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## Legal Position of Prosecutors in India and USA: A Comparative Perspective

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### Abstract

Prosecutors are an unavoidable organ in the administration of justice worldwide. Its role has a far-reaching impact on the justice delivery machinery. Indian as well as the USA system has unique features of prosecutors. The rationale of the study is to examine the outline of statutory framework of prosecutors in India and USA. The article also compares the functioning of prosecution machinery in India and the USA, specifically with investigation machinery, and suggests reforms for better prosecution in India. For this purpose, researchers have applied Doctrinal methodology. For this research paper, the USA is selected because it is the United States only legal system where the citizen elect prosecutors. Depending upon the hierarchy of the courts, the post of prosecutor is created in both these nations.

**Keywords-** Prosecutor, Prosecution, investigation, justice, appointment, adversarial, Fair Trial, Reforms

### Introduction

George Floyd, a 46-year-old American, became a victim of police atrocities in Minneapolis, resulting in death in Minnesota, USA. This instance led to one of America's most prevalent public outrages in the past decade [1]. Interestingly, one of the prosecutors in charge of the case took to social media [2] to address the audience and ensure that justice would be done. This incident of representation by the prosecutor before society in the USA shows the power and authority of USA prosecutors even in the investigation/trial phase of the criminal justice administration. Prosecutors are an unavoidable organ in the administration of justice worldwide [3]. Its role has a far-reaching impact on the justice delivery machinery. Indian as well as the USA system has unique features of prosecutors. Appointment, remuneration, coordination with police, judiciary, prosecution witness, etc., are some factors responsible for efficiently administering justice in pretrial, during the trial and post-trial phases. Prosecutors in USA are directly appointed by the people [4], whereas the government appoints Indian prosecutors on selection basis. [5] Prosecutors in USA have wide range of powers.[6] Indian prosecution systems need reform for efficient prosecution.

Police, prosecutors, defense counsels and judges are the formal organs in the criminal justice administration. The role played by the Prosecutors in the administration of justice is very dynamic[7]along with police, defence counsels, and judicial officers in the Court of Law.[8] They have a primary duty to prosecute cases in the court of law[9]. Their appointment hierarchy, powers, functions, duties, etc., depending upon the specific pattern of administration of justice being followed in the respective nation. As per the United Nations Covenant on Civil and Political Rights: CCPR Commentary, 2nd revised edition, there is a lack of commendation for prosecutors in international instruments compared to defence lawyers, judges, and court administrators. For example, neither the Universal Declaration of Human Rights nor the International Covenant on Civil and Political Rights emphasises the role of prosecutors. In addition, cases adjudicated by the Human Rights Committee pay little attention to the prosecution.

The role of prosecutors all over the globe is subjective. While some nations have accorded them the status of a constitutional figure, others have given them a statutory status. Substantive and procedural laws, human rights mechanisms, and international norms also play dynamic roles while deciding prosecutors' role in the justice administration. Also, there are different attributes to the role of prosecutor in the legal system driven by the riders of Common Law and the Civil Law System. In addition to these two popular systems, religious systems can be based on the religious administration of justice.[9] So, the role of a prosecutor largely depends upon which specific system the particular nation has adopted. Each system has its advantages and disadvantages.

**Why compare India and USA**-In this comparative study, the Indian prosecution system is compared with the United States of America. Both represent a victim before the court and are officers of the court. In both jurisdictions, prosecutors represent the government against the accused. However, the USA is selected for this research paper because it is the United States' only legal system where citizens elect prosecutors. Depending upon the hierarchy of the courts, the post of prosecutor is created in both these nations. The objective of the study is to examine the statutory framework of prosecutors in India and USA. It also compares the functioning of prosecution machinery in India and the USA, specifically with investigation machinery, and to suggest reforms for better prosecution in India.

## Prosecutors In India

Indian Prosecutors are statutory officers, and they are not constitutional figures. They are appointed and regulated under the Criminal Procedure Code as an officer of the courts. For this reason, their position in the statute is in Chapter Offices of the Courts and Powers of the Courts. Section 24 of the Criminal Procedure Code states that the State Government and the Union Government can appoint prosecutors. At least seven years of standing practice is required. Cadre is prepared by the District Magistrate, who endorses the names after consultation with the session's court, and the Ministry finally approves the names. This procedure is followed in case of prosecutors before the session's courts and the high courts.[10] Special public prosecutors require a minimum of 10 years of practice. Special Public Prosecutors represent special cases before the special courts appointed by the government.[11] Directorate of Prosecution is the parent authority to supervise the functioning of Assistant Public prosecutors in the magistrate's courts.[12]

