

CONSTITUTIONAL ROLE AND INDEPENDENCY OF ATTORNEY GENERAL

INTRODUCTION

“Freedom and independence, form my character”

- **Mustafa Kemal Atatürk**

If men were angels, no Government would be necessary. If angels were to govern men, neither external nor internal controls on Government would be necessary.¹ In framing a Government which is to be administered by men over men, the great difficulty lies in this: you must first enable the Government to govern the governed; and in the next place, oblige it to control itself.²

The constitution is full of old and strange jobs and titles, like that of Attorney General. To most people, even those with knowledge of Government and the criminal justice system, the role of Attorney General is something of a mystery.³ The office of Attorney General is described as a meeting place of diverse legal, political and constitutional functions; the Attorney General is both the legal adviser to the Government and the guardian of the public interest.⁴ The common tendency is to view the Attorney General and his department as nothing

¹ Johnson V. Commonwealth, *Defining the Scope of the Attorney General's Office and the Power of The Legislature over It*, 291 KY.829, 165 S.W.2D 280 (1942).

² Stephen Charles Mixter, *The Ethics In Government Act Of 1978: Problems With The Attorney General's Discretion And Proposals For Reform*, *Duke Law Journal*, Vol. 1985, No. 2 (Apr., 1985), pp. 497-522, available at: <<http://www.jstor.org/stable/1372362>>

³ Elwyn Jones, *The Office Of Attorney General*, *The Cambridge Law Journal*, Vol. 27, No. 1 (Apr., 1969), pp. 43-53, available at: <<http://www.jstor.org/stable/4505281>>.

⁴ Darren Lehane, *Legal Janus: Resolving The Conflict Between The Attorney General's Functions as Guardian of the Public Interest and Legal Adviser to the Government*, *The Irish Student Law Review* Vol. 12 (2004), pp.48-63, available at: <http://heinonline.org/hol/page?handle=hein.journals/irishslr12&div=7&g_sent=1&collection=journals#54>.

more than a law firm which is always on call to serve the interest of the political party that is in power at the time.⁵

Now, as discussed above the Attorney General is like the legal adviser of the Government and the defender of the public interest then 'how on earth can one explain the fact that G. E. Vahanvati who is the current Attorney General of India, to put it as politely as possible, misled the Supreme Court itself, if only by his silence?'⁶

The event that happened was this, the Supreme Court asked a simple, a very direct, question. Had the C.B.I. shared its report on the Coal Allotment Scam with anyone in the 'political executive'? Multiple sources confirm that G. E. Vahanvati was present at such a meeting, in the office of the Union Law Minister, and with officials from both the Prime Minister's Office and the Coal Ministry in attendance.⁷

(Union Law Minister Ashwani Kumar has reportedly gone so far as to allege that the meeting was called by the Attorney General!) It is also on record that G. E. Vahanvati was present in court when their Lordships posed that query. He chose to remain silent when Additional Solicitor General Haren Rawal said the C.B.I. had not revealed its report to the 'political executive'.⁸

Can anyone present a reasonable explanation to excuse this?

⁵ John Ll. J. Edwards, *The Attorney General, Politics and the Public Interest*, The Cambridge Law Journal, Vol. 44, No. 3 (Nov., 1985), pp. 480-482.

⁶TVR Shenoy, *Legal Tangles In Investigation*, (May 06 2013), available at: <<http://www.mathrubhumi.com/english/story.php?id=135766>>.

⁷ *Ibid.*

⁸ *Ibid.* at 6.

On 30 April, the Supreme Court spoke on the need to further insulate the C.B.I. from political interference. Perhaps their Lordships could also extend this protection to the Attorney General too — simultaneously sending out the message that the Attorney General is much more than a professional doing his duty to the ministry of the day that he owes a higher duty as an officer of the court.⁹

The Authors see that Article 76¹⁰ of the constitution gives constitutional status to the office of Attorney General. Article 76 (2)¹¹ provides that the Attorney General shall be the legal adviser of the government and shall perform all such powers, functions and duties as are prescribed by law. The constitutional status and role of the Attorney General is defined in the constitution, but “the constitutional provisions do not expressly define all the powers and function of the office.

In Attorney General (Condition of service) Rules¹², the President made the following Rules regulating remunerations duties and other terms and conditions of the Attorney General for India. In the definition clause, Attorney

⁹ *Ibid.* at 6.

¹⁰ Indian Constitution, Art. 76: Article 76 says that Attorney General For India:(1) The President Shall Appoint A Person Who Is Qualified To Be Appointed A Judge Of The Supreme Court To Be Attorney General For India,(2) It Shall Be The Duty Of The Attorney General To Give Advice To The Government Of India Upon Such Legal Matters, And To Perform Such Other Duties Of A Legal Character, As May From Time To Time Be Referred Or Assigned To Him By The President, And To Discharge The Functions Conferred On Him By Or Under This Constitution Or Any Other Law For The Time Being In Force,(3) In The Performance Of His Duties The Attorney General Shall Have Right Of Audience In All Courts In The Territory Of India,(4) The Attorney General Shall Hold Office During The Pleasure Of The President, And Shall Receive Such Remuneration As The President May Determine Conduct Of Government Business.

