

# Appointment of Prosecutor: A Never-Ending Conundrum Between Legislature- Judiciary

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## Introduction

The roles and performance of public prosecutors have long been a pressing issue within India's criminal justice system. As “advocates of all parties' interests” and the “minister of justice”, prosecutors are expected to fulfil their duties lawfully, ethically, honestly, and independently, while upholding fairness and impartiality. However, achieving independence and accountability within the prosecution remains a distant goal in India's criminal justice system.<sup>1</sup> A recent report by the 197th Law Commission of India on the “*Appointment of the Prosecutors*” has raised serious concerns about the accountability and transparency of the prosecution wing<sup>2</sup>. The report thoroughly scrutinized the appointment scheme of prosecutors and highlighted that states are using the prosecution wing to serve their own political agendas.

The term “Criminal law” falls within the Concurrent List of the Indian Constitution, granting both the central and state governments the authority to enact legislation on its various aspects. This intentional allocation by the framers of the Constitution aimed to cater to the diverse demographics of each state, recognizing the impossibility of addressing every issue solely through central legislation.<sup>3</sup> For instance, the inclusion of “Snatching” as an offense in the previous *Indian Penal Code, 1872* by the state of Punjab was applicable only within that state.<sup>4</sup> Presently, the same provision is included under *Bhartiya Nagarik Suraksha Sanhita, 2023*, which is applicable throughout India.<sup>5</sup>

However, this well-intentioned decision led to challenges in the criminal justice system, with some legislators exploiting the prosecution wing for their political

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<sup>1</sup> Sastry, V.V.L.N., (2020). Crime And Politics in India. Idea Publishing.

<sup>2</sup> Kiefer, S. W. (2011). The Securities and Exchange Commission\ u27s 2010 Proxy Access Proposals: A Poison Pill for Corporate Health. <https://scholarship.law.wm.edu/wmblr/vol2/iss1/5>

<sup>3</sup> P Chidambaram, (2024) Who will answer the questions?, The Indian Express, July 14, Available at: <https://indianexpress.com/article/opinion/columns/p-chidambaram-writes-who-will-answer-the-questions-9451830/>, Accessed : July 31, 2024

<sup>4</sup> Section 379A of Indian Penal Code, 1872

<sup>5</sup> Section 304(1) of Bhartiya Nagarik Suraksha Sanhita, 2023

agendas. Notably, the central legislators have laid down guidelines for appointing prosecutors nationwide. Per *Section 24(6) of the Criminal Procedure Code, 1973*, which Parliament enacted, all appointments to Public Prosecutor/Addl positions must occur after a state has established a Regular Cadre of Prosecuting Officers. Public Prosecutors must be exclusively appointed from that cadre.

Nevertheless, several states have amended to replace "must" with "may" in recognition that some such positions should be open to appointment from the Bar of the Sessions Court. This adjustment stems from the belief that Assistant Public Prosecutors, experienced in handling cases in Magistrate Courts, may need to be revised to handle serious offenses. The legislators inadvertently created ambiguity in the law by failing to define the term "regular cadre of prosecuting officer" and by not imposing restrictions on appointing prosecutors directly from private practice.<sup>6</sup> As a result, the government has been given significant discretion in appointing prosecutors.<sup>7</sup> Political interference significantly affects the performance and professionalism of the prosecutor's office.<sup>8</sup> When prosecutors are selected based on their political affiliations, it compels them to remain in the political spotlight. This dynamic may lead a prosecutor to engage in indiscretion, imprudence, or even misconduct in order to maintain their position. The principle of legality dictates that prosecutors should base their decisions on legal principles, while the expediency principle justifies granting prosecutors the authority to exercise discretion.<sup>9</sup> In judgment on the S.B Sahane case<sup>10</sup>, for the first time, the Supreme Court of India evaluated this matter, emphasizing the independence of prosecutors in determining the government's instructions regarding the appointment of prosecutors.