Political interference is not direct, but indirect political connection plays a vital role [13] in the appointment process from the ministerial level.[14] Their appointments are temporary, and there is no retention of services. Remuneration is also not handsome compared to their devotion to the specific case. Prosecutors of the Magistrates Courts are Assistant Public Prosecutors. Their appointment is full-time, and jobs are also secured. They perform their duties under the Home Ministry) of the specific states. [15]

In India, at the national and state level, multiple training sessions are organised by various training institutions to develop professional skill sets amongst the prosecutors. Most of the time, the judicial academies of the union government and the state government offer training sessions for the prosecutors. And at the local level also with initiatives of senior advocates and academicians training sessions are organised. In India, the prosecutors practising before the High Court and Sessions Courts are appointed by the State Government or the Central Government. So indirectly, the candidates in the ruling government's good books are more likely to be recommended and selected. In the withdrawal of prosecution as well, there may be political interference. Earlier, prosecution and police officers used to work under the same cadre [16]. Still, after major amendments in the Code of Criminal Procedure in 1973, prosecutors are detached from police control, and both wings enjoy autonomy. The Higher judiciary, i.e. the Supreme Court of India and the High Court, has given directions for the smooth functioning of prosecutors. [17] Indian prosecutors must prove the guilt of the accused beyond reasonable doubt. In *Hitendra Vishnu Thakur v. State of Maharashtra* [18], the Supreme Court held that "A public prosecutor is an important officer of the State Government and is appointed by the State under the code of Criminal Procedure. He is not a part of the investigating agency. He is an independent statutory authority."

## Prosecutors In USA

In USA, the prosecutor is one of the decision-making authorities at different levels in the administration of justice. By virtue of the US Constitution and the concerned legislation, U.S. President has the power to appoint the attorneys of the United States attorneys [19], subjected to 'advice and consent of the Senate.[20] In practice, senators belonging to the president's political party often make the primary selection of a candidate for U.S. lawyers from a given state. If the senators are from different parties, a leading role may be played by the congressional delegation of the state or by other state party officials. Earlier the status of district attorneys in America was not that of the prosecutors working full time. In the initial nineteenth century, prosecutors, not being full-time workers, often had inadequate legal skills and experience. Surprisingly, the role of the Attorney General of the United States was initially thought to be a part-time job. The honorarium received only half the salary of other cabinet officers. Eventually, prosecutors were largely comprised of lawyers whose private practice was not that gainful. Therefore, the governors were constrained to appoint those prosecuting officers who were not fully competent to discharge the duties delegated and expected from them. Mississippi became the leading state in the nation to hold the election for the position of public prosecutor in 1832[21]. Second state to adhere to the election process of prosecutors was the State Ohio [22]. Like Mississippi, it also introduced the shift against popular discontent for the direct appointment of court officials. Even before the statehood of Ohio, the first federal territorial judges appointed in Ohio had "what one today might call conflicts of interest"

owing to the vested concerns in land disputes before them. During this time, the American government became more democratic. Constitutional conventions are also responsible for the same. States around the nation enacted new constitutions between 1820 and 1860 to increase voting rights, redistribute legislatures, and make more public posts, such as governors and judges, electable. District attorneys were appointed officials in the wake of the Revolutionary War according to the state constitution adopted[23]. Whoever appointed the district attorney varied from state to state in the U.S.A. In Kentucky and New York, it was the county court judge. It was the state legislature of Alabama, Georgia, North Carolina, and Tennessee, the governor in Massachusetts and New Hampshire, aided by his council of counsellors. In Michigan, the state senate advised and gave its permission together with the governor.

The District Attorney turned to an elected position simultaneously as the prosecutors started to gain importance in the criminal justice system. By the beginning of the nineteenth century, district attorneys were judicial functionaries who, including court clerks, coroners, and deed recorders, had non-discretionary primary duties. These responsibilities included, among other things, prosecuting criminal cases on behalf of the state, defending the state in civil proceedings, and issuing subpoenas. Indian prosecutors, on the other hand, are not chosen by the public but are appointed based on their applications. Their appointments are determined by which court they represent their clients in. According to the need of officers, the US government appoints prosecutors. The United States Attorneys' selection process maintains conventional autonomy. For purposes, Special Public Prosecutors can be appointed in the United States of America, and funding provisions are required to be made for that purpose.

