A Dynamic Theory of Prosecutorial Roles in Adversarial Trials

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Prosecutors in adversarial systems are simultaneously expected to be impartial ministers of justice and partisan advocates. Leaving this tension unaddressed can result in poor quality prosecutorial decision-making. This article develops a novel "dynamic" framework for prosecutors to navigate between and prioritise these competing considerations, which can be used to understand, evaluate, and improve prosecutorial performance. Under this framework, the prioritisation should depend on which function the prosecutor is exercising at any given time. The article then deploys primary data collected in Delhi, through court observation and interviews with judges, lawyers, victims, and victim support-persons, to exemplify and justify the framework.

Keywords: criminal justice, prosecutors, victims, trials, adversarial systems, India

I. Introduction

In adversarial legal systems, there are often significant pulls on the prosecutor to serve as a "minister of justice."[1] Broadly, this refers to the prosecutor's obligation to advance the public interest, rather than working indiscriminately towards securing convictions. Simultaneously, prosecutors are responsible for carrying out "vigorous advocacy" to convict the defendant, an obligation stemming from the oppositional nature of adversarial legal systems.[2] These twin roles can be contradictory. On one hand, the minister of justice must work for the common good in a non-partisan manner. On the other hand, the advocate's role as an adversary to the defendant must be a partisan one. Yet, as explored more fully in the next section, few attempts have been made to understand or address this paradox.

In response, this article develops a dynamic model for understanding, evaluating and improving the exercise of prosecutorial discretion in adversarial systems. It argues that the manner in which the prosecutor exercises her

[1] This term sometimes refers to the elected representative heading the Ministry of Justice (or relevant ministry). That is not how this paper uses the phrase. The meaning of this term is explored further in the next section.

[2] Civiletti (1979), p. 1.

discretion should depend on which role she is playing at any given point. Thus, the prosecutor should operate as a minister of justice, except where she is facilitating the competitive fact-finding exercise on which adversarial trials are based. While she is engaging in competitive fact-finding, she should act as an advocate, with minister of justice considerations continuing to constrain her. The implications of this theory are developed through an analysis of primary data from Indian trial courts.

This article develops scholarship about prosecutors in four ways. First, it proposes a novel framework for how the prosecutor's role as a minister of justice should be balanced with her advocacy obligations in adversarial systems. Second, it connects the discussion about prosecutorial roles to the recent, enhanced inclusion of victims in adversarial criminal justice processes. In contrast with existing literature, this article provides an in-depth examination of how prosecutor-victim engagement fits with the twin roles of the prosecutor. Third, this article develops a normative model of prosecutorial roles that will be valuable for a greater range of adversarial jurisdictions than current academic theories are. Existing scholarship about prosecutors concentrates disproportionately on state-level prosecutors within the US, who are in the

distinctive position of being elected officials.[3] This often — though not always — leads to prosecutorial election campaigns that pander to growing public fears about criminality.[4] These electoral incentives, which skew the prosecutor's role towards advocacy, are absent in most other adversarial jurisdictions.[5] Finally, this paper is methodologically unique, given the dearth of empirical scholarship on prosecutors.[6] Its theoretical analysis draws from primary data collected during fieldwork in Indian trial courts. Thus, this article contributes to filling important scholarly gaps.

Some caveats are in order before I proceed. I recognise that many "adversarial" systems include "inquisitorial" elements and *vice versa*.[7] The validity of my arguments is not tied to legal systems being adversarial in any "pure" sense. I use "adversarial" as a rough categorisation for legal systems whose trials follow the institutional logic of competitive fact-finding outlined in the next section. My arguments therefore draw predominantly upon scholarship from a range of

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[3] Wright (2009), p. 581.

[4] Sklansky (2016), p. 669.

[5] Leonetti (2019), p. 462.

[6] As noted in Sklansky (2018), p. 461. On the invisibility of prosecutors' decisions more generally, see Green & Levine (2016), p. 177.

[7] Wolf (2015), p. 33; Kyprianou (2009), p. 82.

adversarial systems, though space constraints make it difficult to carry out a comprehensive, comparative analysis of prosecutorial agencies in all such jurisdictions. Like other generalised models, the dynamic framework may need to be adapted to accommodate the distinctive features of any particular jurisdiction. The Indian case study in the penultimate section illustrates how the general framework can be fruitfully deployed in specific contexts.

Further, this article is concerned with the role of the public prosecutor in the paradigmatic adversarial criminal process, the trial. It therefore does not engage with non-adversarial responses to offending, such as restorative justice, or with prosecutions by private parties.[8] While the reasoning in this article might apply to prosecutors in specialised services that are established to prosecute specific offences,[9] these are not the focus of this article. Finally, the arguments herein are designed to apply to first instance criminal courts. This is because appellate courts in many jurisdictions, including India, do not conduct retrials.[10]

[8] For instance, under section 302 of the Indian Code of Criminal Procedure 1973, the judge can allow private prosecutions for minor offences. Also see Shapland (2017); Hargovan (2010); Frieberg (2007).

[9] For an overview from the English and Welsh context, see Ashworth (2000) pp. 263-6.

[10] Pillai (2017), p. 307.

These courts therefore do not have to conduct the oppositional fact-finding contest with which this article is concerned.

Following these preliminary clarifications, the next section analyses the key research question in more detail and teases out the tension between the prosecutor's dual roles. The ensuing section develops a dynamic theory of prosecutorial roles with a view to resolving this tension. Thereafter, the strengths and limitations of the proposed theory are assessed by using it to analyse the operation of prosecutors in Indian trial courts.

II. Is the prosecutor an advocate or a minister of justice?

In adversarial systems, many prosecutorial obligations reflect the prosecutor's role as minister of justice.[11] The precise content of the term "minister of justice" is elusive, but broadly, it entails the idea that the prosecutor "represents the sovereign and must make decisions for society at large – not for any individual

[11] For example, see Yaroshefsky (2018), p. 35 (USA); Soubise and Woolley (2018) (Canada and USA); Hamer and Edmond (2019), p. 199 (Australia). Given the breadth of literature informing this article, the jurisdiction that cited research refers to is indicated in round brackets throughout the footnotes where relevant.

client."[12] Accordingly, the prosecutor must not be led solely by the victims' or police's interests, or by a single-minded desire to secure convictions.[13] Rather, she must strive towards processes and outcomes that are for the common good. Some illustrative examples lend weight to the idea that the adversarial prosecutor is not simply a combative adversary to the defendant. In Australia and in England and Wales, "public interest" is one of the grounds on which the prosecutor decides whether the case should proceed to trial.[14] Similarly, under the US Attorneys' Manual, the prosecutor's decision to press charges represents a judgment that "the fundamental interests of society" would be served by doing this.[15] The Indian Supreme Court finds that a prosecutor "is really a minister of

[12] Griffin and Yaroshefsky (2017), p. 304.

[13] Mwalili (1997). I use the word "victim" reluctantly since I recognise that its use can be read as undermining the presumption of innocence. However, any alternative would also have shortcomings. For example, using "alleged victim" would be inaccurate for cases which result in convictions. Further, "victim" is a legally recognised category in many jurisdictions, including India (section 2(wa) of the Code of Criminal Procedure 1973). Finally, regardless of the verdict, the experience of most victims is characterised by the trauma of navigating through an unfamiliar or hostile the criminal justice system (for instance, see Ellison (2007)). They are confirmed victims at least in this sense.

[14] Cps.gov.uk (2018), [3.4]; Cdpp.gov.au (2021), p. 5.

[15] Justice.gov (2018), [9-27.001].

justice…[s]he is not a representative of any party."[16] The Public Prosecution Service of Canada develops prosecutorial obligations framed by the explicit recognition of the prosecutors' quasi-judicial role as "ministers of justice."[17] These examples, which could be multiplied manifold, highlight that prosecutors in adversarial jurisdictions serve the public interest at large, and are not expected to be motivated solely by a desire to secure convictions.

While the term "minister of justice" is sometimes used interchangeably with "officer of the court," these are distinct but overlapping concepts. The latter term includes all lawyers and members of the court's staff who are professionally obligated to serve the court with integrity. "Minister of justice" refers specifically to the prosecutor and describes her distinctive obligations to serve the public interest. Some of these obligations are shared with other officers of the court; others are not. For example, as officers of the court, all lawyers, including defence counsels, are usually obligated not to mislead the trier of fact with fabricated evidence. However, for the prosecutor, this obligation arises not just from being an officer of the court, but also from being a minister of justice. Further, as ministers of justice, prosecutors bear enhanced responsibilities. For instance, prosecutors in most adversarial jurisdictions are required to disclose material

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[16] *Centre for Public Interest Litigation v State* (2012) 3 SCC 117 [27].