Apart from the appointment of prosecutors, another prevalent issue affecting the performance of prosecutors is the withdrawal from prosecution. In the Yerneni Raja Ramchander case<sup>11</sup>, the appellant was a member of the Legislative Assembly. It is alleged that the same MLA, along with an employee of the Medical Hospital, fabricated bogus hospital records and withdrew a large sum of money from the government.

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<sup>6</sup> 197<sup>th</sup> Law Commission Report, 2006

<sup>7</sup> Ibid.

<sup>8</sup> James N. Johnson, 'The Influence of Politics upon the Office of the American Prosecutor' (1973) 2 Am J Crim L 187

<sup>9</sup> Tonry, Michael. "Prosecutors and Politics in Comparative Perspective." *Crime and Justice* 41, no. 1 (2012): 1–33. <https://doi.org/10.1086/666975>.

<sup>10</sup> (1995) 3 SCR 673 (SC)

<sup>11</sup> AIR 2009 SC (SUPP) 2859

When certain whistleblowers raised these discrepancies, the MLA returned a certain amount of money to the Ethics Committee of the Legislative Assembly and tendered apologies for his corrupt conduct. Without conducting any investigation, the Ethics Committee suggested withdrawing the charges and recommended the state government to do the same. Again, in the case of K Ajith<sup>12</sup>, while the finance minister was presenting the budget for the financial year 2015-2016 in the Kerala Legislative Assembly, the accused, who were Members of the Legislative Assembly belonging to the party in opposition, disrupted the presentation of the budget, causing damage to furniture and articles in the assembly, resulting in a loss of Rs. 2,20,093. After the investigation, the court took cognizance of the incident, and the trial was initiated against the accused. In both instances, the public prosecutor filed a withdrawal from the prosecution application based on the government's suggestion. However, the court rejected the applications and reprimanded the prosecutors for maintaining the independent nature of their office.

In the previous *Criminal Procedure Code, 1973*, the law recognized prosecutors as an absolute agency for filing withdrawal from prosecution applications in the court of law.<sup>13</sup> However, the relevant grounds for the withdrawal were not provided through its legislation or the state service rules of the prosecutors. Since the law was silent on grounds for withdrawal, the judiciary has interpreted the provisions and laid down necessary guidelines in this regard. In cases such as *Sheonandan Paswan v. State of Bihar*<sup>14</sup> and *State of Bihar v. Ram Naresh Pandey*.<sup>15</sup> The Supreme Court has made a significant ruling, emphasizing that prosecutors have sole discretion in deciding whether to file a withdrawal application. This underscores their independence and decision-making authority.

The guidelines have led to a conflict between the judiciary, prosecution, and government. The law governing withdrawal empowers prosecutors to independently exercise their discretion, a power recognized by the judiciary. However, issues arise when prosecutors need to decide on cases recommended for withdrawal by the government. The government plays a crucial role in developing prosecutors' service law, and due to its significant control over prosecutors, they tend to maintain a close relationship with the government. This raises the question of whether prosecutors will

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<sup>12</sup> Crime No. 236 of 2015

<sup>13</sup> Section 321 of Criminal Procedure Code, 1973

<sup>14</sup> 1987 (1) SCC 288

<sup>15</sup> [1987] 1 S.C.R. 702

carry out their duties independently or remain subservient to the government. If the government has control over the prosecutors, they may exceed the government's directions, while ignoring the government's guidelines may warrant court intervention. To understand the limitations of prosecutors, we need to view this through the J Bellin's "servant of the law theory"<sup>16</sup> and Bruce A. Green & Rebecca Roiphe<sup>17</sup> "fiduciary prosecution theory". Roosenburg's "Hollow Hope" would provide us perspectives to better understand this situation.

