

## IS POWER AND DISCRETION IN THE HANDS OF PROSECUTORS IN INDIA REALLY AN ISSUE?

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### ABSTRACT

*The article looks at the question of the authority and latitude granted to prosecutors in India's criminal justice system. As prominent players in the system, prosecutors have been given a lot of discretionary power, which has provoked discussions and close examination among academics. Critics contend that the broad authority and powers given to prosecutors may result in the infringement of personal freedoms and possible power abuses. When addressing the function of prosecutors in the Indian criminal justice system, the balance between accountability and authority is an important consideration. The Code of Criminal Procedure, 1973, in particular, is discussed in depth in the article as the legislative foundation governing prosecutorial authority. It emphasizes the fact that prosecutors have significant influence over who can be punished and the significance of preserving a balance between authority and discretion. Additionally, the idea of plea bargaining is looked at as a technique employed by prosecutors to sway verdicts. Although plea bargaining may have unexpected repercussions and negatively affect populations in remote and marginalized areas, systems should be put in place to guarantee voluntary decisions, offer transparency, and give protection in the process. The article concludes that there are good reasons to be concerned about the concentration of discretion and authority in the hands of prosecutors in India. It demands extensive legal changes that support prosecutor accountability, consistency, and moral behaviour.*

### INTRODUCTION

The Indian Criminal Justice system is a very complex framework to understand; designed to uphold justice in Indian society. There are multiple actors in the Indian Criminal Justice system that plays a crucial role in the proper functioning of the Indian Criminal Justice system. Prosecutors are one of the most important actors among them. Endowed with wide discretionary powers, Prosecutors play a crucial role in the administration of justice; therefore understanding their role and powers becomes a topic of utmost importance these days.

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However, the extent of power and discretion vested with the Prosecutors has been a subject of wide scrutiny and debate by various scholars and academicians. It is also argued by the critics that the wide powers and authority used by the discretion of the Prosecutors result in violation of individual rights, and open wide doors with the potential for abuse of power vested with them. The question of balance between accountability and authority also comes into the picture, when the power and discretion of prosecutors as an important actor in the Indian Criminal Justice system, is talked about.

This article is an attempt to look into the multifaceted issue of power and discretion vested with the prosecutors in the criminal justice system in India. Understanding the prosecutorial system requires an examination of the legal framework that is involved in governing the authority vested with the prosecutors. The Code of Criminal Procedure, 1973, along with other laws and statutes governs the boundary of power and discretion vested with the prosecutors in the Indian Criminal Justice system.

### **LEGAL FRAMEWORK GOVERNING PROSECUTORIAL AUTHORITY**

Prosecutors including Public Prosecutors, Additional Public Prosecutors, and Special Public Prosecutors are to conduct prosecutions and criminal proceedings in High Courts and Sessions Courts, and Assistant Public Prosecutors are appointed for conducting prosecutions in the Magistrate's Courts<sup>1</sup> as per Sections 24<sup>2</sup> and 25<sup>3</sup> of the Code of Criminal Procedure. A prosecutor is a Court-appointed neutral officer who is expected to offer a true picture to the Court of Law. A prosecutor is independent of the police so the decisions made by police officers do not affect the fair and just functioning of prosecutors, giving the prosecutors independent room for exercising their discretion. Therefore, they can take the proper and independent steps to do the necessary, in order to perform their duty effectively. A prosecutor, therefore, holds major control over who can be punished, which can be substantiated by referring to the *Best Bakery case*<sup>4</sup>. In this case, the Honourable Supreme Court of India has criticized the public prosecutor for opposing the issuance of arrest warrants against the accused persons before a Mumbai court. It was held that a public prosecutor is for the help of the state but when the prosecutor itself begins taking the side of the accused, an

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<sup>1</sup>Radheshyam Prasad, 'Prosecutors as Gate Keepers of Criminal Justice Administration in India' 8 Dr. Ram Manohar Lohiya National Law University Journal 222 (2008)