[17] Ppsc-sppc.gc.ca (2014), chs. 2.2, 2.3, 2.9.

evidence to the defence counsel. This obligation arguably stems from the prosecutor's minister of justice role.[18] The defence counsel generally does not bear an equally onerous reciprocal obligation to share evidence with the prosecutor.[19]

Along with being ministers of justice, the typical adversarial prosecutor is also responsible for carrying out "vigorous advocacy."[20] This obligation arises from the oppositional nature of adversarial systems. Trials in adversarial jurisdictions are popularly understood as contests between equal and opposite adversaries.[21] A popular, though imperfect metaphor is that of a football match. The judge is the neutral umpire who ensures that the relevant rules are enforced, and the contest is fairly fought.[22] The prosecutor and the defence counsel are the two metaphorical teams. Adversarial logic requires that they compete in

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[18] Plater (2006).

[19] Although, on the increasing scope of defence disclosure obligations in England and Wales, see Johnston (2020).

[20] Civiletti, *supra* note 2, p. 20; Heinze (2021), p. 136.

[21] Bazuaye and Oriakhogba (2016), p. 130.

[22] Heinze & Fyfe (2020), p. 348. In many adversarial jurisdictions, a jury might deliver the verdict. For simplicity, I refer to the determination of guilt by the judge, since this is the situation in the exemplar jurisdiction, India. The strength of my arguments does not turn on whether the verdict is delivered by a judge or by a jury.

opposition to each other, within the rules of the game. According to this logic, it is only when both sides have the opportunity to expose each other's strengths and weaknesses that the judge can arrive at the optimally reliable outcome.[23] Thus, for an adversarial system to work, it is necessary that there be a contest between the prosecutor and defence counsel.

In adversarial theory, the fact-finding exercise will only yield a reliable outcome where the parties pitted against each other are on a level playing field. To this end, adversarial systems have evidentiary, procedural and constitutional rules to mitigate the structural "inequality of arms" between the prosecution and the defence. Whether the defendant's time and resources are outweighed by a particular prosecutor's office varies. Nonetheless, in all cases, the prosecutor has ready access to the state's resources, including the police. [24] The prosecutor also benefits from the social capital associated with being the state's lawyer.[25] She can appeal to judges' "desire to be protected against harm to person or

[23] Uviller (2000), p. 1698.

[24] The exact distribution of powers between the police and the prosecutor varies across time and jurisdiction. For a historical comparison of the Scottish arrangement with the English and Welsh one, see White (2006). For a critique of prosecutor-police arrangements in Somalia, see Girginov (2019).

[25] Green (1999), p. 609.

property...."[26] Further, the judge might be invested in maintaining a smooth working relationship with the prosecutor, particularly where the prosecutor is associated with a particular courtroom rather than a specific case file. This may be offset by the defence counsel also being a repeat player in the courtroom. But on average, the prosecutor is in a more advantageous position than the defence counsel.[27] This imbalance is objectionable in principle since it pits two unequal adversaries against each other. However, it is also objectionable on the consequential basis that it distorts the decision-making process and could lead to miscarriages of justice.[28] Accordingly, adversarial systems are designed to uphold several civil liberties, many of them in the form of constitutional safeguards.[29] For instance, the burden of proof rests on the prosecution; the prosecution must prove its case beyond reasonable doubt; and so on.

Within adversarial systems, there is an inherent tension between the twin roles of the prosecutor, as a minister of justice and as an advocate. On one hand, the minister of justice does not represent partisan interests but works for the

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[26] Civiletti, *supra* note 2, p. 20.

[27] For example, see Hamer and Edmond, *supra* note 11 (Australia); Fairclough (2018), pp. 11-2 (England and Wales); Cole (2012), pp. 69, 71 (Botswana).

[28] Brants and Field (2016) p. 267.

[29] Heiner (2016), p. 601.

common good. On the other hand, the advocate's role must be a partisan one, which is developed in opposition to the defendant. These two demands on the adversarial prosecutor can be inconsistent with each other.[30] Yet, few attempts have been made to understand or address this paradox. Formal guidance tends to re-state these roles, without identifying their potentially contradictory nature. For example, the Indian Supreme Court finds:

> [The prosecutor] is the representative not of an ordinary party to a controversy, but of sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done…He may prosecute with earnest and vigour indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones…(See *Berger v United States* (1934) 295 US 78).[31]

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[30] Sklansky, *supra* note 6, p. 461; Griffin and Yaroshefsky, *supra* note 12, p. 313.

[31] *Sheonandan Paswan v Bihar* [1987] 1 SCC 288 [45]. Similarly, KNC Pillai summarises the contradictory High Court judgments that characterise the prosecutor as an advocate in some cases and as a minister of justice in others: Pillai (2008), p. 630.

Similarly, in *Shaikh*, the Supreme Court admonishes the prosecutor observing that while the latter "is not supposed to be a persecutor, yet the minimum that was required to be done to fairly present the case of the prosecution was not done."[32] In *Sud*, the Indian Supreme Court holds that the prosecutor is "required to prosecute with detachment on the one hand and yet with vigour on the other."[33] These decisions do not acknowledge, much less explore, that the obligations summarised can counter each other.

In some jurisdictions, such as England and Wales, there is delegated legislation to guide the exercise of prosecutorial discretion. The Code for Crown Prosecutors issued by the Director of Public Prosecutions requires that "prosecutors must always act in the interests of justice and not solely for the purpose of obtaining a conviction."[34] This Code seems to emphasise justice over advocacy – an interpretation with some academic support.[35] The House of Lords has also described prosecutors as "independent ministers of justice," although the emphasis on that occasion was on establishing prosecutors' independence

[32] *Zahira Sheikh v Gujarat* (2004) 4 SCC 158 [71].

[33] *KC Sud v SC Gudimani* [1981] CriLJ 1779 [13].

[34] Cps.gov.uk, *supra* note 14, [2.7].

[35] Hoyano (2019), p. 111.

from the executive.[36] Nonetheless, the advocacy role of the prosecutor cannot be discounted entirely, given that the English and Welsh criminal justice system is an adversarial one. The Code also acknowledges this by recognising that prosecutors *can* advocate for a conviction, though this must not be their *sole* purpose. However, like other formal authorities, the Code does not investigate the tension between the twin prosecutorial roles.

In India, guidance on the prosecutor's role is not available consistently across all states. Given that published prosecutorial guidance can inspire public confidence in prosecutors, enhance the consistency and fairness of prosecutorial action and provide a foundation to hold prosecutors to account, it may seem curious that more Indian states do not provide such guidance.[37] However, there are other jurisdictions, such as Cyprus, where prosecutorial guidelines analogous to the Crown Code are not instituted.[38] Within these legal systems, the

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[36] *R v Lyons* [2001] EWCA Crim 2860 [18]. Also see *R v Puddick* 176 ER 662 (1865) [499]: '…counsel for the prosecution in such cases are to regard themselves as ministers of justice, and not to struggle for a conviction…nor be betrayed by feelings of professional rivalry—to regard the question at issue as one of professional superiority, and a contest for skill and preeminence…'.

[37] For an overview of the pros and cons of publishing prosecutorial guidance, see Amirthalingam (2013) (Singapore), pp. 61-66.

[38] Kyprianou (2010) (Cyprus), pp. 37, 149-50.

introduction of prosecutorial guidelines is regarded as an unnecessary and unacceptable interference with prosecutorial discretion, which could interfere with taking specific characteristics of a defendant or case into account.[39] It is possible that a similar rationale explains the absence of detailed prosecutorial guidance in India. Where such guidance is available in India, it either under-emphasises one of the twin roles, or fails to address and resolve the possible contradiction between them. The Himachal Pradesh guidance, for instance, understands the mission of the prosecutor as being to secure high conviction rates.[40] While this document does encourage prosecutors to "[e]nsure proper investigation … and secure compensation to the victim", there is no broader recognition of the prosecutor's role as a minister of justice beyond this.[41] In contrast, the guidelines issued by the state of Odisha cast the prosecutor, in explicit terms, only as a minister of justice.[42] This characterisation overlooks the prosecutor's adversarial role on which the trial is premised, as brought out earlier in this section.

A closer look at the Odisha guidelines reveals that the adversarial role of the prosecutor is recognised impliedly. The guidelines expressly acknowledge

[39] Ibid.

[40] Himachal.nic.in (2016).

[41] Ibid.

[42] Dppodisha.nic.in (no date).

that there can be no fair trial where the prosecutor "acts in a manner as if he was defending the accused" and state that prosecutor should "try to prove all relevant facts necessary for the proving of the case of [p]rosecution."[43] At one end of the adversarial extreme, the guidelines mandate that the prosecutor must oppose the release of seized property where such a release would impede a successful prosecution; and where the allegation relates to non-bailable offences, the prosecutor should oppose the grant of bail "to the best of his ability."[44] However, as with other guidance, while the prosecutors' twin roles are reflected in the Odisha guidelines, these guidelines do not provide a more general account of what should happen where the twin prosecutorial roles pull away from each other.