While originally developed in the context of the US criminal justice system, Jeff Bellin's theory of the 'servant of the law' is also pertinent for understanding the nuances of the prosecution service in India. It emphasizes that a prosecutor should not mechanically apply all laws but should instead exercise discretion when bringing charges. The prosecutor should decline to prosecute cases with insufficient evidence, excessive bail or fines, or unjust penalties. At the same time, the prosecutor should not unquestioningly follow commands that lack substance or could cause injustice. The "servant of the law" concept suggests that the prosecutor must work to prevent failures in the legal system. The prosecutor should ensure adherence to correct legal rulings when a trial judge fails to enforce evidence rules, or when the defense counsel or court misunderstands wrongfully collected evidence.

In contrast to the system in the USA, India operates under an adversarial criminal justice system that places significant restrictions on the powers of the prosecutor. The prosecutor is viewed as the Minister of Justice and an independent authority. As such, their role is to assist the court in conducting a trial, with the main objective being the pursuit of truth and the fair punishment of the accused if found guilty according to the established norms of law and procedure. It is not their responsibility to ensure the conviction of an accused under any circumstances or at any cost. They are not meant to be biased or contribute to the persecution of the accused or support any form of denial of justice or fair trial. Their duty is to assist the court in establishing the case beyond any reasonable doubt by providing all relevant witnesses, facts, necessary evidence, etc.<sup>18</sup>

Fiduciaries have discretionary power over the beneficiaries. Prosecutors can be categorized as fiduciaries since they represent the public's abstract system in justice

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<sup>16</sup> Bellin, J., 2020. Theories of Prosecution. *California Law Review*, 108(4), pp.1203-1253.

<sup>17</sup> Roiphe, Rebecca and Green, Bruce A., A Fiduciary Theory of Prosecution, *American University Law Review*, Vol. 69, 2020, (January 31, 2020)

<sup>18</sup> *Marappa Gounder v Venkatachalam* 1983 LW (Cri) 1 Mad

delivery. Prosecutors have a duty to seek justice, but they are also appointed to represent the interests of the government and the victims. The fiduciary theory has made three primary contributions. First, prosecutors have a duty towards the public as beneficiaries, which extends beyond seeking justice or performing in court. It is focused on how prosecutors should pursue public objectives. Second, there are various considerations for exercising discretion, but prosecutors should balance discretion based on law, facts, traditions, and more. Prosecutors should aim to avoid wrongful convictions, treat people proportionally and equally, and exercise independent discretion. Third, prosecutors must be held accountable in case of abuse of power.

The fiduciary theory asserts that a prosecutor can be held accountable for non-performance. However, establishing the prosecutor's accountability necessitates working under a specific authority, which could result in further punishment and pose a threat to the prosecutor's effectiveness. The same principle of accountability applies to the independence of the prosecution. If the prosecution can function independently, similar to the judicial system, it may help alleviate issues related to political interference.

To gain a better understanding of the challenges within the criminal justice system in India, it would be beneficial to explore how Rosenberg's two conflicting viewpoints fit into the functions of the prosecution wing. In "Hollow Hopes," Rosenberg discusses the capacity of the highest court in a country for this implementation from dynamic or constrained perspectives.<sup>19</sup> The Constrained Court perspective highlights certain aspects that compel the court to perform in a limited, confined manner. This is due to various reasons. Firstly, the limited nature of constitutional rights means that practically significant but legally irrelevant policy matters may remain beyond the purview of the court.<sup>20</sup> Judicial discretion is bound by beliefs and norms of the legal culture, and decisions that stray too far from them are likely to be reversed and severely criticized. The bounded nature of constitutional rights prevents courts from hearing or effectively acting on many significant social reform problems.<sup>21</sup> Secondly, there is a lack of judicial independence, as the appointment process of the judges limits their performance. Since they are not self-

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<sup>19</sup> G. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991) at xii+425

<sup>20</sup> Rosenberg, Gerald N. "Hollow Hopes and Other Aspirations: A Reply to Feeley and McCann." *Law & Social Inquiry* 17, no. 4 (1992): 761–78. <http://www.jstor.org/stable/828686>.