¹¹ *Ibid.*

¹² Law Officer (Conditions Of Service) Rules, 1987. Ministry of Law and Justice, Department of Legal Affairs, No.F.18 (1)/86-Judl. Government of India, New Delhi, The 1st January 1987.

General means the person appointed under clause (1) of Article 76¹³ of the constitution as the Attorney General for India and includes any person appointed to act temporarily as the Attorney General for India. In essence, the powers and functions of the Attorney General as described in clause 5, Attorney General (Condition of service) Rules 1987 shall be¹⁴: (a) to exercise the final responsibility for the office of the prosecutor general; (b) to be the principal legal adviser to the President and the Government; (c) to represent the government of India in any reference made by the President to the supreme court under article 143.¹⁵

Since independence, our community has changed fundamentally. It is contented that those changes have produced a redirection, a new purpose in the role of the Attorney General. We have become, in a striking way, a rights-oriented society.¹⁶ The courts are increasingly perceived by our citizens as the appropriate forum for profound social and economic changes. Politics itself is increasingly dominated by the rhetoric of rights.¹⁷

To understand the function of the Attorney General it is necessary to know the nature of the office of which it is a part, and the authority on which that

¹³ *Supra* note 10.

¹⁴ *Supra* note 12.

¹⁵ Indian Constitution, Art.143: Article 143 says that Power Of President To Consult Supreme Court (1) If At Any Time It Appears To The President That A Question Of Law Or Fact Has Arisen, Or Is Likely To Arise, Which Is Of Such A Nature And Of Such Public Importance That It Is Expedient To Obtain The Opinion Of The Supreme Court Upon It, He May Refer The Question To That Court For Consideration And The Court May, After Such Hearing As It Thinks Fit, Report To The President Its Opinion Thereon (2)The President May, Notwithstanding Anything In The Proviso To Article 131, Refer A Dispute Of The Kind Mentioned In The Said Proviso To The Supreme Court For Opinion And The Supreme Court Shall, After Such Hearing As It Thinks Fit, Report To The President Its Opinion Thereon.

¹⁶ Steyn, "*The Weakest and Least Dangerous Department of Government*" (1997) Public Law 84 at pp. 91-92.

office rests. The basis of the office of the Attorney General is found in history and constitution. The origins and development of the office in England can provide a frame of reference for understanding today's problem; to understand this development is to understand the conflicts inherent in the structure today are not necessarily of intentional design.

This paper takes the position that the Attorney General is not just the government's lawyer, but plays an important role in protecting the rule of law within government.

GENESIS OF THE ATTORNEY GENERAL'S OFFICE

"I think it is vitally important to study History. If we are going to lead Britain safely into the future, it is essential that we understand our country's historical roots. If we can learn the lessons of the past, we will be able to avoid making mistakes in the future."

- Tony Blair

It is not that the early experiences of the development of the office of the Attorney General would necessarily answer today's questions. But, one of the most important contributions that a study of history of this office offers is the point that, from the start of this office, what were the questions and problems present and what were their answers. But while history cannot provide definitive answers, it offers an instructive approach to constitutional interpretation.

DEVELOPMENT OF OFFICE OF ATTORNEY GENERAL IN ENGLAND

THE OFFICE of Attorney General is an ancient and honourable one in the constitutional history of the British people. The 1st appointment was of Lawrence del broke in around 1247 whose function was to sue 'the king's affairs

of his pleas before him'.¹⁸ Essentially, the officials who became known as attorneys general were the representative for the king in the courts of the realm.¹⁹ The actual office of Attorney General was probably established in 1472 with the appointment of William Hesse as the chief attorney for king Edwards IV²⁰. His title as well as his office, has been derived from the common law of England, where from an early date the Attorney General has been the chief legal representative of the sovereign.²¹

The office grew rapidly in prestige during the sixteenth and seventeenth centuries. The Attorney General was summoned by writ of attendance to the House of Lords where he was consulted on bills and points of law.²² In 1673 the Attorney General began to sit in the House of Commons. During the ensuing constitutional struggles the Attorney General emerged as legal adviser to the President.²³ Either by himself or through his deputy he appeared on behalf of the President in the courts, gave legal advice to all departments of state and appeared for them if they wished to take action in the courts.²⁴ In general, the office is quite characteristic of English constitutional development.' From one out of many of the King's Counsel the Attorney General became, by an evolutionary process,

¹⁸ Elwyn Jones, *The Office of Attorney General*, The Cambridge Law Journal, Vol. 27, No. 1 (APR., 1969), pp. 43-53, available at: <<http://www.jstor.org/stable/4505281>>.

¹⁹ *Ibid.*

²⁰ Kent Roach, *The Attorney General and the Charter Revisited*, The University Of Toronto Law Journal, Vol. 50, No. 1 (WINTER, 2000), pp. 1-40, available at: <<http://www.jstor.org/stable/826033>>.