<sup>2</sup>The Code of Criminal Procedure 1973, s24

<sup>3</sup>The Code of Criminal Procedure 1973, s 25

<sup>4</sup>*Zahira Habibullah H. Sheikh v State of Gujarat*, 2005 Cr LJ 2050 (S.C.)

imbalance is created and the “impartiality and purity of judiciary come into question”<sup>5</sup>. This implies that the role and power in the hands of a prosecutor make the prosecutor so much important that the whole justice system faces an imbalance when the prosecutor does not do his work in the right manner. Therefore, prosecutors ought to keep the balance between authority and discretion. Even new laws can be further introduced in order to keep a check on the unhindered powers and authority of the prosecutors in the Indian criminal justice system.

## PLEA BARGAINING

Plea Bargaining is also one of the most important issues that need a good analysis while looking at the powers and discretionary authority of the Prosecutors. Douglas Husak in his writing<sup>6</sup> points out the use of ‘Plea Bargaining’ by prosecutors in the justice system and uses it to mould the way it likes to increase or decrease the punishment, thereby controlling how much punishment one will be awarded. The concept of “Plea Bargaining”<sup>7</sup> was introduced in the Indian criminal justice system via an amendment to Criminal Procedure Code in 2006<sup>8</sup>. It allows the accused to plead ‘guilty’ to a less serious offence before the court and thereby get the benefit by getting a reduced sentence, than the sentence he would have gotten in the ordinary course of events. There have been some prominent cases in which the accused have gotten their way by pleading guilty to a minor offense, in spite of committing crimes as grave as murder. One such case is *Mahabala Shetty vs The State Of Maharashtra*,<sup>9</sup> in which the accused, who allegedly committed murders, got his way by repeatedly pleading guilty to a minor offense of committing burglary, which shows that in the Indian criminal justice system, the position of the prosecutor, in this case, was against the accused but despite such position taken by the prosecutor, nothing substantial impediment came in the way of the accused to get along with less punishment, which points to the conclusion that the powers and discretionary authority vested with the prosecutors cannot every time turn the case in their favour. A concept such as Plea Bargaining which is widely thought about as a tool used by

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<sup>5</sup> *State Of Karnataka v Selvi J. Jayalalitha & Ors*, (2017) 6 SCC 263

<sup>6</sup> Douglas Husak, ‘The Amount of Criminal Law’, *Overcriminalization: The Limits of the Criminal Law* (Oxford Scholarship Online 2007)

<sup>7</sup> The Code of Criminal Procedure 1973, Chapter XXIA

<sup>8</sup> K. Venkataramanan ‘What is plea bargaining and how does it work?’ (*The Hindu Explains*, 19 July 2020) <<https://www.thehindu.com/news/national/the-hindu-explains-what-is-plea-bargaining-and-how-does-it-work/article32126364.ece#:~:text=Plea%20bargaining%20refers%20to%20a,to%20a%20less%20serious%20of%20fence>> accessed 30 April 2023

<sup>9</sup> ‘Burglar avoided long jail terms by plea bargaining’ (*The Hindu*, 11 March 2017) <<https://www.thehindu.com/news/cities/mumbai/burglar-avoided-long-jail-terms-by-plea-bargaining/article17444217.ece>> accessed 1 May 2023

the prosecutors to turn the case according to the Prosecutors' wish cannot every time help them ultimately as is evident in the *Mahabala Shetty vs The State Of Maharashtra*.<sup>10</sup>