A similar omission characterises other national and international guidance. For example, the Northern Irish Code for Prosecutors describes the prosecutor's role at trial to be guided by the "interests of justice."[45] However, the same paragraph also requires prosecutors to "prosecute to the full extent of their abilities within the law and rules of evidence and procedure", emphasising advocacy for conviction.[46] What is not acknowledged in this guidance is that

[43] Ibid.

[44] Ibid. 'Non-bailable' cases are those where bail can only be granted by the court.

[45] Ppsni.gov.uk (2023) [5.1].

[46] Ibid.

prosecuting to the fullest extent might be contrary to the public interest. Similarly, the UN Guidelines on the Role of the Prosecutors require the prosecutor to play an "active role" in instituting prosecutions, particularly - though not exclusively - for crimes committed by public officials.[47] Simultaneously, these guidelines recognise the prosecutor's commitment to the public interest.[48] In the same vein, the standards adopted by the International Association of Prosecutors (IAP) indicate that a case should be "firmly but fairly" prosecuted, thereby recognising elements of the prosecutors' dual roles but not their possible contradiction.[49] These guidance documents do delineate clear duties in some specific circumstances where prosecutors might need to prioritise one role over the other, such as by obliging prosecutors to disclose all relevant evidence to the defendant (*i.e.* prioritising justice over advocacy when it comes to disclosure).[50] However, they do not provide a more general understanding of how the prosecutor should resolve possible conflicts between being a minister of justice and an advocate for convictions.

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[47] Ohchr.org (1990) [11], [15].

[48] Ibid [13b].

[49] Iap-association.org (1999) [4.2e].

[50] For example, Ibid [4.3d]; Ppsni.gov.uk, *supra* note 45 [4.54] - [4.59].

The academic literature does not take us much further. Within the scholarship on prosecutorial discretion, there is a heavy focus on prosecutorial decision-making about whether the defendant should be prosecuted and if so, what charge or sentence recommendations the prosecutor should pursue.[51] Extant research also emphasises and analyses prosecutors' decisions to pursue alternatives to the trial such as restorative justice or plea bargaining.[52] In analysing prosecutors' approaches to charging or sentencing the defendant, some scholars are particularly critical of the prosecutor's role in bringing about wrongful convictions or other miscarriages of justice.[53] In addition, apart from scrutinising legal factors, the academic literature assesses the extent to and manner in which discriminatory prosecutorial attitudes, including sexist and racist

[51] For example, Mou (2020), pp. 123-38 (China); Colvin (2019); Douglas (2019) (Australia); Goodman-Delahunty et al (2019) (Australia); Palmer and Missbach (2018), pp. 423, 425 (Indonesia); Cowdery (2013); Shermer and Johnson (2010) (USA); Melilli (1992) (USA); Albonetti (1987) (USA); Langbein (1974) (Germany and USA).

[52] For example, Huang et al (2023) (Taiwan); Mou, *supra* note 55, pp. 139-57 (China); Zhang and Hu (2022) (China); Wu (2020) (China); Mustaffa (2016) (Malaysia); Hamin et al (2019) (Malaysia).

[53] For example, see Johnson (2022) (Japan); Le et al (2022), pp. S64–S65 (Vietnam); Bibi et al (2022), pp. S98, S113 (Pakistan); Tahura (2022), p. 66 (Bangladesh); Roach (2019) (Australia).

ones, influence the exercise of prosecutorial discretion.[54] Finally, existing scholarship evaluates how broader structural factors – such as institutional independence[55], systems of accountability[56], promotion and rewards systems[57] and even broader political conditions[58] – affect the exercise of prosecutorial discretion. Thus, most studies on prosecutorial discretion either focus on specific prosecutorial decisions, or particular influences on the exercise of prosecutorial discretion. Besides the research reviewed later in this section, the academic literature for the most part, does not address the potentially contradictory pulls placed by the dual roles of the adversarial prosecutor.[59] Even where both roles are explicitly recognised in the research, they are seldom acknowledged as being

[54] For example, Kemp and Varona (2023) (Spain); Lynch (2021) (USA); Bowman (2020) (USA); St George and Spohn (2018) (USA); Weenink (2009) (the Netherlands).

[55] Jain et al (2022) (India); Adekunle (2019) (Nigeria); Bakibinga (the Bahamas), pp. 239-40.

[56] For example, Chen (2013) (Singapore); Steele et al (2020), pp. 176-177, 181 (Japan); Johnson and Hirayama (2019) (Japan).

[57] For example, Toole (2019) (Australia), pp. 242-43; Bibas (2009) (USA).

[58] For example, Hsu (2019), pp. 336-41 on how authoritarian containment and democratisation shaped prosecutors' normative commitment to justice in Taiwan. Also see Jasch (2019) (Germany).

[59] Sklansky (1999), p. 531. Ulmer (2018), p. 1131 and Shermer and Johnson (2010), p. 395 highlight the scarcity of literature on prosecutorial discretion more generally.

in tension with one another. For example, with respect to Indian prosecutors, Sharma tasks the prosecutor with securing convictions, while simultaneously proposing that she "need not be overwhelmingly concerned with the outcome of the trial," and that she "is required to present a truthful picture before the court."[60]

Nonetheless, there are notable exceptions who address the central concern of this paper. Some scholars suggest that the tension between the twin roles should be resolved by choosing one over the other. For example, Fish argues that the prosecutor's advocacy role should be done away with, and adversarial trials should be recast in the image of their inquisitorial counterparts.[61] His proposal draws specifically upon inquisitorial jurisdictions, including France and Germany. Similarly, Bellin suggests that a "non-combative prosecutorial mindset…may be the most valuable thing American legal systems can import from continental Europe."[62] Reasoning that casts the prosecutor only as a non-

[60] Sharma (1997).

[61] Fish (2018), p. 1440.

[62] Bellin (2020) ostensibly rejects the 'minister of justice' model to develop a 'servant of the law' theory of prosecutorial behaviour, to constrain the exercise of prosecutorial discretion in line with existing legislative policy. However, on a closer look, Bellin's arguments appear to give a particular, legislatively grounded meaning to the 'do justice' injunction on prosecutors rather than rejecting this injunction wholesale.

adversarial minister of justice also underpins *obiter dicta* from the Delhi High Court.[63] On the other end of the spectrum, Bennet Gershman argues:

> …the prosecutor's role is not that of a justice-giver, but of an advocate… Frequent ceremonial language about the prosecutor's quasi-judicial function is not only misleading, but may be detrimental. It places the prosecutor in an untenable conflict…it invites the judiciary to display a kind of obeisance towards the prosecutor…[64]

Based on the adversarial theory outlined in this section, neither approach is tenable. Dispensing with the prosecutor's advocacy function is undesirable for legal systems that are committed to an adversarial evidential, procedural and constitutional framework, and do not want to overhaul their trials into inquisitorial ones. Perhaps this broader overhaul is desirable. Some scholars have argued that the commitment to adversarial trials is ill-founded and often leads to inaccurate outcomes.[65] Yet, transforming the prosecutor's role without changing other aspects of the criminal justice system is like trying to fit a square peg into a

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[63] *Ajay Kumar v State and others* [1986] CriLJ 932 [16].

[64] Gershman (1988), p. 10.

[65] Zalman and Grunewald (2015).

round hole. At the same time, thinking of the prosecutor only as an advocate could have a high cost in terms of miscarriages of justice, given the usual inequality of arms between the prosecutor and the defendant.

Another approach could be to divide the prosecutor's office into different units or cadres, so that no official is simultaneously expected to be a minister of justice and an advocate.[66] However, this approach appears unwieldy. Imagine a case where the police secure clinching evidence of the defendant's guilt halfway through the trial. The prosecutor suspects, but does not know, that this evidence has been obtained in circumstances that might render it inadmissible. The defence counsel is unaware about the doubtful admissibility. Should the advocate-prosecutor use the evidence since she does not belong to the minister of justice unit? Should she request an adjournment to seek advice from the appropriate unit? The first option could lead to a miscarriage of justice; the second to undesirable delays. Proposals to bifurcate the prosecutor's office would also lead to inefficiency, with a larger pool of prosecutors being drawn into decision-making about the same case. Further, such proposals do not shed light on which of the twin prosecutorial roles should influence prosecutor-victim engagement. We are left to assume that the advocate-prosecutor has no obligations towards

[66] Uviller, *supra* note 23; Barkow (2008).

the victim. This neither accounts for the victim's special interest in the case, nor for the value of the victim's testimony to the advocate-prosecutor's case.