²¹ *Ibid.*

²² Robert Kramer and Nathan Siegel, *The Attorney General of England and The Attorney General of The United States*, 1960 DUKE L.J. 524.

²³ Henry Barrett Learned, *The Attorney-General And The Cabinet*, Political Science Quarterly, Vol. 24, No. 3 (SEP., 1909), pp. 444-467, available at <<http://www.jstor.org/stable/4506788>>.

²⁴ Rita W. Cooley, *Predecessors of the Federal Attorney General: The Attorney General in England and The American Colonies*, The American Journal Of Legal History, Vol. 2, No. 4 (OCT., 1958), pp. 304-312, available at: <<http://www.jstor.org/stable/844539>>.

the chief legal officer of the President. Tradition coupled with modern requirements shaped the character of the office.²⁵

The King had an exceptional position with respect to appearing by attorney, for as supreme "justiciar," in whom re-posed the rights and liberties of the people, the administration of the laws in their behalf; he could not appear in his own courts in person to plead his case where his interests were concerned.²⁶ It was necessary that he appoint some qualified person to appear in his behalf. At first it was the practice for the King to appoint an attorney for a particular court or for a particular cause.²⁷ But this attorney was more than an ordinary attorney. He was the representative of the President, looking after the interests of the King in the King's own court, who was present in the eyes of the law.²⁸ The King was said to be "prerogative." This gave the King's attorney superior standing, especially when later the King came to appoint an attorney to represent him generally in all courts.²⁹

The Attorney General as the legal representative of the President represents the interests of the President qua sovereign, and also qua parens

²⁵ Gordon F. Gregory, *The Attorney General in Government*, 36 U.N.B.L.J. 59 (1987).

²⁶ H. Jefferson Powell, *The Constitution and The Attorneys General*, *The American Journal of Legal History*, Vol. 44, NO. 2 (APR., 2000), pp. 224-225, available at: <<http://www.jstor.org/stable/846123>>.

²⁷ Holdsworth, *The Early History of The Attorney and Solicitor General*, 13 ILL. LAW REV. 602 (1919). (An Interesting Passage Which Demonstrates The Medieval Use Of The Term As Well As Shakespeare's Legal Knowledge Appears In Richard II In Which York Says To Richard: If You Do Wrongfully Seize Hereford's Rights, Call In The Letters Patent That He Hath By His Attorneys-General To Sue His Livery, And Deny His Offer'd Homage You Pluck A Thousand Dangers On Your Head. (Richard II, Act II, Sc. 1).)

²⁸ John Griffiths, *The Australian Constitution Annotated By The Attorney General's Department*, *The Cambridge Law Journal*, Vol. 41, No. 2 (NOV., 1982), pp. 370-371, available at: <<http://www.jstor.org/stable/4506468n>>.

²⁹ G. W. Keeton, *The Office Of Attorney General*, 58 JURIDICAL REV. 109 (1946).

patriae.³⁰ The Attorney General may act on his own initiative, as guardian of the public interest to restrain public nuisances and prevent excess of power by public bodies.³¹

The basis of the office appears to have been that as the sovereign could not appear in person in his own courts to plead in any case in which he had an interest, an attorney appeared on his behalf.³² The British Attorney General while representing the law as any attorney must, have the specific and clearly defined function of serving as the lawyer for the prime minister and his government.³³ When he rendered advice, he did so for his government alone, not for the public at large. Accordingly, his representations as counsel were confidential; his opinions were not published.³⁴ His advice had a limited impact; indeed, if disregarded by the prime minister and his government, it will have almost no impact at all upon society.³⁵

³⁰ LITERALLY, "FATHER OF HIS COUNTRY." Black's Law Dictionary, p. 1269 (4th ed. 1951). The Parens Patriae Function In English Common Law Had Its Origin In Feudal Times. The King Actcd As Guardian Of Persons Non Sui Juris-Those Legally Incompetent To Act For Themselves. Blackstone Noted That:

[U]Pon The Abolition Of The Court Of Wards, The Care, Which The President Was Bound To Take As Guardian Of It's Infant Tenants, Was Totally Extinguished In Every Feudal View; But Resulted To The King In His Court Of Chancery, Together With The General Protection Of All Other Infants In The Kingdom.... As To Idiots And Lunatics: The King Himself Used Formerly To Commit The Custody Of Them To Proper Committees, In Every Particular Case; But Now, To Avoid Solicitations . . . A Warrant Is Issued By The King. . . . The King As Parens Patriae Has The General Superintendence Of All Charities...

³¹ The Honourable Ian Scott, *Law, Policy, And The Role of The Attorney General: Constancy And Change In The 1980s*, 39 U. TORONTO L.J. 109 1989.

³² Kent Roach, *Not Just The Government's Lawyer: The Attorney General As Defender Of The Rule of Law*, 31 QUEEN'S L.J. 598 2005-2006.

³³ CUMMINGS & MCFARLAND, *The Attorney General and the Cabinet*, 24 POL. SCI. Q. 444, 45 (1909).

