notably progressed⁸⁵ over time. It has transformed into a confident and impactful entity within the realm of criminal justice. It has acquired enhanced authority, streamlined its structures, and integrated various other prosecution bodies⁸⁶. In America the prosecutor has become the powerful prosecutor⁸⁷. However, the U.S. Supreme Court has aptly observed that the prosecutor does not represent a regular party in a dispute but a sovereignty and he is obliged to work impartially: his interest is not merely winning, but ensuring justice prevails. In this unique role, he is a servant of law, tasked with twin objectives of preventing guilt from escaping and innocence from suffering⁸⁸. This highlights the significance of vital "prosecutorial discretion," a deficiency apparent in the Punjab Criminal Prosecution Service. Consequently, this shortfall is detrimentally impacting the effectiveness of the prosecution service.

In conclusion, it is evident that the Punjab Criminal Prosecution Service is following the example established by the Crown Prosecution Service. The key distinction lies in the fact that the Punjab Criminal Prosecution Service lacks the essential prosecutorial discretion to determine whether or not to prosecute, while the Crown Prosecution Service possesses this authority. The labels of 'poor prosecution' and 'low conviction ratio' will persist within the CJS until prosecutorial discretion is granted to the Punjab Criminal Prosecution Service.

The legislation of the Prosecution of Offences Act 1985, that forms the basis for establishing a prosecuting service in England and Wales, includes within its section 10 provisions the creation of Guidelines for Crown Prosecutors. These guidelines are mandated to be issued by The Director, who is required to provide a Code for Crown Prosecutors. This Code serves as a set of directions concerning fundamental principles to be adhered to by prosecutors, with specific emphasis on aspects such as in determining whether to initiate legal proceedings for an offense or, in cases where proceedings have already commenced, deciding whether they should be terminated⁸⁹. While the section 9 of the CPS Act 2006 specifies in its sub-section (5) that upon examining the report, the Prosecutor "may" (a) send it back within three days to the responsible police station officer or investigation officer for correction if deemed defective, or (b) submit it to the appropriate Court if deemed suitable for submission. The section, however, does not address actions to take when the report is "not fit for submission." As a

83 Ben Kempinen, "The Ethics of Prosecutor Contact with the Unrepresented Defendant," *Georgetown Journal of Legal Ethics* 19 (2006): 1147; Maynard E Pirsig, "Modern Legal Ethics, by Charles W. Wolfram," *William Mitchell Law Review* 13 (1987).

84 Alec Samuels, "Crown Prosecution Service," *The Journal of Criminal Law* 50, no. 4 (November 1, 1986): 432-41, doi:10.1177/002201838605000409; Andrew Sanders, "An Independent Crown Prosecution Service.," *Criminal Law Review*, January 1986, 16-27, doi:10.3316/agispt.19862437.

85 Dru Sharpling, "The Developing Role of the Crown Prosecution Service," *Inter Alia: University of Durham Student Law Journal* 2006 (2006): 40.

86 Chris Lewis, "Recent Changes in the English Public Prosecution Service," *Pakistan Journal of Criminology* 2, no. 4 (October 2010): 71-82.

87 Jeffrey Bellin, "The Power of Prosecutors," *New York University Law Review* 94 (2019): 171.

88 "Berger v. United States, 295 U.S. 78 (1935)," *Justia Law*, accessed August 9, 2023, <https://supreme.justia.com/cases/federal/us/295/78/>.

89 "Prosecution of Offences Act 1985" (n.d.), <https://www.legislation.gov.uk/ukpga/1985/23/part/I>.

result, prosecutors often end up forwarding cases to the court even if they are not fit for submission. And section 17 of the CPS Act 2006 merely states that the Prosecutor General will formulate a Code of Conduct for Prosecutors; however, unlike the Prosecution of Offences Act 1985, it does not specify the particular areas or topics this Code of Conduct should cover. Therefore, this research underscores the significance of prosecutorial discretion and advocates for amendments to the CPS Act 2006, aligning it with international best practices on prosecutorial discretion. The Prosecution of Offences Act 1985, along with the code established under its section 10, can serve as exemplary legislation.

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