Finally, some scholars argue in favor of a differentiated understanding of the prosecutor's role. Prominent among them is Fred Zacharias, who proposes:

> Once a prosecutor determines the prosecution should proceed, her function is to advocate the defendant's guilt. But when the system breaks down, she at least temporarily must set aside her view that the defendant should be convicted … As a 'minister' of the system, [she must] help restore adversarial balance. (citations omitted)[67]

According to Zacharias, a breakdown requiring the prosecutor to perform a non-adversarial role can happen in several ways, such as where the trial is marked by unequal adversaries, or the tribunal is biased. Zacharias' work focuses on the litigative role of the prosecutor. Against this background, his default presumption is that the prosecutor should serve as an advocate, unless there is special reason not to do so. In many ways, this is the inverse of the model proposed in this paper. This is because this article is concerned not just with the litigative role of the

[67] Zacharias (1991), p. 64.

prosecutor, but with the advocacy-justice dilemma facing her more generally, including in her interaction with the victim. Nonetheless Zacharias' analysis is one of the clearest articulations of how prosecutorial functions relate to the adversarial nature of trials. It provides a rich foundation for the framework developed in the next two sections.

III. A dynamic account of the prosecutor's role

I argue that a prosecutor's role is best conceived as a dynamic one. Thus, the tension between the prosecutor's twin roles should be resolved depending on what power the prosecutor is exercising at any given time, in line with the following principles. These principles are sketched out below but exemplified and developed in the next section.

1. **In general, the prosecutor should operate as a minister of justice.** This obligation derives from the public nature of the prosecutor's office, as well as the conceptualisation of criminal offending as a form of public wrongdoing.[68] The exercise of this minister of justice role also contributes to maintaining an equality of arms between the state and the defendant – for example, through

[68] On the public nature of the prosecutor's role, see *Vidyarthi v UP* (1991) 1 SCC 212 [14]; Boolell (2013), p. 14. On the "public element" of crime see Ashworth (1986), pp. 89-92.

the sort of disclosure obligations discussed in the previous section. In this way the prosecutor's operation as a minister of justice is a pre-requisite for legitimate and reliable adversarial trials. Consequently, it is public interest that should be the default concern of the prosecutor.

2. **When the prosecutor is facilitating the competitive fact-finding exercise on which adversarial systems are based, she should operate as an advocate.** Typically, this extends to situations in which the prosecutor is providing her opening or closing arguments, or is engaging in the chief examination, cross-examination or re-examination of a witness. Without this principle being implemented, the foundational logic of adversarial criminal justice systems would collapse**. Nonetheless, while engaging in advocacy, the minister of justice role should continue to constrain the prosecutor. Such constraints should apply where they are necessary to ensure the conduct of legitimate and reliable adversarial proceedings.** For example, prosecutorial intervention is warranted where the judge proceeds to record a key witness' testimony in the absence of the defendant's lawyer even if the absence of this intervention would maximise the chances of conviction.[69] Proceeding in the defence counsel's absence would pit unequal adversaries

[69] A similar illustration is analysed in the next section.

against each other. Under adversarial logic, such unequal processes would fail to yield an optimally reliable outcome. Thus, the minister of justice prosecutor should intervene to restore the adversarial balance in this scenario.

3. **In her advocacy role, the prosecutor should advocate for the conviction of the defendant.** The prosecutor does not have a client in the same way that the defence counsel has a client.[70] The prosecutor does not neatly represent the victim, the state or the community – though all those persons or entities are relevant to her role. This does not mean that the prosecutor can never be an advocate. In her advocacy role, the prosecutor should be understood as an antagonist to the defendant. Adversarial logic dictates that she must create a case in favour of conviction, which can then be challenged by the defence counsel.

    Three criticisms may be directed against this claim. First, it could be argued that characterising the prosecutor as a party in a binary oppositional contest is misleading, since the prosecutor may make arguments, in the alternative, to convict the defendant for a lesser offence. In such cases, the choice for the judge is not binary. She can decide that the defendant is convicted of offence A, convicted of offence B, or acquitted. Put another way,

[70] Joe (2018), p. 888 (though the author concludes that “the community” is the prosecutor’s client).

if the trial is a football match, the dynamic framework overlooks that the prosecutor might win or lose by different scores. However, even if the prosecutor includes lesser alternative charges, she can still be understood as an antagonist to the defendant. This is because in relation to each charge, the prosecutor would be advocating to convict the defendant.

Second, it may be argued that having the prosecutor necessarily advocate for a conviction can be contrary to the victim's interests. Victims are "protagonists" of the incident being prosecuted in the trial.[71] They may not want the defendant to be convicted.[72] Third, it could be argued that the proposed understanding of advocacy could breed overly punitive systems, which would be an overall disbenefit. In particular, such punitiveness could adversely affect oppressed groups that are already disproportionately targeted by the criminal justice system.[73] These criticisms raise important concerns, but they mischaracterise what is meant by advocacy in this paper. These concerns relate to the prosecutor's decision or arguments about whether a prosecution should be pursued. Under the proposed model, making these decisions or

[71] Doak (2005), p. 298.

[72] Ellison (2002), p. 838.

[73] For example, Mrinal Satish writes about the disproportionate impact of the Indian criminal justice system on those from oppressed tribes, castes and classes: Satish (2011).

arguments does not implicate the advocacy function of the prosecutor. It is not a part of the competitive fact-finding exercise on which adversarial trials are based. In determining whether the prosecution should proceed, the prosecutor is required to act solely as a minister of justice under the dynamic model. The victim's unwillingness to support the prosecution, or the impact of the prosecution on a marginalised defendant, are factors the prosecutor should consider as a minister of justice.

4. **Prosecutor-victim relations should be governed by the prosecutor's role as minister of justice**. The victim is not the prosecutor's client. However, the prosecutor acting as a minister of justice must still engage with the victim during legal proceedings. This is because, at a basic level, the victim is a member of the community that the prosecutor is obliged to serve as a public official.[74] If the crime was committed, the victim is also someone whose interests have been especially damaged on account of public wrongdoing.[75]

As an incidental benefit of this approach, the advocate-prosecutor will be well-served by ensuring the victim feels invested in the prosecution, since it may be difficult to secure a conviction without the victim's co-operation.[76]

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[74] Gershman (2005), p. 563.

[75] Wemmers (2009), p. 410.

[76] Iliadis and Flynn (2018), p. 557; Gershman, *supra* note 80, p. 560.

This is especially true where there is little corroborating evidence and the victim's testimony is the chief prosecution evidence as often happens, for instance, in rape cases.[77]

5. **In sentencing proceedings, the prosecutor should act as a minister of justice** and not as a partisan advocate. This is because sentencing proceedings do not lend themselves neatly to an oppositional format. During the trial, it is sensible to have two opposing sides because each can argue for one of two possible outcomes, guilty or not guilty. According to adversarial logic, this would yield an optimally reliable outcome. It would strain this logic to extend it to sentencing because arguments relating to the sentence are not binary. The sentence can fall at any point within a range. In theory, it is possible to conceive of scenarios where the neutral judge is left to decide whether the prosecutor's account of aggravating factors is more persuasive than the defence counsel's arguments around mitigating circumstances. But the question for the sentencing judge is not simply whether the sentence should be "high" or "low." Sentencing is done along a spectrum, based on several capacious considerations including retribution, rehabilitation, and deterrence.[78] Hence, it is undesirable to conduct sentencing proceedings as

[77] Buller (2017), p. 3.

[78] Resnik (2019), p. 367; Lave (2016), p. 228.

> adversarial contests with the prosecutor playing a partisan role. The prosecutor's participation during sentencing proceedings should therefore be grounded in her role as a minister of justice, whether or not she is empowered to recommend a particular sentence.[79]

Having sketched out this dynamic account of the prosecutor's role, the next section will develop it based on fieldwork conducted in Indian trial courts. This empirical account will add detail and granularity to the theoretical model developed through this paper so far.

IV. Prosecutors in Delhi trial courts

This section draws from fieldwork conducted in trial courts in Delhi to exemplify and justify the dynamic theory of prosecutorial roles. It introduces the methodological and legal framework underpinning the empirical research, before engaging with the substantive findings and arguments.

The fieldwork was conducted from April to October 2016. Ethical approval to do so was obtained from the (redacted). The fieldwork was conducted as part

[79] I recognise that in many jurisdictions, including England and Wales, the prosecutor may not be allowed to recommend a sentence: Rogers (2006), p. 781.

of a research project to evaluate factors associated with adjudication in rape cases. It entailed observation of proceedings in special fast-track courts that have been established to prosecute prominent sexual offences.[80] With the relevant judge's permission, one such court was observed in each of Delhi's six trial court complexes, for a period ranging from seven to ten days. Typically, brief simultaneous notes were made during the proceedings, with fuller descriptions being typed out over the following few days.

