

Law Commission of India

197th Report

on

Public Prosecutor's Appointments

July, 2006

Justice

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Chairman

LAW COMMISSION OF INDIA

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Dear Shri Bharadwaj Ji,

Sub: 197th Report of the Law Commission on ‘Public Prosecutor’s Appointments.

I have great pleasure in forwarding the 197th Report of the Law Commission on ‘Public Prosecutor’s Appointments’.

The Ministry of Home Affairs, in their file bearing No.12/33/2006-Judicial Cell forwarded to the Law Commission of India on 29.5.2006 a letter of the Prime Minister’s Office ID No.805/11/C/4/06-Pol dated 16.5.2006, seeking the views of the Law Commission on three matters which read as follows:

- “(i) Making of appointment of Public Prosecutors/ Additional Public Prosecutors only from amongst persons constituting regular Cadre of Prosecuting Officers – in terms of s. 24(6) of the Code of Criminal Procedure, 1908 (sic 1973), as originally legislated by Parliament- may need to be legislatively restored to override various State Amendments. Further, a time limit may need to be prescribed by law to require creation of such cadres in a definite timeframe, while simultaneously incorporating a ‘sunset clause’ in s. 24(4) of the Cr.P.C.
- (ii) Requirement of consultation with Sessions Judge u/s. 24(4) may need be resorted to override State Amendment(s).
- (iii) Other institutional mechanism(s) and safeguard(s) in terms of eligibility requirement, assessment of past performance, adequate tenure, etc. could be considered to reduce the scope for arbitrariness in appointments.”

In this 197th Report, the Law Commission has made indepth study of the role of the Police, the Prosecutor, the Executive and the Courts in the criminal justice process and

has gone into the question of the procedure for appointment of Public Prosecutors and has given its recommendations. A draft Bill for substituting existing subsections (4) to (6) of sec. 24 of the Code of Criminal Procedure, 1973 is also annexed to this Report.

Initially, the Commission, has gone into the role of the Public Prosecutors as stated in the judgments of the Supreme Court and the earlier Reports of the Law Commission. The Commission has stated that the Public Prosecutor has to be independent of the executive and all external influences, also independent of the police and the investigation process. He cannot advise the police in matters relating to investigation. He has duties to the State, to the Court and to the accused. He has to discharge his duties objectively. He is in the position of a minister of justice assisting the Court.

As regard the procedure for appointment of Public Prosecutors, Addl. Public Prosecutors in the Sessions Court, the requirement in sec. 24(4) of the District Magistrate consulting the Sessions Judge is salutary and it is unfortunate that some States have dispensed with this procedure of consultation with the Sessions Judge.

The provisions of sec. 24(6) of the Code as enacted by Parliament states that once a Regular Cadre of Prosecuting Officers is constituted in a State, all appointments to the post of Public Prosecutor/Addl. Public Prosecutor "shall" be made only from the cadre. Several States have made amendments substituting the word 'shall' by the word 'may' as they felt that some of the posts of Public Prosecutor/Addl. Public Prosecutor must be allowed to be filled from the Bar of the Sessions Court. The Law Commission in this Report has stated that in as much as the Asst. Public Prosecutors who are in the Regular Cadre have practised only in the Magistrates Courts which generally try offences where punishment of imprisonment can only be upto seven years, it is necessary that Public Prosecutor/Addl. Public Prosecutor's posts in the Sessions Courts are filled also by members of the Bar who practice in the Sessions Court, in as much as they have greater experience in dealing with Sessions cases where punishment could be death or imprisonment for life.

We have, therefore, suggested that the post of Public Prosecutor must always be filled by a member of the Bar from a panel prepared by the District Magistrate in consultation with the Sessions Judge, that 50% of the posts of Addl. Public Prosecutor in a District must also be filled by the Bar from the panel prepared by the District Magistrate under sec. 24(4) in consultation with the Session Judge and remaining 50% of the posts of Addl. Public Prosecutor in a District must be filled from among Asst. Public Prosecutors who are in the Regular Cadre of Prosecuting Officers.

We have also recommended an express provision to be inserted in sec. 24(4) that the Session Judge must recommend names of lawyers who have personally conducted substantial number of Sessions cases and who bear good character. If such a Central amendment is brought, in case the State Amendments omit the provision of consultation

with the Sessions Judge and selection of members of the Bar with such experience and good character, such a procedure will offend Art. 14.

Likewise, in regard to sec. 24(6), 50% of posts of Addl. Public Prosecutor, must be filled by Asst. Public Prosecutors from a panel prepared by a State Level Committee consisting of (a) a retired High Court Judge/sitting High Court Judge, nominated by the Chief Justice of that High Court, (b) the Law Secretary in the State Government, (c) an officer of the rank of Secretary of that State and (d) the Director of Prosecution. That Committee must assess the merit, experience, previous record of performance of the Asst. Public Prosecutors and it must be ensured that the persons selected bear good character.

We have also stated that within six months of the proposed amendment to the Code, State Governments must constitute a Regular Cadre of Prosecuting Officers consisting of 50% of posts of Addl. Public Prosecutors in a District and all the Asst. Public Prosecutors in the State.

