

# Encyclopedia of Law & Society: American and Global Perspectives

## Prosecutors

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Among the world's criminal procedure systems, the main legal actors are judges (professional and lay), who adjudicate legal disputes; jurors (lay persons), who render a verdict and find facts; defense attorneys (professional and lay) who defend the accused, and prosecutors, who participate in bringing the state's case against the accused.

## Prosecutorial Roles and Legal Traditions

Either public or private prosecutors conduct criminal prosecutions, with public salaried government employees the most common. Public prosecutors enter state employment either as civil service or direct appointees or through popular election. They typically are responsible for initiating prosecution against the accused. In private prosecution systems, the victim or victim's relatives often initiate prosecution. This process may run parallel to the public prosecution system, as in Austria, Germany, Sweden, and Finland.

The role of the prosecutor varies according to a system's legal tradition, which involves a distinct set of beliefs, attitudes, and practices about the nature of law, the role of law in society, and the organization of law and legal processes. The principal legal traditions are the civil law, common law, socialist law, religious law, and customary law. Legal systems within each tradition have many similarities, though significant differences also exist between nations.

## Civil Law

Under the civil law tradition, the adjudicatory process is typically *inquisitorial*. Presumably, truth emerges through continuing investigation. Here the judge acts as a finder of fact, supervising the collection of evidence, questioning witnesses and the defendant, and adjudicating the case. The prosecutor screens cases and decides whether to charge the accused. If the case reaches trial, the prosecutor and defense have a more inactive role than in the adversarial system. They suggest the direction of inquiry for the judge and may ask questions once the judge has finished her inquiry. The civil law tradition and its variations are dominant in the world today, existing in

continental Europe, Latin America, and parts of Africa, Asia, and the Middle East. It is also the system used in the International Criminal Court.

France offers an example of the civil law tradition. In France, the *procurator* acts on behalf of society, not the state. Her primary duty is to ensure that justice is done and that society's interests are served. The three key actors in the French criminal justice system are (1) the judicial police, (2) the procurator, and (3) the examining magistrate. The police investigate cases and, depending on their status, may detain suspects for investigation. The procurator decides whether to charge the suspect or dismiss the case. They prosecute less serious felonies and most misdemeanors and direct the work of the judicial police. Depending on the charge, either an investigation by a magistrate is required (serious felonies) or the procurator can request it. In principle, all cases go to trial. The presiding judge conducts the trial. He questions the accused and calls witnesses. The prosecutor and defense may question witnesses directly and the accused indirectly through the judge.

## Common Law

In the common law tradition, the adjudicatory process is typically *adversarial*. Presumably, truth emerges through an adversarial process—that is, during trial. The prosecutor plays a much more active role than in the inquisitorial system. She is responsible for bringing the state's case against the accused. The prosecutor evaluates cases for prosecution and decides whether to charge the accused. If the court charges the accused with a crime, the prosecutor and defense gather the [p. 1218 ↓ ] evidence and present it to a judge (and in some cases a jury) who decides the defendant's future. During a trial, the prosecutor is responsible for establishing a defendant's guilt. The judge, as the neutral third party, acts as a referee during trial and may decide the outcome of the case if no jury is present. Common law systems exist in the United Kingdom and most English speaking countries.

## Islamic Law

Islamic law (*shari'a*) covers all aspects of social and religious life. As with the civil and common law traditions, each nation implements the law differently within the tradition. Countries that apply Islamic law in their criminal justice system include Pakistan, Sudan, Libya, Kuwait, United Arab Emirates, Afghanistan, Iran, and Saudi Arabia.

Saudi Arabia is an example of the Islamic legal system. There, *shari'a* courts have jurisdiction over civil, criminal, and family matters. The Board of Investigation and Prosecution, in the Ministry of Justice, is responsible for the investigation and prosecution of all crimes. The dominant roles belong to the investigator and *kadi* judge. Criminal investigation officers collect evidence, identify perpetrators, and interview the suspect and witnesses. A supervisor, who determines whether to close the case or send it forward to the prosecutor, reviews their report. The *kadi* questions the witnesses and the accused, interprets the evidence, determines guilt or innocence, and stipulates the sentence. Sentences relate to the crime category. For *hadud*, crimes against God, the punishments are written in the *Qur'an* or *sunna*.

There are two levels of shari'a courts in Saudi Arabia: (1) courts of first instance (summary and general), and (2) courts of cassation (appeals). The summary courts adjudicate minor civil and criminal cases. The general courts handle cases that are more serious. There are two courts of cassation, one in Riyadh and the other in Mecca. Either the defendant or the prosecutor can appeal cases to this level.

## Prosecutors in the United States

The United States is an example of a common law legal system. Prosecutors are the chief law enforcement officers in each particular jurisdiction. At the federal level, the president, for each of the almost one hundred federal districts, appoints U.S. attorneys. At the state level, the people typically elect district attorneys for each county, who then hires assistants. In many cities, the mayor appoints city attorneys to advise city government. In some situations, city attorneys are chief misdemeanor prosecutors and,

sometimes, such as district attorneys, are elected. At each level, assistant prosecutors and their staff conduct the day-to-day work.

In the United States, prosecutors have become the most powerful actors in the criminal justice system. This results, in part, from their role as gatekeeper of the criminal court system. They decide which cases will enter the system, whether or not they will formally charge an individual with a crime, and control people's liberty through case screening and charging decisions.

How do prosecutors decide whether to reject or accept cases into the criminal procedure system? This decision to file a case occurs within the organizational context of the prosecutor's office, institutional structure of the court system, and the political context of the community. Typically, prosecutors only file cases they consider convictable. This convictability standard is itself shaped by the organizational policies and procedures of the prosecutor's office, such as promotion criteria, and the courts. Prosecutors try to anticipate how judges and jurors will interpret case facts. In general, if prosecutors are unable to construct a credible account of the incident for a jury, they will not file the case.

In the United States, the majority of criminal cases do not enter the court system due to the prosecutor's decision not to prosecute. Of those cases that entered the system in 2005, approximately 96 percent were resolved through plea negotiation. Traditionally prosecutors set the terms of the plea negotiation, and the judge will either concur with the recommended sentence or not. With the advent of recent sentencing guidelines, judges sentencing discretion has decreased. Now, prosecutors, through their charging decisions, are often de facto setting a defendant's sentence.

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Prosecutors routinely exercise enormous discretion in their everyday decision making. In the majority of circumstances, these decisions are within the bounds of ethical conduct. As studies on death penalty cases in the United States show, prosecutorial misconduct has grave consequences. The courts have convicted some innocents for murder because prosecutors concealed evidence suggesting defendants were innocent,

presented evidence they knew was false, or discriminated against African Americans during jury selection.

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#### Further Readings

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