Primary data were also collected through interviews with the following participants:

[80] Here, "fast-track courts" refers to dedicated courts established by the Delhi High Court, upon the Delhi government's recommendation, to prosecute defendants accused of specified sexual offences (DNAIndia.com (2012)).

Category of interviewees	Number of people interviewed
Lawyers (excluding prosecutors and those from the Delhi Commission for Women (DCW))[81]	18
Prosecutors	8
DCW lawyers	5
Judges	9
Victims	6
Members of the victim's family[82]	2
Members of non-governmental organisations and women's collectives	13
Total	61

[81] The Delhi Commission for Women is a statutory body established under the Delhi Commission for Women Act 1994 to promote women's development.

[82] This was done for disabled or child victims since I did not have ethical clearance to speak to them directly.

Usually, semi-structured qualitative interviews were carried out in Hindi or English, though ten interviewees participated using written questionnaires. On average, oral interviews were thirty-nine minutes long.

Interviewees were recruited through a range of methods. For example, some victims or members of victims' families were approached in court. Others were contacted through lawyers, police officers or victim-support organisations. Similarly, some prosecutors were approached directly in court; the remainder were introduced to me by judges, defence counsels or by other prosecutors. Lawyers apart from prosecutors were recruited through personal or professional networks, "snowballing," victim-support organisations, the Delhi Legal Services Authority (DLSA) and, where they were well-known for providing representation in rape cases, through cold-calling.[83] Judges were interviewed through questionnaires administered by the Delhi High Court on my behalf. Victim-support organisations were located through targeted internet searches and contacted directly through phone calls or emails.

[83] Snowballing is the process by which one research participant suggests other potential interviewees. The DLSA is a statutory body constituted under the Legal Services Authorities Act 1987, which provides free legal representation to disadvantaged parties. DLSA lawyers may represent either rape victims or defendants.

All interviews were transcribed and, where relevant, translated by me. Collectively, the court observation and interviews generated a voluminous record, which was read over multiple times to identify relevant themes. The arguments developed in this article are based on that thematic analysis. More details of the research process are available elsewhere.[84]

Having introduced the research methods, a summary of the procedural framework for rape prosecutions in Delhi will help understand the following empirical examination. Most commonly, proceedings are initiated when information about the offence is reported to the police under section 154 of the Code of Criminal Procedure 1973 (CrPC). Thereafter, the police investigate the allegations and prepare a report ("chargesheet"), in which they record their determination of whether the evidence discloses the commission of an offence.[85] The report is submitted to the magistrate, who takes "cognisance" (judicial notice) of the offending where appropriate.[86] The case is then "committed" (transferred) to a sessions court where a judge decides which charges it is appropriate to

[84] (redacted)

[85] CrPC, s 173.

[86] CrPC, s 190.

"frame" (lay), if any (sections 209 and 228, CrPC).[87] The prosecution is based on these charges.

The prosecutor does not decide whether charges should be framed, but she is still entitled to withdraw the prosecution with the judge's permission.[88] The Supreme Court has explicitly connected this power of withdrawal to the prosecutor's role as a "minister of justice," ruling that proceedings can be withdrawn to ensure "public justice, public order and peace."[89] The interests of public justice may transcend "the legal justice of the particular litigation."[90] For example, the prosecutor may withdraw proceedings if pursuing them would reignite settled labour disputes. Further, the nature and gravity of the alleged offence is relevant to assessing whether the prosecutor should withdraw proceedings.[91] However, the prosecutor's decision to withdraw must be made

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[87] CrPC, ss 209, 228. Sessions courts are local courts that fall directly under the High Court and are typically used for trials involving serious offences (CrPC, ss 9, 26 read with the First Schedule).

[88] CrPC, s 321.

[89] *WB and others v Dipak Mishra* 2021 (2) RCR (Criminal) 575 [14]-[15].

[90] *Singh v Bihar* (1977) 4 SCC 448 [2].

[91] *Kerala v Ajith and others* AIR 2021 SC 3954 [23]; *Wahab K v Kerala* (2019) CriLJ 415 [13].

impartially and independent of governmental control.[92] The prosecutor must also inform the court of the reasons underlying the withdrawal.[93] While the withdrawal is subject to judicial permission, this permission can only be denied if the prosecutor has acted improperly, in bad faith or with ulterior motives; where she has attempted to interfere with the normal course of justice for illegitimate reasons; or where the grant of judicial permission would result in manifest injustice.[94] Thus, in theory, the prosecutor's power of withdrawal is an expansive one. In practice, it is frugally exercised *inter alia* because of the managerialism characterising the prosecution service. The prosecutorial reluctance to exercise the power of withdrawal is analysed more fully later in this section.

While decision-making powers in the criminal process rest mainly with judicial officers, the prosecutor nonetheless presents arguments relating to all key decisions including which charge should be framed, whether the defendant should be granted bail and what sentence should be imposed on a convicted defendant. For our purposes, it will be useful to investigate which of the twin

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[92] *Afjal Ali Sha v WB and others* [2023] 2 SCR 1090 [33]; *Muralidhar v AP* (2014) 10 SCC 380 [18].

[93] *WB and others v Dipak Mishra, supra* note 95, [15].

[94] *Kerala v Ajith and others*, *supra* note 97, [23]; *Bihar v Pandey* 1957 CriLJ 567 [5].

prosecutorial roles underpins the exercise of prosecutorial discretion in such situations.

Further, in rape cases, the prosecutor is mandatorily assisted by a lawyer from the DCW,[95] and may be further assisted by a private counsel hired by the victim or accessed by the victim through legal aid schemes.[96] Nonetheless, the focus of this section remains on the public prosecutor, who leads the prosecution and decides the litigation strategy in every case.[97]

There is no instrument analogous to England and Wales' Code of Crown Prosecutors or the US Department of Justice Manual applicable in India to provide guidance to prosecutors on how they should exercise their powers; nor is such guidance available through statutes. Appellate court rulings provide some indication of the principles that should guide the discharge of prosecutorial duties. As per these rulings, prosecutors must be guided by the need to convict the guilty,

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[95] Delhi.gov.in. This system was introduced following judicial directions in various appellate court judgments including *Delhi Domestic Working Women's Forum v Union Of India* (1995) SCC (1) 14 [15]; *Delhi Commission for Women v Delhi Police* (2009) SCC OnLine Del 1057 [1]. However, not all states in India provide victim support through the equivalent of a DCW advocate.

[96] CrPC, s 24(8).

[97] CrPC, ss 225, 301(2) read with *Murarka v WB* (2020) 2 SCC 474 [12].

acquit the innocent, maintain law and order, and uphold the rule of law.[98] They must ensure fairness in the proceedings so that "justice prevails."[99] Thus,

> If an Accused is entitled to any legitimate benefit during trial the Public Prosecutor should not scuttle/conceal it…[She must] winch it to the fore and make it available to the Accused. Even if the defence counsel overlooked it, the Public Prosecutor has the added responsibility to bring it to the notice of the court...[100]

Accordingly, prosecutors must eschew "excessive zeal" to convict suspects, even where the police seek a conviction.[101] These rulings emphasise important values, such as fairness and institutional independence. The importance of these values is echoed in High Court rulings, which create the expectation that prosecutors

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[98] *UP v Mal* (2004) 4 SCC 714 [74].

[99] *Shinde v Maharashtra* (2019) 15 SCC 470 [10.1].

[100] *Kumar v Chand* (1999) 7 SCC 467 [14]. Similarly, on the prosecutor's obligation to disclose evidence to the defendant and to ensure the latter's right to a fair trial, see *Manoj and others v MP* (2023) 2 SCC 353 [171] – [179]; *Ponnusamy v TN* 2023 (122) AC C 923 [11] – [18].

[101] *Kundu v Haryana* (1989) CriLJ 1309 [9].

remain independent and non-partisan actors.[102] For instance, where the prosecutor argues that the death penalty should be imposed on the defendant, the prosecutor must adduce evidence relating to both mitigating and aggravating sentencing factors before the court.[103] In such cases, the state must provide a psychiatric and psychological evaluation report focussed on the defendant as well as other relevant information relating, for example, to the defendant's socio-economic background and criminal antecedents, or lack thereof.[104]

Nonetheless, extant rulings do not explore the prosecutors' role in adequate detail. For example, at what point does the advocate-prosecutor's "zeal" to convict suspects become "excessive"? Does the prosecutor's obligation to act with "fairness" include a minister of justice duty to the victim? How should the prosecutor navigate between her potentially contradictory obligations? The following empirical analysis will delve deeper into these abstract concepts, deploying original primary data to exemplify and justify the proposed dynamic model. Since the fieldwork did not cover sentencing processes, the discussion will concentrate on the first four principles of the model developed in the previous

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[102] For examples from the Delhi High Court, see *Jha v State* 2023/DHC /4524 [31]; *Saleem v Delhi* 2023/DHC /002622 [28].