³⁴ Robert P. Lawry, *Who Is The Client Of The Federal Government Lawyer? An Analysis of The Wrong Question*, 37 FED.BAR J. 61 (FALL 1978).

³⁵ Jones, *The Office Of Attorney General*, 27 CAMBRIDGE L. REV. 43-64 (1969).

But, as the function of sovereignty became more complex and more extensive, and acquired a more public character so the role and duties of the attorney became wider.

DEVELOPMENT OF THE OFFICE OF ATTORNEY GENERAL IN INDIA:

The roots of the office of Attorney General in independent India can be traced back to the era of colonial British rule in India. This office was first introduced in the year 1919 by the Government of India Act, 1915-19 in which the office of Attorney General was mentioned as Advocate General. The provision for the office of Advocate General was in section 114³⁶ of the act this provision provided Advocate General's for each of the presidencies in British India. Then later on the Government of India Act, 1935 was enacted. This act established the position of Advocate General for India.

The Government of India Act, 1935 vide section 16³⁷, provided for an advocate-general for the centre.³⁸ Section 16³⁹ provided for the appointment of

³⁶ Government of India Act, 1915-19 [Repealed]: Section 114: (1) His Majesty may, by warrant under His Royal Sign-Manual, appoint an advocate-general for each of the presidencies of Bengal, Madras and Bombay; (2) The advocate-general for each of those presidencies may take on behalf of His Majesty such proceedings as may be taken by His Majesty's Attorney General in England., (3) On the occurrence of a vacancy in the office of Advocate-General or during any absence or deputation of an Advocate General the Governor-General in Council in the case of Bengal, and the local government in other cases, may appoint a person to act as Advocate-General; and the person so appointed may exercise powers of an Advocate General until some person has been appointed by His Majesty to the office and has entered on the discharge of his duties, or until the Advocate General has returned from his absence or deputation, as the case may be, or until the Governor General in Council or the local government, as the case may be, cancels the acting appointment.

³⁷ Government of India Act, 1935 [REPEALED], § 16 - Advocate General For Federation: (1) The Governor-General Shall Appoint A Person, Being A Person Qualified To Be Appointed A Judge Of The Federal Court, To Be Advocate-General For The [Federation].(2) It Shall Be The Duty Of The Advocate-General To Give Advice To The [Federal] Government Upon Such Legal Matters, And To Perform Such Other Duties Of A Legal Character, As May Be Referred To Assigned To Him By The Governor-General, And In The Performance Of His Duties He Shall Have Right Of Audience In All Courts In British India And, In A Case In Which [Federal] Interests Are Concerned, In All Courts In Any [Federated] State. (3) The Advocate-General Shall Hold Office

an Advocate General for India. His function was to give advice to the government on such legal matters and perform such other duties of a legal character as may from time to time be referred or assigned to him.⁴⁰ The provision of this section has been substantially incorporated in article 76⁴¹ of the constitution but for the change of name from Advocate General to Attorney General.⁴²

Since the 1980s, our understanding of the role of the Attorney General in the administration of criminal justice has evolved dramatically. The independence of this role has been eroded by the fact that courts and law societies have taken a more active role in scrutinizing the decisions of Attorneys General, and the public has demanded greater transparency and accountability.⁴³

In contrast, in England, the office of the Attorney General is regarded as a political office in the sense that he is a member of the ministry and comes in and goes out with it.⁴⁴ In India, the Attorney General has not, so far, been a member of the council of ministers. But there is a practice that the Attorney General also resigns on the resignation of the council of ministers.⁴⁵

During The Pleasure Of The Governor-General, And Shall Receive Such Remuneration As The Governor-General May Determine. (4) In Exercising His Powers With Respect To The Appointment And Dismissal Of The Advocate General And With Respect To The Determination Of His Remuneration, The Governor-General Shall Exercise His Individual Judgment.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.*, 36

⁴¹ *Supra* note 10.

⁴² *Supra* note 10.

⁴³ Craig E. Jones, *On The Attorney General, The Courts And The New Ministry Of Justice*, 71 ADVOCATE VANCOUVER 189, 2013.

⁴⁴ Paul.P Craig, *Administrative Law*, 5TH ed., 2008.

⁴⁵ V.N. Shukla, *Constitution of India*, pp. 150-151, 11th ed., 2008.

The Constituent Assembly believed the office of the Attorney General so important that they devoted Article 76⁴⁶ of the Constitution to it. (Articles 74⁴⁷ and 75⁴⁸, by the way, spell out the powers and duties of the Prime Minister and the Union Council of Ministers.) In practice the Attorney General and his colleagues form a bridge between the executive and the judicial wings of the state.⁴⁹

The Bar Council of India's web lays out the professional standards expected from lawyers.⁵⁰ The first sentence starts with: 'Advocates, in addition to being professionals, are also officers of the courts...'⁵¹ it carries on with a lot of dos and don'ts but those first twelve words are all you need to know.

⁴⁶ *Supra* note 10.