American prosecutors began as appointed full-time government officers, and they have continued to be so in the federal government. American prosecutors are full-time salaried employees and get full job retention. Their remuneration is also as good as judicial officers. Each U.S. attorney shall be appointed for a four-year term but shall generally remain in office at the expiry of their term until a replacement is named [24]. Attorneys in the United States are subjected to the dismissal of president. Attorney General appoints the Assistant United States Attorneys and is subject to removal by them. However, in practice, the selection and removal of assistant United States attorneys (who enjoy civil service protection) are handled locally. On the contrary, Indian prosecutors do not have that kind of job retention since their appointments are tenure based, i.e. three years to 5 years. Their remuneration is also not very significant, and no protection for persons and property. To sharpen professional skill sets and cope with upcoming challenges in the administration of justice, periodical training is essential for prosecutors. American prosecutors must attend training programmes to develop their professional skill sets. America has had its own statutory body to care for and nourish prosecutors since 1984[25]. All kinds of support are offered to the prosecutors. The aim is to strengthen the system and make that institution well-equipped[26].

As the people directly elect American prosecutors, automatically, party politics come into this system. But once prosecutors are appointed, they are the deciding authorities to proceed or not to proceed with the criminal cases. In colonial America, we see the origin and evolution of subcategories of public prosecutors functional at the local level. Local public prosecutors- also called district attorneys, state attorneys, prosecuting attorneys, or county attorneys- originated. From 1832 to 1860, nearly 75% of the states in the Union were determined to confer on the citizenry the right to elect public prosecutors.[27] During this time, the American government became more democratic. Constitutional conventions are also responsible for the same. From 1820 to 1860, with the adoption of new constitutions by the states across the country, there were attempts to expand voting permissions, redistribute legislative powers, and subject the government offices, including governors and judges, to elected. The status of full-time prosecutors was also only available to American district attorneys.[28] However, the system has changed with time, and now full-time government officers are the prosecutors in the USA.[29]

## **Rational Behind Direct Selection from People in the USA**

Like many other US state and county government officials, Procurators were appointed civil servants in the early 19th century. In the 1820s and 1830s, however, two structural trends laid the groundwork for elected prosecutors. First, voters were dissatisfied with the nomination or selection process. Governors gained new powers, giving unchecked appointment power to a single man in many states. In contrast, in states where the Legislature chose prosecutors, political parties took over the nomination process to reward their associates and punish their rivals. On the same verge of time, prosecutors started to adopt a more significant role in the administration of criminal justice and acquired somewhat arbitrary powers over prosecutions. Voters started to dissent against the impaired and biased selection process in respect of such a rapidly becoming significant office, so an impartial election was a just and natural option. Both viewpoints were mirrored in early nineteenth-century political debates till 1830, as evident from the instances of Mississippi and Ohio becoming the first states to resort to the formal process of elected prosecutors.

**Case Study of control on criminal prosecution by political machinery in New York-**In 1853, A. Oakey Hall, having his affiliation with the Tammany Hall Political machine, was elected as district attorney for New York

County,[30] continuing to affirm in his favour re-election four times and further to hold the office with entire tenure subjected only for a short interruption till 1869. [31] The Democrats of Tammany Hall depended on the Irish and German immigrants' vote bank, substantial numbers of whom owned the taverns and beer gardens and the infringers of the local liquor laws. Hall quickly established the practice of overturning the charges levelled against members of politically influential electorates, known as "pigeon-holing." Eventually, local liquor regulations frequently lost their vigour of enforcement in the courts. Till 1880s, paper media criticised the office of New York County District Attorney and exposed that it was in the clutches of Tammany. The office was operated as an instrumentality with great respect to the views and interests of criminals and strongly warranted for the restoration of balance as the district attorneys were found abortive to entertain the cases when the accused belonged to very influential political affiliation.

Prosecutors in the United States of America have a unique feature. They have complete control over the investigation procedure. They are the charging authority [32], so the people make their appointment directly. After the commission of a crime, the prosecutor decides the modus Operandi of an investigation. To go ahead or to stop the case shall be decided by the prosecutors. [33] Like India, American prosecutors need to prove the guilt of the accused. But it shall not be beyond a reasonable doubt. Prosecutors enjoy great powers; their types depend upon the court before presenting the case. The USA Constitution and statutes have provisions relating to the selection of prosecutors.[34] There is active political interference in the selection process. Due to close association with police officers and active involvement in the investigation, police officers get inputs from them, and investigation can be error-free. There is a judicial review of the functioning of prosecutors.[35]

### **Prosecutors In India and USA- A Comparative Study**

In both nations, Prosecutor is a socially and politically sensitive position. The extent of sensitivity is different. Their job is linked with the courts, human rights mechanisms, and protection of victims of crime. Their hierarchy is also linked with the nature of crime and the adjudicating bodies from bottom to toe.