<sup>21</sup> McCann, Michael W. Review of *Reform Litigation on Trial*, by Gerald N. Rosenberg. *Law & Social Inquiry* 17, no. 4 (1992): 715–43. <http://www.jstor.org/stable/828684>.

selected but appointed by the senate, presidents tend to nominate those who they think will represent judicial interest, which creates problems in judicial independence. Thirdly, the judiciary's inability to develop appropriate policies and its lack of powers for implementation. The court's decisions have had no or virtually no significant independent direct or indirect effect on social change.<sup>22</sup> In contrast, the dynamic viewpoint argues that the courts perform duties independently where the political superiors have ignored to proceed due to structural or procedural issues. This view claims that courts offer the best hope to poor, powerless, and organized groups.

The prosecution wing in India is considered an independent agency<sup>23</sup>, with prosecutors holding public office. <sup>24</sup> However, the government retains deep and pervasive control over the appointment, promotion, and termination of prosecutors, as well as significant influence over decisions related to appeal or withdrawal from prosecution. The 197th Law Commission of India's report, 2006 on "Public Prosecutors Appointment" raised concerns about the lack of transparency in prosecutors' appointment and recommended measures to ensure transparency. Similarly, The Vidhi Centre for Legal Policy, in their report "Inquest for Prosecutorial Independence 2021" highlighted that despite the concept of an independent prosecution wing, state government control over every aspect of the prosecution wing undermines its independence. This excessive government interference has led to the infringement of victims' rights. Rosenberg's dynamic court concept suggests that underrepresented minorities can seek recourse in court to protect their rights. Conversely, the concentrated court concept implies that court decisions remain within the control of the parties themselves.

The appointment of prosecutors and withdrawal from prosecution are two critical factors that have heightened the importance of the independence and accountability of the prosecution. These matters are vital in the criminal justice delivery system in India. As such, this paper will thoroughly examine the regulatory frameworks governing prosecutors, which is the focus of this paper. Part II of the paper will discuss the role of the Public Prosecutor is thoroughly discussed. This discussion will cover the appointment scheme of the Public Prosecutors and the judicial

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<sup>22</sup> Saiful Karim, Okechukwu Benjamin Vincents & Mia Mahmudur Rahim, 'Legal Activism for Ensuring Environmental Justice' (2012) 7 AsJCL

<sup>23</sup> Commonwealth Secretariat, 2016. Prosecution independence and accountability: principles, challenges and recommendations. *Commonwealth Law Bulletin*, 42(4), pp.567-595.

<sup>24</sup> *Ibid.*

intervention for resolving appointment disputes. Part III will examine the scheme for withdrawal from prosecution and judicial intervention to restrain the government from exercising its prosecutorial discretionary power.

## **Public Prosecution in India**

India has the oldest judiciary in the world. No other judicial system has a more ancient or exalted pedigree.<sup>25</sup> The real test of any judicial system is that it should enable the law courts to discover the truth, and that of ancient India stands high under this test. Barring the Supreme Court, India has no federal judiciary like the United States. Each State has its own judiciary, which administers both Union and State laws. The Supreme importance of judges being independent and fearless, even of the king. The Constitution of India adopted the English doctrine of the security of tenure, and a High court or supreme court Judge can be removed only on the ground of proved misbehaviour or incapacity, and after each House of Parliament has passed by a two-third majority an address to the President for his removal (Articles 124 and 217). On the one hand, our High Courts and the Supreme Court are invested with the power to interpret the constitution and declare any law or act of the State invalid on the ground that it is unconstitutional or illegal or restrictive of the fundamental rights of a citizen. The law declared by the Supreme Court has a binding supremacy throughout the territory of India, and plays an important role in the administration of justice

The criminal justice system (CJS), a cornerstone in any democratic country, is a key component in maintaining law and order in society. The CJS aims to reduce crime and its harmful effects through a continuum of policing, courts, corrections, and prosecution. The CJS is a complex policy space with many involved actors and shared jurisdiction with provinces and territories. The federal jurisdiction extends to criminal law, federal corrections, and conditional release. Provincial jurisdiction includes policing, prosecutions and administration of justice. Victim services and crime prevention programming operate in both jurisdictions and criminal records may fall into all jurisdictions.