[103] *Chaudhary v Delhi* 2023 (124) ACC 258 [18] – [22].

[104] *Manoj and others v MP*, *supra* note 106, [213] – [217].

section. To recap, the dynamic account of the prosecutor's role is summarised again:

Summary of the Dynamic Account of the Prosecutor's Role

1. In general, the prosecutor should operate as a minister of justice.
2. When the prosecutor is facilitating the competitive fact-finding exercise on which adversarial systems are based, she should operate as an advocate. Nonetheless, while engaging in advocacy, the minister of justice role should continue to constrain the prosecutor. Such constraints should apply where they are necessary to ensure the conduct of legitimate and reliable adversarial proceedings
3. In her advocacy role, the prosecutor should advocate for the conviction of the defendant.
4. Prosecutor-victim relations should be governed by the prosecutor's role as minister of justice.
5. In sentencing proceedings, the prosecutor should act as a minister of justice.

During the fieldwork, the necessity of clear guidance on how prosecutors should navigate between their twin roles manifested in interviews with prosecutors. The

following vignette captures the confusion experienced by one prosecutor who fluctuated abruptly between casting himself as a minister of justice and as an advocate. It reflects the need for more scholars and practitioners to explore this paper's central theme.

Vignette 1: Ambiguity in Prosecutors' Roles

When asked about conviction rates in rape cases, one prosecutor raised the issue of false complaints. As an example, he discussed a case where the victim was found "roaming" with the defendant ten minutes after the alleged incident. He said that in such cases he would direct the judge's attention away from the victim's conduct and focus on the defendant's actions. However, he pointed out that if fairness is important, then surely the victim's behaviour was equally relevant. It was suggested that since he was the prosecutor and not the defence counsel, it was reasonable for him to focus on the defendant's culpability. The prosecutor took strong exception to this saying that he was not the victim's representative, but an officer of the court obliged to function in an impartial, fair manner.

On another occasion, the same prosecutor emphasised the difference between himself and a defence counsel. He explained that the defence counsel only had to care about his client. However, as a prosecutor, he had to consider

his duty to the court, to the defendant and to the public more generally. He was then asked whether, in public interest, he should argue for the defendant to be discharged where the allegation was not borne out by the evidence. He replied in the affirmative and was invited to provide an example where he had done this. He described an allegation of intoxicated gang-rape where the victim was inconsistent about the location of the incident and her phone records established her as having made several calls during the alleged incident. Further, one defendant's alibi was backed by closed-circuit television footage and statements from eyewitnesses. The forensic report indicated the presence of semen stains, but these did not match with the defendants. However, when questioned further, the prosecutor acknowledged that while the court had not framed charges, he had still pushed for them to do so. On being asked why, he stated that this was his duty as a prosecutor.

The prosecutor in this account was conscious of the simultaneous demands on him as a minister of justice and as an advocate. Yet, while his rhetoric cast him solely as a minister of justice, his practical approach appeared to be motivated by considerations of advocacy alone. He resisted this explanation for his actions but was unable to provide examples to the contrary. This vignette demonstrates how a policy failure to address the potential conflict between prosecutorial roles

can result in arbitrary prosecutorial decision-making, with prosecutors unjustifiably choosing one role over the other in practical terms – whether by design or oversight.

Adopting the proposed model would enable the prosecutor in the preceding vignette to prioritise distinct aspects of his role at different times. The prosecutor would recognise that as a minister of justice, he was bound to disclose relevant evidence to the defence counsel, including evidence of the victim socialising with the defendant shortly after the incident in the first case. However, having done this, it was his duty as an advocate-prosecutor to focus on the defendant's culpability during the trial. There was no need for him to be confused, ashamed or defensive while doing so. Similarly, in the second case, he would recognise that in proceedings relating to the charge, he was not obliged to argue for charges to be framed simply because he was a prosecutor. Since these arguments were not related to oppositional fact-finding at trial, he would ground them in his role as a minister of justice. Thus, he would prioritise the public interest at this stage and consider the risk of wrongful conviction before arguing for charges to be framed. However, without a clear framework for determining which role to prioritise, the prosecutor seemed unable to provide principled justifications for his actions. This article argues that the appropriate framework to guide prosecutors facing similar dilemmas is the proposed dynamic model.

The remainder of this section discusses each principle of this model in turn. It uses the principle to critique the observed operation of prosecutors and draws out why adopting the dynamic framework would lead to better prosecutorial decision-making.

The first principle is that in general, the prosecutor should operate as a minister of justice. Adopting this principle would be useful for the prosecutor while arguing about preliminary or ancillary matters, such as charge or bail. The following vignette presents a case where the prosecutor based arguments relating to charge on the threat of negative publicity. The better alternative would have been for her to act as a minister of justice and base them in the public interest, as required under the proposed model.

Vignette 2: The Prosecutor as a Minister of Justice in Proceedings Relating to Charge

In one observed case, the victim alleged that she had been blackmailed into a prolonged sexual relationship with the defendant, who threatened to defame her if she disclosed the offending to anyone. Halfway through the victim's examination, proceedings were adjourned because the victim started crying and became too distressed to continue. After the victim left, the judge asked the prosecutor why she was wasting time and resources by prosecuting this case

when the defendant should have been discharged. The prosecutor laughed, saying that the claim of defamation made it an unfit case for discharge. She added that while a discharge order might have been appropriate, she was wary of negative publicity. According to her, if the judge ordered a discharge, he should be prepared for candle-lit vigils and protests against the order. The judge pointed out that discharging the defendant at an early stage could improve conviction statistics. The prosecutor placated the judge by assuring him that a conviction in another pending case was likely.

A few months later, while interviewing a different prosecutor, it emerged that he was in the process of assessing several discharge orders from the court where the above exchange had taken place. He could not understand why these orders were passed because he understood the relevant prosecutor to be a good one.

As this vignette illustrates, it was rare for a prosecutor to argue that the defendant should be discharged in a rape case, no matter how weak the prosecution evidence. This happened in only one observed case during the entire period of fieldwork. Prosecutors cited a fear of adverse publicity as a major reason for their pro-advocacy stance in proceedings related to the charge, especially given that Delhi has received intensely negative press coverage on the issue of violence

against women.[105] This adverse reporting has resulted in heightened scrutiny by the Directorate of Prosecution and could lead to internal inquiries of the type described above. One prosecutor interviewed for this study suggested that this scrutiny was a direct result of managerialism in the prosecution service.[106] Another prosecutor talked about a high volume of paperwork having to be filed where defendants were discharged in rape cases. Against the background of additional paperwork and departmental inquiries, she deemed it more efficient to argue for charges to be framed in all rape cases – especially since prosecutors tend to be overworked in general. Concerns about over-work and substandard employment conditions were echoed by several other prosecutors and have also been articulated in academic literature.[107]

Nonetheless, prosecutors should not approach the framing of charges under the influence of irrelevant considerations, such as press coverage. Further, whether it stems from managerialism, or from fears of negative publicity, or for any another reason, an automatic pro-advocacy stance in relation to charges

[105] Roychowdhury (2013), p. 282.

[106] For a critique of managerialism in the English and Welsh criminal justice system, see Porter (2019); Loveday (1999).

[107] Sharma (2017), p. 96; Bhandari (2016), p. 94.

could lead to innocent people being prosecuted or convicted.[108] Following a mechanical, pro-advocacy approach to charging can also interfere with the prosecutor's advocacy during the trial, when she is expected to argue for the conviction of defendants whom she is convinced are innocent – as analysed later in this section. For all these reasons, a pro-advocacy stance in relation to the framing of charges is undesirable. Adopting the proposed dynamic framework would ensure that the prosecutor operates as a minister of justice while arguing about the charge, rejecting an automatic pro-advocacy orientation. Thus, it is public interest that would determine the prosecutor's arguments about charge. In some cases, this would entail arguing for the defendant to be charged; in other cases, it would entail recognising that some or all charges would be inappropriate.

The desirability of giving prosecutors the leeway to frame arguments relating to the charge in the public interest could be countered by references to their corruption, as well as the stereotypical attitudes espoused by many prosecutors in relation to rape victims, or to marginalised groups more

[108] Green (2019), p. 602.

generally.[109] The primary data lends weight to these counterarguments, as also illustrated in the discussion on prosecutors' discriminatory attitudes towards the end of this section. To give a particularly jarring example, one prosecutor said that he could not understand how it was physically possible to have sex with a woman against her wishes. According to him, two people would need to hold her down while a third one committed the act. On this basis, he concluded that rape complaints were mainly filed for money because of the availability of generous compensation to victims of this crime.