#### **A. Position**

Indian prosecutors are statutory appointments, while prosecutors in the USA are a Constitutional and statutory body which naturally possess higher respect and dignity than the Indian prosecutors. In India, the prosecutors are appointed under the Code of Criminal Procedure, and the Constitution has no direct provision for the prosecutors. Prosecutors in the USA enjoy heavy discretionary powers. Therefore, they enjoy a superior position in the American Criminal Justice System.

#### **B. Nature of Appointment, Job Retention, Remuneration, And Security of Person and Property of Prosecutors**

Indian prosecutors in the sessions and high court are part-time; however, the prosecutors before the Magistrate Courts are full-time employees. Their jobs are part-time and limited to a specific tenure, so they have no job retention. Remuneration paid to the prosecutors is nominal, depending on active hearing of the case. The amount is average. Generally, there is no security for prosecutors in India. On the other hand, American Prosecutors are appointed in full-time service mode. Their jobs are retained, and remuneration paid to them is also handsome and good as the judicial officers. They enjoy security to people and property. Because of such a structured way of appointment and job retention, the career as a prosecutor is being selected by many aspirants in USA, and they develop their whole lifetime career as a prosecutor. However, that is not the case with the Indian Prosecutors, who are part-time prosecutors appointed for three or five years.

#### **C. Connection with Police**

Investigation procedure is part and parcel of the administration of justice. The role of police commences as soon as commission of crime is reported. Indian as well as American Prosecutors pitches in to investigate the crime and report to the superior authority. In India, only the cadre differs between the prosecutor and the police. The prosecutor must represent the police with all possible evidence at the place. Suppose we draw a line between trial and pretrial phases. In that case, the prosecutors in India are hardly connected with the investigation team during investigation phase as Indian Prosecutors are isolated from the task of interrogation. Investigation is the sole prerogative of police machinery. Sometimes, this leads to issues of faulty investigation since police officers may need help to do their tasks rigorously. However, the prosecutors in the USA have full control over the investigation process and those officers. After completion of a police investigation, they have full authority to charge or not a specific criminal case. They have charging power as well.

In India, the state adheres to the Investigation and Prosecution shall follow the canons of fair and free trial and the natural justice mandate. In *Zahira Habibullah Sheikh v. State of Gujarat*[36], the mode of investigation and prosecution was challenged, and the Supreme Court of India ordered complete retrial of the case. In case of investigation faults in the pretrial phases, the benefit of doubt is given to the accused. However, it is not correct. The same concern was raised in *Kailash Gour v. State of Assam*[37] “here the court observed that, “the benefit arising from any such faulty investigation should go in favour of the accused and not in support of the prosecution. So also, the quality and creditability of the evidence required to bring home the guilt of the accused cannot be different in cases where the investigation is satisfactory vis-à-vis cases in which it is not.”

#### **D. Harmony with Judiciary**

In both systems, prosecutors are regarded as court officers. Bringing facts before the courts and assisting them in finding facts is their important duty. In India, charging authority is upon the judicial officers; however, in the USA, the prosecutor is charging authority whose power rests with the judges in India. Due to close connection of American prosecutors with the judiciary, those prosecutors enjoy high respect and dignity in the administration of justice.

#### **E. Political Neutrality**

The people do not elect Indian prosecutors. They are appointed by the State or Central Government in consultation with the judiciary. At the time of endorsement of names in ministry, political loyalty plays an important role. On the other hand, in the process of direct election from the people, the dominant political party play an important role in recommending their candidate as a prosecutor. Sometimes this interference is in the appointment of candidates and sometimes in the withdrawal of prosecution. *Vinit Narayan v Union of India* [38] has shown concern about political interference in the judicial process.

The post of prosecutor is the most sensitive in both nations. And as per cases reported and expert jurists, the prosecutors, are indirectly linked with their earlier loyalties towards ruling parties. So, this issue is serious about protecting the freedom of society and about maintaining neutrality in society.

#### **F. Training, IT Support, Library, and Infrastructural Facilities for prosecutors**

Training is indispensable for continuous growth and compatibility with the changing world. In both nations, training is organised at different levels per the need. Indian prosecutors are getting training from the professional institutions established for judges and prosecutors. Training sessions are organised to understand better and use Information Technology, forensic science, and scientific study of critical cases. The government tries to give a sufficient infrastructure facility to all the prosecutors for their smooth and efficient daily work. In the USA and state-wise, prosecution training institutions are rigorously conducting training programs for prosecutors. The number of training sessions and care of the prosecutor is more in the USA than in India.