India follows an adversary criminal justice system. Each specific agency has certain duties to perform like as the police has the authority to conduct the

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<sup>25</sup> Dhavan, S.S., 2022. The Indian judicial system: a historical survey. *High Court of Judicature at Allahabad Commemoration*, 1.

investigation, and the prosecution has the authority to conduct the trial and represent the interests of the state as well as victims in the court.

Prosecutors are important players in the criminal justice system. However, the function of the prosecutor can be enlarged or reduced based on the jurisdiction. Under the adversarial legal system, the Public Prosecutor performs as a functionary of the State, appointed to assist the court in the conduct of a trial, the object of which is basically to find the truth and to punish the accused if he is found guilty according to the known norms of law and procedure.<sup>26</sup> It is no part of his obligation to secure the conviction of an accused, in any event, or at all costs. Nor is he intended to play a partial role or become party to the persecution of the accused or lend support, directly or indirectly, to a denial of justice or of fair trial to the accused. He is bound to assist the court in establishing the case beyond any reasonable doubt. He should aid the court with all the relevant witnesses, facts, necessary evidence, etc.<sup>27</sup> His plain task is to represent the State's point of view based on the material that could be legitimately brought before the Court at the trial. The Prosecution can also inform the court, if he finds any witness wouldn't be helpful for the prosecution, he is empowered to skip the witness from being examined as a prosecution witness.<sup>28</sup> He has no prejudices, preconceived notions, bias, hostility or his own axe to grind. If the prosecutor can able to find any lawful gain towards the accused, he should inform the accused at the earliest. He should be truthful towards the accused and must deliver the case without any hinderance<sup>29</sup>. He has the authority to present relevant evidence before the court and examine the material witnesses. He evaluates police records, witness testimony, and other pertinent documents to determine the robustness of the case.<sup>30</sup> He is bound to produce all the relevant evidence before the court of law, for rendering justice towards the accused and victims.<sup>31</sup> He should avoid suppression of material capable of establishing the innocence of accused.<sup>32</sup>

Prosecutors have the option to participate in plea bargaining with the defense, when the accused consents to pleading guilty to a less severe offense in return for a decreased punishment. Prosecutors often engage in communication with crime

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<sup>26</sup> Dandurand, Yvon. "The role of prosecutors in promoting and strengthening the rule of law." *Crime, Law and Social Change* 47 (2007): 247-259.

<sup>27</sup> *Marappa Gounder v Venkatachalam* 1983 LW (Cri) 1 Mad

<sup>28</sup> *Banti alias Guddu v. State of Madhya Pradesh*, 2004 All MR (Cri) 288

<sup>29</sup> *Deepak Aggarwal v. Keshav Kaushik*, 2013 All SCR 952

<sup>30</sup> *Sheonandan Paswan v State of Bihar*, AIR 1987 SC 877

<sup>31</sup> *Sidhartha Vashisht v State (National Capital Territory of Delhi)*, AIR 2010 SC 2352

<sup>32</sup> *Amallesh Chandra v State*, AIR 1952 Cal 481

victims, ensuring they are regularly updated on the advancements of the case and actively seeking their feedback on crucial decisions. He should limit his work within the bounds of law only.

Public Prosecutor holds public office<sup>33</sup>. He has an independent and responsible character. The office of Public Prosecutor involves duties of a public nature and is of vital interest to the public. The role of the Public Prosecutor in any criminal trial, whether at the instance of the State or of a private party, is to safeguard the interest of the complainant as well as the accused. The right to be heard includes a right to be represented by an able spokesman of one's confidence. This right belongs both to the accused and the complainant. It is not only the accused who is in need of assistance and protection of his rights but also the complainant. In fact, it is to vindicate the rights and grievances of the complainant and, through him, of the State, that the prosecution is launched whether by the State or by the private party. The object and purpose of criminal prosecution is to bring home the guilt of the accused and to ensure that he is adequately punished. The prosecutor has, therefore, to discharge his duties diligently, without fear or favour and without ill-will or mala fide<sup>34</sup>.