Nonetheless, I argue that despite evidence of discrimination or corruption, prosecutors should reject an automatic pro-advocacy approach to charging. In part, this is because prosecutors are statutorily limited to making arguments about charges. Only the judge can decide which charges should be framed. These statutory limits placed on the prosecutor's role should alleviate some concerns about dishonest or biased conduct. Further, apprehensions about such misconduct are not particular to the framing of charges. They are relevant to the discharge of prosecutorial duties more generally. The appropriate remedy would

[109] Bhandari describes prosecutors in India as being "susceptible to political interference": Bhandari, *supra* note 113, p. 95. Similarly, on discriminatory prosecutorial attitudes in the USA, see Wu (2016); Davis (2013).

be to create robust systems of accountability to tackle any *mala fide* prosecutorial action, at any stage.

Having discussed the prosecutor's default role as a minister of justice, I will now discuss the second and third principles. Under these principles, during competitive fact-finding at trial, the prosecutor should operate as a partisan advocate for the defendant's conviction. The following vignettes describe prosecutors who inadequately discharged their duty of advocacy during the trial. They justified this approach by suggesting that the cases in question were unfit for trial. This approach seems to reflect public interest concerns, drawing from the prosecutor's role as a minister of justice. However, under the dynamic model, prosecutors would focus on advocacy during competitive fact-finding. Where the case for conviction is weak, there are alternative courses of action the prosecutor can explore in her capacity as a minister of justice, as discussed below. A dilution of the prosecutor's advocacy obligations during adversarial fact-finding is an inappropriate response to weak cases.

Vignette 3: Advocacy during Competitive Fact-finding

Where the defendant deceives the victim into a sexual relationship based on a dishonest promise of marriage, he can be prosecuted for rape.[110] These cases are popularly termed “promise to marry cases.” One prosecutor suggested that most such cases involve false allegations. For support, he highlighted that many such allegations are preceded by a prolonged romantic relationship between the victim and defendant. According to him, this made it unrealistic that the victim was deceived. When asked what the defence evidence in such cases was, he said that there were usually extensive phone records or messages that indicated a loving relationship between the victim and defendant. To reinforce his point, he hypothesised about a situation where he had consensual sex with the interviewer, followed by a lengthy romantic relationship. In this case, it could not be alleged that he had committed rape based on a fraudulent promise of marriage. It would be relevant that it was the interviewer who had approached him for research, rather than him soliciting her company. When asked how he countered defence evidence during the trial he shrugged and said that if there was consent, then there was consent. He did not press for a conviction in those cases.

[110] For an analysis of the scope and enforcement of these laws, see Garg (2019).

This prosecutor deliberately refrained from engaging in advocacy in promise to marry cases, since he understood these allegations to be generally false. However, his determination of falsity was based on unpersuasive evidence. For example, the existence of a loving relationship between the victim and defendant is compatible with an allegation of rape based on a fraudulent promise of marriage. Such promises are likely more convincing when made by someone who professes to love the victim. Similarly, the circumstances in which the victim and defendant first met are unlikely to be related to whether the defendant later raped her. In fact, during the fieldwork, prosecutorial disbelief in the victim's credibility often appeared to be prompted by prejudicial attitudes towards women who reject conventional sexual norms, such as by having premarital sex.

Under the dynamic model, even if the prosecutor in the above vignette was unconvinced about proceeding against a particular defendant, half-hearted advocacy during the competitive fact-finding phase would not be an option. Instead, the prosecutor would have alternatives available to him outside the fact-finding process. For example, he could argue in favour of the defendant's discharge, or seek judicial permission to withdraw the prosecution. Even so, in making these arguments he would have to be guided by the public interest and not by the sort of fallacious reasoning on display in the vignette. If the case were to proceed to the competitive fact-finding phase – for example, if the judge

decided to frame rape charges or deny permission for a withdrawal order – the advocate-prosecutor would then be obliged to put forward the strongest possible case for conviction. In adversarial logic, as reflected in the second and third principles of the dynamic model, it is a contest between the prosecutor and defence counsel that would allow the judge to arrive at an optimally reliable outcome. This contest is impossible without the prosecutor's advocacy during the fact-finding phase. It follows that such advocacy is obligatory even where the prosecutor lacks a personal belief in the defendant's guilt, which is not explicable on relevant evidence. This is especially important given the stereotypical attitudes that often shape prosecutors' beliefs.

Further, there is ongoing debate about whether rape laws should include promise to marry cases.[111] Many prosecutors criticised existing laws for being over-inclusive and this made them unwilling to advocate for a conviction in promise to marry cases. Nevertheless, legally, the defendant's conduct in such cases is classifiable as rape. The prosecutor might subjectively regard the law as unjust, but by itself, this is an unacceptable reason to abandon her advocacy obligations under the dynamic model. [112]

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[111] Ibid.

[112] Young and Sanders (2004), pp. 200–5.

Like the last vignette, the following vignette describes a prosecutor who refused to advocate for the conviction of a defendant she believed to be innocent. Once again, this rejection of advocacy seemed to be grounded in her role of as a minister of justice. However, under the dynamic model, the prosecutor would prioritise advocacy in her litigative role. Rather, the weakness of the evidence, or undesirability of the prosecution would inform other aspects of her prosecutorial role such as those relating to the framing of charges, as brought out in the discussion below.

Vignette 4: Advocacy during Competitive Fact-finding

In one observed trial, the victim alleged that she was forcibly raped, whereas the defence claimed that she was married to the accused.[113] The prosecutor and investigating officer discussed the case on their way to the former's office. The investigating officer said that the victim was a suspicious character who drank liquor and engaged in *jagrans*.[114] She further stated that the victim had been married six times by the time the trial began and that one of the former husbands was too scared to testify because of the victim's links with violent gangs. The

[113] Conduct within marriage cannot be prosecuted as rape (Indian Penal Code 1860, s 375).

[114] Night long rituals of Hindu worship.

police officer admitted that they had stopped investigating once they discovered too much exculpatory evidence. For instance, they had left a rent agreement out of the case file because it identified the leaseholder as the victim's former husband. She said they had only registered the case because the victim was well-connected and had created a scene at the police station. The prosecutor commented that she was amazed by how many lies one person could tell. The prosecutor seemed to accept the veracity of the investigating officer's claims at face value. She did not, in the researcher's presence, challenge the investigating officer or request that all the relevant evidence be included in the formal record.

Later, in informal conversations with the judge and other lawyers, she used this victim as an example of rape victims who are not credible. In one such conversation in her office, another prosecutor asked her what arguments she would present in this case. The prosecutor said that she would let the victim's counsel present closing arguments in her stead. The prosecutor was asked to confirm that this was her intended strategy. She repeated that she would not present arguments in the case.[115]

[115] Though notably, it is not legal for the victim's counsel to conduct the prosecution in this way (*Baruwa v Orissa* (2013) 16 SCC 173). Also see Uviller (1973), p. 1155: "the prosecutor should seek to learn the stories of as many witnesses as he can find."

The prosecutor appeared to have concluded that the accusation was false based on an informal conversation with the investigating officer and was willing to forego advocacy on that basis. As with the previous vignette, the prosecutor's impulse against advocacy was motivated by her subjective beliefs about the prosecution being unjust, and not by relevant evidence that formed part of the record. This would be unacceptable under the dynamic model. The proposed model would require that the prosecutor act as a minister of justice in discharging all her functions, except her engagement in competitive fact-finding at trial. Thus, as a minister of justice, the prosecutor would bring the exculpatory evidence to the attention of the court and the defence counsel. Given the belated stage at which she found out about the evidence, she would also consider whether it was appropriate to withdraw the prosecution.[116] Having taken these steps, if the trial continued, she would proceed to set up the best possible case for the defendant's conviction. Instead, the prosecutor chose to protract the proceedings while deliberately under-performing in her role as an advocate. This was regarded by her as a justifiable moral compromise. However, this undermined the adversarial premise of the trial while also taking up scarce resources in an over-burdened system.

[116] In addition, if she found out about the evidence pre-trial, she would consider its relevance to arguments on the charge.

The second principle of the dynamic model also requires that the prosecutor's advocacy be constrained by minister of justice considerations. Where the foundational presumptions of adversarial criminal procedures are undermined, the prosecutor must intervene in line with her role as a minister of justice. In the field, these presumptions were undermined where multiple witnesses were simultaneously examined, compromising the ability of the judge, prosecutor and defence counsel to discharge their duties effectively. This happened frequently given the resource constraints under which most trial courts operate.[117] In other instances, witnesses – ranging from the defendant's landlady to the victim herself – were examined or cross-examined in the defence counsel's absence. On such occasions, in the absence of an appropriate judicial response, the dynamic model would require the prosecutor to intervene and object. This is because even though a deviation from adversarial procedures could afford the prosecutor a competitive advantage, her advocacy should be constrained by minister of justice considerations. This is of course impossible where the prosecutor is absent herself. For example, one victim's chief examination commenced with no prosecutor, defendant and defence counsel in court – only

[117] For an overview of the pendency and backlog in Indian courts, see Ghosh (2018), p. 23.

the DCW advocate was present.[118] Even so, in other cases, it was possible for the prosecutor to intervene and object, and the dynamic model would require her to do so.