⁴⁷ Indian Constitution, Art. 74: Article 74 says that Council Of Ministers To Aid And Advise President:(1) There Shall Be A Council Of Ministers With The Prime Minister At The Head To Aid And Advise The President Who Shall, In The Exercise Of His Functions, Act In Accordance With Such Advice: Provided That The President May Require The Council Of Ministers To Reconsider Such Advice, Either Generally Or Otherwise, And The President Shall Act In Accordance With The Advice Tendered After Such Reconsideration,(2) The Question Whether Any, And If So What, Advice Was Tendered By Ministers To The President Shall Not Be Inquired Into In Any Court.

⁴⁸ Indian Constitution, Art. 75: Article 75 says that Other Provisions As To Ministers:(1) The Prime Minister Shall Be Appointed By The President And The Other Ministers Shall Be Appointed By The President On The Advice Of The Prime Minister,(2)The Minister Shall Hold Office During The Pleasure Of The President,(3) The Council Of Ministers Shall Be Collectively Responsible To The House Of The People,(4) Before A Minister Enters Upon His Office, The President Shall Administer To Him The Oaths Of Office And Of Secrecy According To The Forms Set Out For The Purpose In The Third Schedule,(5) A Minister Who For Any Period Of Six Consecutive Months Is Not A Member Of Either House Of Parliament Shall At The Expiration Of That Period Cease To Be A Minister,(6) The Salaries And Allowances Of Ministers Shall Be Such As Parliament May From Time To Time By Law Determine And, Until Parliament So Determines, Shall Be As Specified In The Second Schedule The Attorney General For India.

⁴⁹ *Supra* note 6.

⁵⁰ The Bar Council Of India Advocates, In Addition To Being Professionals Are Also Officers Of The Courts And Play A Vital Role In The Administration Of Justice. Accordingly, The Set Of Rules That Govern Their Professional Conduct Arise Out Of The Duty That They Owe The Court, The Client, Their Opponents And Other Advocates, available at:

[http://www.barcouncilofindia.org/about/professional-standards/Rules-on-professional-standards/.](http://www.barcouncilofindia.org/about/professional-standards/Rules-on-professional-standards/)

⁵¹ *Ibid.*

Uncompromisingly, they remind attorneys that they are not around just to make money but to serve the cause of justice.⁵²

And if that is true for lawyers in general how much more so for the Attorney General(the Attorney General, the Solicitor General, and the Additional Solicitor(s) General), then Can you say that the Attorney General has lived up to the ideal spelt out by the Bar Council in some of the most notorious scandals of our times?

There have been many scandals or as they are called now ‘Scams’ in India since its independence and if we were to make a list of these scandals then which scandals or ‘Scams’ would head the list? Such a list would include the Bofors Scandal, the 2G Scam, and the Coal Allotment Scam and then there were others like the Taj corridor case and the habeas corpus case or Indian emergency (1975–77) case. The authors would be discussing a few of these cases with respect to the role that the Attorney General played in these cases.

ROLE AND INDEPENDENCY OF ATTORNEY GENERAL IN PROSECUTION

One of the most important of the Attorney General's responsibilities, encompassed by the constitution is the power to institute or stay criminal proceedings. Decisions on prosecution policy must be made on a daily basis and represent one of the Attorney General's historical functions. Although responsibility for prosecutions obviously pre-dates the constitution, the traditional constitutional requirements that have applied to the Attorney General's exercise of prosecutorial authority provides a valuable perspective on the way in which the Attorney General should approach other duties to which the

⁵² *Supra* note 6.

constitution may be related. The constitutional position of the Attorney General in making prosecutorial decisions is quite clear.

In **TAJ CORRIDOR CASE**⁵³, the court had ordered registration of FIR against Ms Mayawati and others when an application filed by amicus curiae Krishan Mahajan and a petition filed by Ajay Agarwal alleged that Crores of rupees were being siphoned out of the Rs 175-crore project, which was yet to receive environmental clearance. After the CBI completed its investigation, it had sought an opinion of the AG as to whether it should prosecute Mayawati on the basis of evidence gathered by it.⁵⁴ The opinion of the Attorney General not to prosecute Ms. Mayawati came as a surprise as the investigating officer of the case, the superintendent of police, the deputy legal advisor, the DIG, the joint director, additional legal advisor and additional director of CBI — had all opined that a case was made out for her prosecution.⁵⁵

The Supreme Court, which was not convinced with the AG's opinion, then asked the Central Vigilance Commission (CVC) to go through the case files.⁵⁶ The CVC told the court that it was a fit case for the prosecution of Ms Mayawati. It had also said that chargesheets could be filed against Ms.

⁵³ Tavleen Singh, Taj Corridor Case: High Court Notice To Maya, Siddiqui, The Indian Express, Sat Sep 19 2009, 05:40 Hrs At Lucknow, available at: <<http://www.indianexpress.com/news/taj-corridor-case-high-court-notice-to-maya-siddiqui/519049/>>.