A prosecutor who fails in and neglects his duties cannot import effective and substantial service to the administration of justice. In the discharge of his duties as a prosecutor, he is ordained by law, by professional ethics and by his role as an officer of the Court, to employ only such means as are fair and legitimate, and to desist from resorting to unjust and wrongful means. The duties of the prosecutor and the requirements of a fair trial do not vary from case to case. Moreover, there is always the Court to safeguard the interests of the accused and the complainant, to control the proceedings and to check the omissions and commissions of the prosecutor. It is needless to mention that the Court is not a moot spectator in a criminal trial, but an active participant therein. Therefore, by no stretch of imagination, it can be held that where Special Public Prosecutor is appointed whether paid by the State or the Private Party, the prosecution and the trial should be presumed to be biased, partial or unfair.

The Prosecutor is also not a part of the investigating agency, he should not speak on behalf of the investigating agency <sup>35</sup>. The public prosecutor is anticipated to

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<sup>33</sup> K.C. Sood v. S.C. Gudimani AIR 1981 CriLJ 2

<sup>34</sup> P.G. Narayanankutty v. State of Kerala and Ors. [1982] CrL. L.J. Vol. 88

<sup>35</sup> Vinay Kumar Srivastava v State of Uttar Pradesh, (2006) Cr LJ 702 (All)

carefully consider the investigating agency's request before presenting a report to the court to seek an extension of time for the completion of the inquiry. He is not only a post office or a forwarding business<sup>36</sup>. A public prosecutor may disagree with the reasons provided by the investigating officer for requesting an extension of time if they believe the investigation was not conducted properly or if there were unnecessary delays. They take into factors such as the probability of obtaining a conviction and the gravity of the alleged crime. They substantiate evidence, scrutinize witnesses, and formulate legal arguments in order to convince the judge or jury of the defendant's culpability. He is also not an agent of the police.<sup>37</sup> An investigation officer can't be directed to consult with the prosecutor before filling out the charge sheet.<sup>38</sup>

### **Entanglement in the Regulation of Public Prosecution**

The government has a pivotal role in the appointment process of the prosecutor. Michel J Ellis (2012) argued on the line that whenever the legislature selected a prosecutor, parties commandeered the appointment process to reward their allies and punish their enemies.<sup>39</sup> The author pointed out that the prosecutors are unable to perform their duties when the opposite party is a politician.<sup>40</sup> If the prosecutors ignore following the directions of the government, they are compelled to leave office. The American presidential administration of George W. Bush (2012) initiated politically motivated prosecutions of Democratic state officials, most notoriously of former Alabama governor Don Siegelman and fired Republican US attorney David Iglesias in New Mexico and other US attorneys because they refused to initiate politically motivated prosecutions.<sup>41</sup>

This situation is quiet under the Indian Criminal Justice system. The concept of elected prosecutors yet not prevailed in India. Presently, Prosecutors are appointed by the state government. Based on the recommendations from the courts, the

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<sup>36</sup> Hitendra Vishnu Thakur vs. State of Maharashtra, (1994) 4 SCC 602

<sup>37</sup> Madhav v. State, (1977) 18 Guj LR 896

<sup>38</sup> Sarla R. v. T.S. Velu, AIR 2000 SC 1731

<sup>39</sup> ELLIS, MICHAEL J. "The Origins of the Elected Prosecutor." *The Yale Law Journal* 121, no. 6 (2012): 1528–69. <http://www.jstor.org/stable/41510452>.