But this does not undermine the argument that prosecutors using their wide power and discretionary authority can affect the pronouncement of a majority of judgments in the Indian Criminal Justice System by using the concept of 'plea bargaining', and despite the potential benefits plea bargaining has, it sometimes can have unintended consequences and again the same set of people of the society, who are poor, illiterate and marginalized are affected, and the condition becomes more polarised when those people belong to rural parts of India, gets into the dark web set by the prosecutors sometimes. And since the fact that the large part of the Indian population (around 64%<sup>11</sup>) lives in the rural part of India, and therefore is unable to afford quality education due to various reasons, and as a consequence is unable to understand the intricacies of law in full essence and are naïve and gullible as a result, and therefore when convicted for crimes, even if in reality those crimes are small, but the prosecutor wants to establish his guilt and want her to be convicted, the prosecutor is generally able to persuade her under the garb<sup>12</sup> that if she does not accept her guilt under the charges imposed, she will be punished with larger punishment and ultimately the prosecutor is successful in bringing out the charge as desired by him. The same also occurs with the minority sections of society such as Scheduled Castes and Scheduled Tribes. And there is literally no means in today's era to confirm if the voluntariness<sup>13</sup> expressed by the accused is in a real sense *voluntary* and the end the guilt of the accused under the charges as chosen by the prosecutor. Further, the lack of transparency and safeguards in the process of plea bargaining raises legitimate concerns.

There should be some kind of mechanism in place that has the potential to keep the 'voluntary' aspect in place and allow the affected sections of the society to take proper and independent decisions on their own, on the aspect of whether they want Plea bargaining to be invoked or not.

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<sup>10</sup>*Ibid.*

<sup>11</sup>'Going Rurban: Will villages be relieved of 64% rural population & become the rich 'countryside'?' *The Economic Times (India)*, 14 August 2023)

<sup>12</sup>Douglas Husak, "The Amount of Criminal Law," *Overcriminalization: The Limits of the Criminal Law* (Oxford Scholarship Online 2007) 1, 3

<sup>13</sup>The Code of Criminal Procedure 1973, s 265B

## CONCLUSION

The power and discretion vested with the prosecutors in the Indian criminal justice system is undeniably a serious issue that needs careful consideration. Throughout this article, the multifaceted issue of prosecutors' powers and discretionary authority and its potential implications on the justice administration has been explored.

One of the primary concerns which ought to be assessed carefully is the factor regarding authority and accountability, thereby keeping the balance between the two. The discretion vested with the prosecutors is undoubtedly a necessity to enable them to exercise their duties efficiently, but it is imperative to come up with an efficient mechanism that ensures that the actions of the prosecutors are guided by impartiality and fairness and uphold the individual rights to justice. For striking this delicate balance, a robust oversight mechanism should be set up. And concerning the issue of plea-bargaining, it cannot be denied that it is a necessity to vest the prosecutors with discretionary authority in order to enable them to function efficiently but it is also required to ensure that plea bargains are voluntary, informed, and not disproportionately affect vulnerable sections of society, such as the poor, illiterate, or marginalized.

In order to address these concerns effectively, comprehensive legal reform is required. The legal reform should bring transparency concerning the discretionary powers of the prosecutors and bring out consistency in the protocols to be followed by the prosecutors while carrying out their duty efficiently in the Indian Criminal Justice system. The development of standardized protocols can help the legal framework to bring a check on the unhindered prosecutorial discretion in India can enable in bringing consistency in decision-making and might also help in reducing arbitrary use of power and discretion by the prosecutors and also reduce the potential for any kind of bias. Additionally, the training programs for the prosecutors should not focus only on legal considerations but also on moral and ethical considerations in order to emphasize the importance of individual rights and the importance of fairness, and equity.

Moreover, encouraging a culture of professionalism and ethical conduct within the prosecutorial community is important for a fair and just society. Ultimately, addressing the issue of power and discretion in the hands of prosecutors in India requires a comprehensive approach that involves multiple stakeholders which includes academicians, politicians,

policymakers, and legal professionals. A consistent and collaborative effort to review the existing laws and frame new laws which enable effective oversight mechanism is of utmost importance to contribute towards a more equitable and transparent Indian Criminal Justice system.

Therefore, while prosecutors play a crucial role in the Indian Criminal Justice system, the concentration of power and discretion vested with them poses legitimate concerns. Striking the right balance between power, authority, and accountability is essential for ensuring a fair and just trial and legal process. By taking appropriate measures and introducing reforms, it is possible to mitigate the risk involved with prosecutorial power and foster a just and effective criminal justice system in India.