⁵⁴ *Ibid.*

⁵⁵ Mayawati Trapped In Taj Corridor, The Economic Times, Nov 28, 2006, 03.09am Ist At New Delhi, Available At: <http://articles.economictimes.indiatimes.com/2006-11-28/news/27434384_1_taj-corridor-case-cbi-director-naseemuddin-siddiqui>.

⁵⁶ Taj Corridor Case: Supreme Court Issues Notice To Mayawati, The Economic Times, Pti Jan 28, 2013, 12.59pm Ist, Available At <http://articles.economictimes.indiatimes.com/2013-01-28/news/36596485_1_taj-corridor-mayawati-and-siddiqui-governor-t-v-rajeswar>.

Mayawati, her then Cabinet colleague in charge of the environment ministry Naseemuddin Siddiqui and former environment secretary RK Sharma.⁵⁷

The court tore into the advice of the government's chief law officer, Attorney General Milon Banerjee, and said his views were sought to kill the case.⁵⁸ "When all members of the investigating team opined that it is a fit case for prosecution, it was nothing but a charade performance by the CBI director to seek the closure of the case," the bench comprising Justice S.B. Sinha, Justice S.H. Kapadia and Justice D.K. Jain said.⁵⁹

What has emerged is an expectation that the office of the Attorney General is protected from improper political influences and that prosecution is conducted in accordance with fairness and respect for the law.⁶⁰ The authors argue that while the most important factor in the impartial administration of justice may be the personal character and integrity of the Attorney General. The Attorney General is not simply the government's lawyer, but the protector of the rule of the law within government. The case for the Attorney General as defender of the rule of law is not easy one.

The rationale for the Attorney General's independence in criminal prosecutions is the need to ensure that the law is applied fairly and equally to all, and that people are not needlessly prosecuted when there are neither sufficient legal nor public interest grounds for the prosecution.⁶¹ This requires that

⁵⁷ *Ibid.*

⁵⁸ *Supra* note 55.

⁵⁹ *Supra* note 55.

⁶⁰ Geoffrey c. Hazard Jr., *Conflicts Of Interest In Representation Of Public Agencies In Civil Matters*, 9 WIDENER J. PUB. L. 211 (2000).

⁶¹ H. Garrison, *The Opinions By The Attorney General And The Office Of Legal Counsel: How And Why They Are Significant*, 76 Alb. L. Rev. 217 2012-2013.

prosecutorial decisions be made by a law officer, usually one trained in the law and always advised by those experts in the law.⁶²

As the President's Attorney he occupies an office with judicial attributes and in that office he is responsible to the President and not responsible to the Government.⁶³ He must decide when to prosecute and when to discontinue the prosecution. In making such decisions he is not under the jurisdiction of the Cabinet nor should such decisions be influenced by political considerations.⁶⁴ They are decisions made as the President's Attorney, not as a member of the government of the day.⁶⁵

The authors understand that the duty of the Attorney General is that he should absolutely decline to receive orders from the Prime Minister, or Cabinet or anybody else that he shall prosecute. His first duty is to see that no one is prosecuted with all the majesty of the law unless the Attorney General is satisfied that a case for prosecution lies against him. He should receive orders from nobody.

The above discussion indicates that the issues of whether to institute or discontinue a prosecution are not matters of government policy. The Cabinet has no power to direct whether a particular prosecution should be pursued or whether a particular appeal should be undertaken.⁶⁶ These decisions rest solely with the Attorney General, who must be regarded for this purpose as an independent

⁶² Philip b. Kurland and d. W. M. Waters, *Public Prosecutions In England, 1854-79: An Essay In English legislative History*, Duke Law Journal Volume **1959** Fall Number 4.

⁶³ Bruce A. MacFarlane, *Sunlight and Disinfectants: Prosecutorial Accountability and Independence through Public Transparency*, (2002) 45 CRIM. L.Q. 272 at 282.

⁶⁴ *Supra* note 25.

⁶⁵ *Ibid.*

⁶⁶ Debra M. Mcallister, *The Attorney Generals Role As Guardian Of The Public Interest In Charter Litigation*, 21 WINDSOR Y.B. ACCESS JUST. 47, 2002.

officer exercising a function that in many ways resembles the functions of a judge.⁶⁷ Questions of prosecution policy are legal issues and, while considerations of the public interest are vital in determining these questions, prosecutorial decisions must be made according to legal criteria.⁶⁸ The Attorney General's assessment of the public interest must absolutely exclude any consideration of the political implications of a particular decision.⁶⁹ Public respect for the rule of law demands that prosecutorial decisions be made objectively, without regard to possible political consequences.⁷⁰

There is only one consideration which is altogether excluded [from the decision whether or not to prosecute] and that is the repercussion of a given decision upon the Attorney General's personal or his/ her party's or the government's political fortunes: that is a consideration which never enters into account.

There must be excluded any consideration based upon narrow, partisan views, or based on the political consequences. In arriving at a decision on such a sensitive issue as this, the Attorney General is entitled to seek information and advice from others but in no way is he directed by his colleagues in the government or by Parliament itself. In other words, prosecutorial decisions should be made with due attention to the requirements of the law.