<sup>40</sup> Wisconsin Lawyer: Policy or Prejudice? Examining the Historical Roots of the Governor's Power to Remove a District Attorney: (wisbar.org)

<sup>41</sup> Tonry, Michael. "Prosecutors and Politics in Comparative Perspective." *Crime and Justice* 41, no. 1 (2012): 1–33. <https://doi.org/10.1086/666975>.

legislature has included judicial opinion in the appointment of Public Prosecutors and additional Public Prosecutors.

The term "Public Prosecutor" is explicitly defined in Section 2(u)<sup>42</sup> of the *Criminal Procedure Code, 1973*. However, the appointment scheme of Public Prosecutors, Additional Public Prosecutors, Assistant Public Prosecutors, and Special Public Prosecutors is explicitly provided under Section 24, 25 & 25A of the *Criminal Procedure Code, 1973*. In order to be considered for the role of Director of Public Prosecution or Deputy Director of Prosecution, an advocate must possess a minimum of ten years of experience and must get approval from the Chief Justice of the High Court. The Deputy Director of Prosecution will maintain the reporting relationship with the Director of Prosecution. The Director of Prosecution has a higher position than the Public Prosecutors, Additional Public Prosecutors, and Assistant Public Prosecutors employed at the High Court. District Court Prosecutors, Additional Prosecutors, and Assistant Prosecutors will be supervised by the Deputy Director of Prosecution. While the High Courts have the authority to designate a Public Prosecutor or an Additional Public Prosecutor, the Central Government or a State Government may also make this choice in conjunction with the High Courts.

Similarly, the Public Prosecutors of the District Courts are selected from the roster of permanent staff members. The Sessions Judge, in collaboration with the District Magistrate, compiles a roster of eligible applicants from whom the Public Prosecutors for the district are selected. A Public Prosecutor or an Additional Public Prosecutor must possess at least seven years of professional experience, whereas a Special Public Prosecutor appointed by the Central or state government must possess at least 10 years of experience. The Central or State Government has the authority to designate one or more Assistant Public Prosecutors to manage matters in the Magistrate Court. The appointment of Assistant Public Prosecutors mostly occurs via examinations administered by the State Public Service Commission. However, certain states have amended the provisions on the appointment of Assistant Public Prosecutors.

The central legislation has clear guidelines with certain lacuna in the appointment of the prosecutor. As a result, the judiciary needs to interfere in framing the guidelines as well as upholding the rule of law. Firstly, in Harpal Singh Chauhan's

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<sup>42</sup> "Public Prosecutor" means any person appointed under section 24, and includes any person acting under the directions of a Public Prosecutor

case, the district judge recommended certain names for the extension of service terms of the Public Prosecutor. However, the district magistrate ignored the list prepared by the district judge. District Magistrate, based upon his inquiry, found that the candidates were not competent to uphold the public interest. The state government acted upon on the report of the district magistrate only. When the matter raised in the court of law, the court interpreted the provision Section 24(4) of *Criminal Procedure Code, 1973*, which lays down that “*The District Magistrate shall, in consultation with the Sessions Judge, prepare a panel of names of persons*”. The court held that consultation with the sessions judge is compulsory, and primacy would be given to the opinion of the district judge.<sup>43</sup> Post this judgment, the State of Uttar Pradesh has removed the role of the judges while dealing with appointment matters. At present, judges have no role to play in the appointment of the prosecutor. The government can take the direct benefits of this amended provision. At present, the government aimed to withdraw only politically motivated cases.<sup>44</sup> Despite minimising the role of the judges in the appointment of the prosecutor, the judicial organ tried to maintain the constrained role on its own.