Finally, under the fourth principle of the dynamic model, prosecutor-victim relations should be governed by the prosecutor's role as minister of justice. Currently, the prosecutor's approach towards the victim appears underpinned by neither of the twin functions. Prosecutors generally do not engage with the victim, except during her testimony. This attitude can alienate victims from legal proceedings.[119] It can exacerbate the trauma they experience first, from having suffered a crime and second, from having to navigate an unfamiliar and unsupportive legal system.[120] Getting appropriate information and updates about the case can minimise this trauma and increase victim satisfaction in the criminal justice system.[121] Conversely, victims' disengagement from the proceedings can

[118] Similarly, Mayur Suresh recounts attending a trial for terrorist offences with the defendant attending the proceedings virtually, or not at all: Suresh (2019), p. 84.

[119] For a similar pattern in domestic violence cases, see Cammiss (2006), 707.

[120] Van Camp (2017), pp. 681-3.

[121] Victimsupport.org.uk (2017).

culminate in their refusal to support the prosecution, even where the crime was committed.

Members of civil society who support rape victims were often critical of prosecutors' attitudes towards victims. One support-person – though mischaracterising the victim as the prosecutor's client – said:

> The kind of sensitive behaviour and professionalism that should characterise the public prosecutor's approach to their client, the comfort that the victim should have with her lawyer…these are missing. Prosecutors are so hierarchical…They think that the victim is nothing compared with how important they are...

One lawyer, who frequently appears as a victim's counsel, contrasted her own approach with that of prosecutors as follows:

> That's the difference between those [prosecutors] and…those lawyers like me who think [rape] is an issue of rights…I don't see [the prosecution just] as a case. I see [the victim] as a human being [whose] right has been violated. Give [her] due respect!

These observations were reflected in the experiences of the victims interviewed for this study, who were generally unable to explain the status of the case. Their experience with prosecutors varied, with some never having met the prosecutor.

Many prosecutors were convinced that rape allegations are mostly false, often based on unpersuasive and stereotypical reasoning. For example, one prosecutor said that she could tell from how one victim looked that the accusation was false. She added that since the victim's father-in-law (defendant) was the only Hindu person in a Muslim household, he was probably being framed. Another prosecutor said that persons from the middle and upper classes do not commit rape; it is migrant, poor men from rural areas who give Delhi a bad name.[122] Based on these and other ill-informed and/or discriminatory beliefs, prosecutors often assumed that it was not worthwhile to spend time explaining legal processes or decisions to victims. The dynamic model would reject this approach, requiring instead that the prosecutor act as a minister of justice in relation to the victim. This not only includes treating the victim with dignity and respect – as all officers of the court are obliged to do – but also acknowledging the victim's unique interest in the prosecution as someone who has potentially

[122] On the stereotypes associated with the migrant poor, see Atluri (2013), pp. 374-6; Roychowdhury, *supra* note 77, p. 286.

suffered direct damage to her rights and well-being. This justice-oriented approach would translate to enhanced interaction with and support to the victim.

Many prosecutors suggested that they could not be expected to engage directly with victims, given their burgeoning workload. They justified their approach based on the presence of other legal points of contact for the victim, such as DCW advocates, or victims' counsels, whether accessed privately or through legal aid. However, none of these lawyers is an appropriate substitute for the prosecutor. There is at best one DCW advocate per court, which means that the caseload for each such advocate is generally at least equal to that of the prosecutor. Privately hired counsels can provide useful explanations to the victim. Nevertheless, many victims find such lawyers unaffordable, if not extortionate. For example, one victim interviewed for this study said she had sold her house and lost her business while trying to afford legal costs, including the fees of victims' counsels she had hired over the years. While victims can access legal aid through the DLSA, the experience of victims with such advocates was generally negative. One victim recounted how her DLSA lawyer was also representing the defendant, unbeknownst to her. Since he had ensured that the formal documentation was filed by his colleague, she only found out about the

conflict of interest belatedly.[123] She later managed to access another DLSA lawyer, who was able to relay her concerns in court. Nonetheless while these services are meant to be free, he charged her for them.[124] She described her experience as follows:

> …[F]or so many days I have had no idea what has been happening…Nor was there any lawyer on my behalf. I had filed one application [to have a lawyer appointed]…I did not know he was also handling the other party's case…In the *vakaltanama*,[125] he did not show his own name. So, I found out later. Then I got another lawyer to stand up for me…through the court…He took five hundred rupees from me…I have no idea what is happening in court. In front of me some people will go into court, they will announce the name of my case, and then they will tell me to come on another date. I describe to them what happened with me but then they tell me that the investigating officer handling my case will come to court on the

[123] The lawyer's conduct violates Standard 14 of the Standards of Professional Conduct and Etiquette to be Observed by Advocates made by the Bar Council of India under section 49(1)(c) of the Advocates Act 1961.

[124] This is a common practice in trial courts: Chandra (2016), p. 190.

[125] A document empowering the lawyer to represent a client.

> next date…He was transferred, and I don't even know which police officer is handling the case now. And if I go to court then they just give me date after date, date after date. So last time I decided, I will have a lawyer stand up for me in court. He told the court, 'This is how things are. [The defendants] beat her, they beat her husband very aggressively, they harass her on the streets, they abuse her in vile terms, they threaten her, they engage in misconduct and target her'…I will find out what is happening in the case on the next date…

Even where the victim successfully recruits a lawyer, the seriousness with which the prosecutor or judge takes such lawyers varies depending on the latter's seniority and reputation.[126] Most victims will not have access to renowned counsels.

The preceding analysis shows why prosecutors should not assume that the victim's engagement is ensured by the presence of other lawyers in the court. Under the dynamic model, the prosecutor acting as a minister of justice must engage with the victim, providing her with appropriate information and updates. This approach can also collaterally facilitate the prosecutor's advocacy. For

[126] For an analysis of similar attitudes in the Indian appellate judiciary, see Galanter and Robinson (2013).

example, many rape victims refuse to support the prosecution as the trial progresses. There can be many reasons for this, including threats from the defendant, or pressure from the victim's family on account of the stigma associated with rape. When one prosecutor was asked how she dealt with such cases she said:

> …I was able to counsel [the victim that] whatever has happened with you…come up with the truth before the court, … [But] if someone has prepared their mind and they were tutored by the counsels and so many persons before meeting me, it's very difficult for the prosecutor…to change [the victim's] mind at that particular stage.

If the prosecutor keeps an open channel of communication with the victim from the outset, this can prevent the victim's alienation from the proceedings and give her strength and resources to withstand pressure from third parties while testifying. The successful discharge of the prosecutor's minister of justice role can thus also facilitate effective advocacy on her part.

It could be argued that closer interaction between the victim and the prosecutor could result in creating unrealistic expectations in the victim's mind. For instance, one prosecutor participant mentioned that to reassure the victim,

he would sometimes state that he was her representative, even though he knew this was not true. Misleading the victim in this way could leave her doubly disappointed when the prosecutor's claims turn out to be unfounded. However, a minister of justice approach, while requiring greater prosecutor-victim engagement, would not extend to condoning such a distorted representation of the legal position. The nature and quality of that engagement would still be circumscribed by public interest considerations under the dynamic model.

V. Conclusion

Prosecutors remain relatively under-researched actors within the criminal justice system.[127] This article has drawn attention to the complexities, conflicts and complementarities of the prosecutor's duties. It has identified the tension between the dual roles of the prosecutor as a minister of justice and as an advocate for conviction. By contextualising these roles against the background of the adversarial criminal justice system, it has devised a dynamic model to guide the discharge of prosecutorial obligations. It has then used fieldwork from rape

[127] Flynn (2016), p. 578.

prosecutions in Indian trial courts to exemplify and justify this model. Thus, this article has contributed to the scant normative and empirical literature on prosecutors.

The prosecutor's office is a potent one. Prosecutors have an important role to play at almost each stage of the criminal justice process though the nature of their obligations evolves. Expecting prosecutors to function without guidance on this evolution can result in arbitrary decision-making, or the unprincipled domination of one of the dual roles in practice. In response, the dynamic model developed in this article provides a benchmark against which the performance of prosecutors in trial courts can be understood, critiqued and improved.

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