⁶⁷ Gil McKinnon, Q. C. and Keith Hamilton, *Taking Politicians Out of Prosecutions*, 52 Advocate Vancouver 843, 1994.

⁶⁸ *The hon. I J King ac, QC, The Attorney General, politics and the judiciary*, THE AUSTRALIAN LAW JOURNAL— VOLUME 74, pp. 444-460.

⁶⁹ Michael Code, *President Counsel's Responsibilities When Advising the Police at the Pre-Charge Stage* (1998) 40 CRIM. L.Q. 326 AT 328-38.

⁷⁰ R. A. Melikan, *Mr. Attorney General and the Politicians*, The Historical Journal, Vol. 40, No. 1 (MAR., 1997), pp. 41-69, available at: <<http://www.jstor.org/stable/3020952>>.

The above discussion of the independence of the office of the Attorney General has been discussed by the eminent Attorney General of England Hartley William Shawcross, Baron Shawcross. This doctrine will be discussed by the authors as follows.

PROSECUTION WITH RESPECT TO SHAWCROSS DOCTRINE

In addition, the Attorney General under the Shawcross doctrine of Attorney General's independence from cabinet,⁷¹ states that the Attorney General is free to consult with Ministers of the President about the public interest implications of legal decisions, provided that he does not take direction from those ministers or the Cabinet.⁷²

The true meaning of the doctrine is that it is the duty of the Attorney General, in deciding whether or not to authorize the prosecution, he should acquaint himself with all the relevant facts of the case, including, for instance, the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order, and with any other consideration affecting public policy.⁷³ In order so to inform himself, he may, although (Lord Hartley William Shawcross, Baron Shawcross) does not think he is obliged to, consult with any of his colleagues in the government, and indeed, as Lord Simon once said, “*He would in some cases be a fool if he did not*”.⁷⁴ On the other hand, the assistance of his colleagues in the government is confined to informing him

⁷¹ James W. Diehm, *The Government's Duty To "Seek Justice" In Civil Cases*, 9 Widener J. PUB. L. 289, 1999-2000.

⁷² *Ibid.*

⁷³ The Honorable Marc Rosenberg, *The Attorney General and the Prosecution Function on the Twenty-First Century*, Vol. 43(2) Of Queen's Law Journal, P. 813-862 (Queen's University, Kingston, 2009).

⁷⁴ H Shawcross, *'The Office of Attorney General'* (1954), *Parliamentary Affairs*, Vol. VII, No 4, 381.

of particular considerations which might affect his own decision, and does not consist, and must not consist, in telling him what that decision ought to be.⁷⁵ The responsibility for the eventual decision rests with the Attorney General, and he is not to be put, and is not put, under pressure by his colleagues in the matter.⁷⁶

An Attorney General who seeks to sustain his privileged constitutional status as the guardian of the public interest, in the widest sense of that term, may seek, and frequently would be seriously at fault in failing to do so, advice from whatever quarter, ministerial or otherwise, that may help to illuminate the decision confronting him.⁷⁷ What is absolutely forbidden is the subjection by the Attorney General of his discretionary authority to the edict of the Prime Minister or the Cabinet or Parliament itself.⁷⁸ The cabinet or the council of ministers has the right to question and criticise the Attorney General. It does not have the right to direct the Attorney General in the discharge of his constitutional duties.⁷⁹ The absolute independence of the Attorney General on questions of prosecution policy is accepted as an important constitutional principle.⁸⁰

POLITICIZATION OF OFFICE AND DOCTRINE OF PLEASURE

An appointed Attorney General is subject to interest group politics and all the potentially compromising influences. An appointed Attorney General could be product of political cronyism and therefore be subject to under political pressures and interference from the cabinet in deciding whether to make an

⁷⁵ *Ibid.*

⁷⁶ *Supra* note 70.

⁷⁷ *Supra* note 73.

⁷⁸ Grant Huscroft, *Reconciling Duty and Discretion: The Attorney General in the Constitution Era*, 34 QUEEN'S L.J. 773, 2008-2009.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

inquiry, initiate an investigation, or bring an action.⁸¹ This would happen in as he is appointed under article 76(1)⁸² of Constitution of India and article 76(4)⁸³ which lay down that the Attorney General shall hold office during the pleasure of the President.⁸⁴

The Origin of the pleasure doctrine was discussed in the case of *Union of India v. Tuslsiram Patel*⁸⁵, that:

“Servants Of The President Hold Their Appointments At The Pleasure Of The President Or Durante Bene Placito ("During Good Pleasure" Or "During The Pleasure Of The Appointor") As Opposed To An Office Held Dum Bene Se Gesserit ("During Good Conduct"), Also Called Quadiu Se Bene Gesserit ("As Long As He Shall Behave Himself Well").⁸⁶”

In the case of *Ram Jawaya Kapur v. State of Punjab*⁸⁷ where the Supreme Court has observed that:

“The expression 'aid and advice' may apparently suggest that it is left to the President to accept the advice or ignore the same and thus the decision on all matters will be of the President himself. But on a true Interpretation of the expression in the context of the relevant provision of the Constitution, it becomes

⁸¹ William N. Thompson ,Lee Gough, John Wallace, *Conflicts of Interest and the State Attorneys General*, 15 WASHBURN L.J. 15, 1976.