Again, *Neelima Sadanand Vartak v. State of Maharashtra*<sup>45</sup>, the state government tried its level best to appoint the public prosecutor of their own choice. The state government amended the central legislation with certain new words. At present, the law is “*The District Magistrate shall, with the approval of the State Government, prepare a panel of names of persons who are in his opinion fit to be appointed as Public Prosecutor or Additional Public Prosecutor for the district.*” Based on this provision, the district magistrate prepared the list of advocates for the appointment of the prosecutor, with responses from other state authorities. However, the Supreme Court took a dynamic approach to decide this matter. While deviating from the state amended legislation, the court opined that the District Judge comment is necessary for the appointment of the prosecutors in District Court. The Supreme Court take one step ahead with putting a limitation on the recommended list. The court suggested that a proper proportion has to be maintained between the number of persons to be selected and the number of persons to be considered for the particular post. Following this guidance, two Indian States have followed and incorporated the

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<sup>43</sup> State of UP v Johri Mal (2004) 4 SCC 714, 732

<sup>44</sup><https://www.deccanherald.com/india/uttar-pradesh-contemplating-withdrawal-of-criminal-cases-against-ministers-bjp-mlas-1135213.html>

<sup>45</sup> AIR2005BOM431

service rules of the prosecutor. Odisha and Karnataka have restricted the number to 4 and 5, respectively.<sup>46</sup>

There are instances of prosecutors' political hobnobbing. In the matter of Tarsem Kumar's<sup>47</sup> case, the prosecutors are transferred based on the Demo-Official note from the MLA. The alleged offence was that the prosecutor was conducting criminal trial against the same MLA from he had received the Demo-Official order. The court held that the prosecutor ignored his sovereign duties and that the change of transfer notice based on MLA's written statement affected the true nature of the prosecutor's office.

Another lacuna existed in the laws, "regular cadre of prosecuting officers" which has remained undefined till date. The composition of the regular cadre can't be traced either in procedural laws as well as state service rules. Initially, the central government directed the state government to appoint prosecutors only from the regular cadre of prosecuting officers. It also caved out one exception in case of the non-availability of suitable prosecutors: the state government can be able to appoint the prosecutor from the list which is prepared by the district judge in consultation with the district magistrate.

The judiciary tried to define the term in the case of *K.LJohn v. State of Kerala*<sup>48</sup>, the court opined that the regular cadre of the prosecuting officer shall consist of the Public Prosecutor at the top level and the Assistant Public Prosecutor at the lowest level. The court held that no appointment of prosecutors shall considered as valid if the prosecutors are not appointed from the regular cadre of prosecuting officers.

Unfortunately, a few states, West Bengal, Madhya Pradesh, Rajasthan, Maharashtra, and Bihar, amended the clause of a regular cadre of prosecuting officers and shifted the compulsory application of this provision into a temporary clause. As a result, the state government can appoint the prosecutor based on its own requirements. Though the Constitution permits amendments by states to parliamentary legislation, total control exercised by the executive over PP appointments not only goes against the spirit of several judicial decisions but also violates the principle of separation of powers.

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<sup>46</sup> Section 5 The Orissa Law Officers' Rules, 1971

<sup>47</sup> Tarsem Kumar vs. State of Himachal Pradesh and Ors. (06.07.2022 - HPHC) : MANU/HP/0940/2022

<sup>48</sup> 1990 SCR (3) 319

## Conclusion

Prosecutor associations of 28 states as well as union territories have approached the Supreme Court through the way of PIL to set down guidelines for the appointment and promotion of the prosecutor. However, the matter is still pending in the Supreme Court. Large amounts of prosecutors are waiting for the directions of the Supreme Court. Article 142 of the Constitution empowers the Supreme Court of India to ensure complete justice for its citizens. Unfortunately, the Supreme Court didn't use this power to protect the rights of the prosecutor and restrict the legislature abruptly amending the provision. When the matters are knocking at the doors of the court, the supreme court ignored to lay down any proper guidelines.

Following Roosenburg Hollow Hope theory on Dynamic court as well as constrained court, it can be easily found that the Supreme Court preferred to perform as constrained court only. The prosecutors, i.e, the Minister of Justice, are seeking their own rights; the courts do not pay any heed to this grave concern. Despite framing unlimited guidelines on the role of the prosecutor, the Supreme Court never intended to comment anything on the practices of the legislature.

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