#### **Conclusion**

Only some systems in the globe can be considered ideal and comprehensive. It depends upon how the stakeholder run the system sincerely. Therefore, we cannot say that USA is better than India or vice versa. All over the globe, the prosecutor's posts are carefully analysed, and reforms are suggested. International Association of Prosecutors (IAP) has been in existence to protect this community for more than seven decades. Also, Rome Statute, and Consultative Council of European Prosecutors (CCEP) [39] are keen to develop this wing in the administration of justice. [40] Justice is a very precious concept which is directly linked to the life of people in society. Prosecutors are justice workers. The stand of prosecutor in the court is determining factor for victims' rights and of the accused involved in the criminal case. Prosecutors in India and the USA play a crucial role in the criminal administration of justice. However, due to constitutional position and more democratic way of appointment and control of police investigation, prosecutors in the USA are superior. India should adopt better solutions for the prosecutorial reforms from the USA. Being full-time employee with status and position, most of the cream law student tends to be a part of the prosecution in the USA. On the other hand, in India, motivational factors are very few to join prosecution. Also, having more control over the investigation procedure, prosecutors in the USA are more successful in their careers.

#### **Recommendations For Betterment of Indian Prosecutors**

Indian Prosecutors have been subject matter of Law Reform for many decades. Major changes took place in year 1973 wherein independence of prosecutors from police wing occurred. In 2003, the Mallimath Committee on Law Reform suggested various reforms to maintain independence of prosecutors' office from political influence. Various state governments have their own Directorate of Prosecutors under Section 25 (A) of the Criminal Procedure Code for

supervising Assistant Public Prosecutors. From 2009, the parties can accommodate an advocate to support prosecutors in criminal cases. So, periodically, various recommendations are given, and most of them are followed by the Union Government. Still, there is a grey area wherein there is a dire need for reform for betterment of justice. Those are as under.

- [1] Prosecutors in India should be appointed after the preliminary examination which will test their theoretical and practical knowledge.
- [2] Political affiliations or loyalty should not be a criterion. The state prepares Indian prosecutor's cadre as per judiciary recommendations at the High Courts and the Sessions Courts. [41] However, political influences play behind the curtain. Sometimes, a candidate who is of calibre to represent victim may be selected. So, to avoid this, there shall be entrance tests for all the candidates keen to become prosecutors. Their wisdom should be tested before they are appointed as a prosecutor. The topic for the examination should be the most crucial burning issue topic.
- [3] Indian prosecutors should be allowed to participate in the investigation process. At least for serious criminal cases. This will reduce errors in the investigation. Error-free and technical investigation is a dire need of hour. It has been observed that due to errors of investigation team, the entire prosecution case leads to disappointing stages. Hence, the prosecutors should be empowered to direct and control the investigation phase for healthier and more fruitful process. This process is followed in France [42], Germany [43] and USA.
- [4] The political neutrality of the candidate should be considered before appointing prosecutors since running prosecution is a very delegated and crucial task. Political affiliation may affect the purity of justice delivery in many ways. Hence, the prosecutors' political neutrality must be tested and confirmed well. Sometimes, the candidate's political affiliation deters the prosecutors from taking decisive actions against the lawbreakers, or revenge can be taken on the innocent accused who is against the political thought of a specific political party the prosecutor is following.
- [5] Job Retention - To get merited and committed candidates in this field. The state should retain jobs of prosecutors. Due to the uncertainty of the future, many deserving candidates opt for another way of career, and classic crowns may not be attracted towards prosecutors' positions. Such a situation is fatal for healthy administration of justice.
- [6] Training, IT Support, and Infrastructure facilities for Indian prosecutors should be given periodically. Society, nature of crimes, mindset of government, etc., is rapidly changing. Prosecutors should be equipped with proper training to cope with this changing scenario. Use of technology, different ways of crimes newly emerging crimes, systematic frauds, scams, etc. complicated issues need smart work of prosecutors. Hence, periodical training is must. District-wise training institutions should be created to update and train prosecutors periodically on crucial cases relating to forensic evidence, Information Technology, upcoming challenges in the process of administration of justice, etc. Also, in the prosecutor's offices, for updated case studies, online and offline infrastructure facilities are essential for justice's smooth and efficient administration. Information Technology access by way of internet facilities to be offered to the prosecutors at the offices. Fully updated books and journals should be available in the prosecutor's libraries at their offices on the court premises. All the above recommendations are to be considered for healthy prosecution in India.

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