⁸² *Supra* note 10.

⁸³ *Ibid.*

⁸⁴ *Supra* note 10.

⁸⁵ *Union of India v. Tuslsiram Patel*, AIR 1985 SC 1416: 1985 SCR Supp. (2) 131.

⁸⁶ *Ibid.*

⁸⁷ AIR 1955 SC 549: 1955 2 SCR 225.

*abundantly clear that the functions of Ministers or Council of Ministers are not merely giving advice; they can take decisions which must take effect.*⁸⁸

In *B.P Singhal v. union of India*⁸⁹, the Supreme Court held that:

*“The President is bound to act in accordance with the advice of the council of ministers.”*⁹⁰

Now, from the above discussed cases we can infer that if the Attorney General is not in alignment with the political ideas of the government, then government will lose confidence in Attorney General which would amount to his removal by the President who acts on the aid and advice of the council of ministers of government. Hence this office would become political one and will lose its independence.

But, there is a distinction between the doctrine of pleasure as it existed in a feudal set-up and the doctrine of pleasure in a democracy governed by rule of law.⁹¹ In a nineteenth century feudal set-up unfettered power and discretion of the President was not an alien concept.⁹² However, in a democracy governed by Rule of Law, where arbitrariness in any form is eschewed, no Government or Authority has the right to do what it pleases.⁹³ The doctrine of pleasure does not mean a licence to act arbitrarily, capriciously or whimsically.⁹⁴ It is presumed that discretionary powers conferred in absolute and unfettered terms on any

⁸⁸ *Ibid.*

⁸⁹ (2010) 6 SCC 331.

⁹⁰ *Ibid.*

⁹¹ *Ibid.* at 88.

⁹² *Ibid.* at 88.

⁹³ *Ibid.* at 88.

⁹⁴ *Ibid.* at 88.

public authority will necessarily and obviously be exercised reasonably and for public good⁹⁵.

As we have seen that the pleasure doctrine operates on the aid and advice of the council of ministers which makes this constitutional body a political one. Also, as the removal of the Attorney General is governed by the doctrine of pleasure, his removal might be arbitrary. But, this is contrary to the fundamentals of democracy which is that the power of the doctrine of pleasure shouldn't be whimsical in nature and must be backed by reasons. So, the removal of the Attorney General arbitrarily should not happen in country as this a democratic nation.

CONCLUSION

Wise members of the legislature often ask for advice as to whether the proposed legislation, conflicts with an existing legislation and if not is it constitutional and whether the language proposed has an established legal meaning and import. On these important questions the Attorney General's advice can be most helpful.

Lincoln's Attorney General, Edward Bates said of his office:

*"The office I hold is not properly political, but strictly legal; and it is my duty, above all other ministers of state, to uphold the law and to resist all encroachment, from whatever quarter, of mere will and power".*⁹⁶

The motto "qui pro domina justitia sequitur" is roughly translated to mean "now comes he who prosecutes on behalf of justice"⁹⁷ the significance of

⁹⁵ *Ibid.* at 88.

⁹⁶ Arthur S. Miller, *The Attorney General As The President's Lawyer, In The Roles Of The Attorney General Of The United State*, DUKE LAW REVIEW 41, 51 (1968)

the motto is less in its history and more in the assertion and proposition that it provides. The office of Attorney General was perceived from its origin and through to the modern era as the officer tasked with carrying out his or her duties in the quest of law and justice, not politics. A reliance on the people is no doubt the most important control on the government; but experience has taught mankind the need of auxiliary precaution. It is important, at this time, to remind ourselves of the advancement that can be made towards this goal through the Attorney General's duty to ensure that government activities and legislation conform to constitutional requirements. The public and the legal profession should be observant to see that the Attorney General vigorously pursues this duty in a manner that respects the fundamental principles of independence and detachment that have historically guided the exercise of the Attorney General's responsibilities.

Also, as there is no legislative or constitutional basis for the independence of the Attorney General and that his functions as custodian of the public interest are not clearly defined. It would certainly help improving this situation if the duties and responsibilities office of the Attorney General is carefully defined and that the independence of the Attorney General in the exercise of such functions be given by way of a statute.

The authors would like to conclude by saying that the important aspect of Attorneys general's job is to serve as an overseer over the executive branch, keeping an eye around on the government and the administration to prevent and prosecute unlawful conduct. Certainly the existence of an elected Attorney General without political loyalty or administrative accountability to the governor

⁹⁷Arthur H. Garrison, *The Opinions By The Attorney General And The Office Of Legal Counsel: How And Why They Are Significant*, 76 Alb. L. Rev. 217, 2012-2013.

and state agency officials and with investigative and prosecutorial authority constitutes a check and balance feature of the executive branch of state government, a means for ambition to counteract ambition.