The above recommendations answer all the questions posed by the PMO in its letter to the Home Ministry.

We, therefore, request you to kindly issue instructions for transmission of this 197th Report to the Home Ministry.

Yours sincerely,

(M. Jagannadha Rao)

Sri H.R. Bharadwaj
Union Minister for Law & Justice
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Chapter I

The Reference by the Home Ministry and the views of the PMO

As desired by the Prime Minister's Office (hereinafter referred to as PMO), the Ministry of Home Affairs has sought the views of the Law Commission of India in regard to the suggestions made by the PMO concerning the appointment of the Public Prosecutors under section 24 of the Code of Criminal Procedure, 1973. The PMO referred initially to a suggestion which had been made to it to the following effect:

“There is a need to fix responsibility on Directorate of Prosecution. The criminal trial should always be conducted by Police/ CBI prosecutors only but not by State Public Prosecutors. There is a problem of accountability in contractual public prosecutors appointed on political recommendations in a State. The section in CrPC which empowers the State Government to appoint public prosecutors should be got amended with immediate effect. All police prosecutors/public prosecutors/senior public prosecutors should either be allowed to conduct the trial or if public prosecutors are to be selected in states they should be selected through PSCs after conducting thorough screening and examination.”

The PMO then considered the above suggestion. It referred to section 24(3) of the CrPC, under which the State Govt. shall appoint a Public

Prosecutor for every district, and may also appoint one or more Addl. Public Prosecutors and to section 24(4) under which the District Magistrate shall, in consultation with the Sessions Judge, prepare a panel of persons, who are, in his opinion, fit to be appointed as Public Prosecutor or Addl. Public Prosecutor (hereinafter referred to as PP/Addl. PP) for the district. It then referred to sec. 24(6) which states that the provisions of s. 24(4) shall not apply where a Regular Cadre of Prosecuting Officers exists in a State and, that, in such cases, the State Government shall appoint a PP/Addl.PP only from among the persons constituting such Cadre.

The PMO has opined that the intention behind the provision of sec. 24(6) appears to be that there should be a Regular Cadre of Prosecuting Officers, including Asstt. Public Prosecutors (hereinafter referred to as Asst. PPs), who alone would be promoted to the rank of PPs or Addl.PPs and the earlier provision of appointment from the panel of practicing advocates prepared by the District Magistrate in consultation with the Sessions Judge would be discontinued once the Cadre of Prosecuting Officers came into being.

The PMO further stated, “ However, s. 24(6) has been amended by a number of State Amendments, making it optional for the State Government to appoint persons from the Cadre of Prosecution Officers as PPs/ Addl. PPs. Further, some States may not have created a regular Cadre of Prosecuting Officers yet. The requirement of consultation with the Sessions Judge while preparing the panel has also been done away through State Amendments in some State(s).”

In the above context, the PMO suggested that following measures may be considered:

- “(i) Making of appointment of Public Prosecutors/ Additional Public Prosecutors only from amongst persons constituting regular Cadre of Prosecuting Officers – in terms of s. 24(6) of the Code of Criminal Procedure, 1908 (sic 1973), as originally legislated by Parliament- may need to be legislatively restored to override various State Amendments. Further, a time limit may need to be prescribed by law to require creation of such cadres in a definite timeframe, while simultaneously incorporating a ‘sunset clause’ in s. 24(4) of the Cr.P.C.
- (iv) Requirement of consultation with Sessions Judge u/s. 24(4) may need be resorted to override State Amendment(s).
- (v) Other institutional mechanism(s) and safeguard(s) in terms of eligibility requirement, assessment of past performance, adequate tenure, etc. could be considered to reduce the scope for arbitrariness in appointments.”

The above suggestions of the PMO will be examined in detail in the next chapters of this Report by the Law Commission.

It is also proposed to give a draft for amendments to sec. 24 of the Code of Criminal Procedure, 1973 which, in the opinion of the Law Commission, will result in a more efficient, transparent scheme concerning appointment of Public Prosecutors and Addl. Public Prosecutors in a

District consistent with Art. 14 of the Constitution of India, and which will not permit arbitrary exercise of power while appointing PPs/Addl PPs.

Chapter II

Independent role of Public Prosecutor in the criminal justice process

The suggestions by the PMO have to be considered in the light of several legal principles applicable to the criminal justice system and in the context of the role that the Public Prosecutor is expected to play and the need for independence, efficiency and accountability in his functioning.

Before we go into the role of the Public Prosecutor, first we must recognize the independent role of the police during investigation and bringing to book those who violate the law, as declared by the Supreme Court of India.

Police to act on their own without outside influence:

In Union of India v. Sushil Kumar Modi: 1997 (4) SCC 770, the Supreme Court quoted with approval the following words of Lord Denning in R v. Metropolitan Police Commissioner: 1968 (1) All ER 763, as to the independent role of police:

“I have no hesitation, however, in holding that, like every constable in the land, he should be, and is independent of the executive. He is not subject to the order of the Secretary of State..... I hold it to be the duty of the Commissioner of Police, as it is of every Chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about

these affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought; but in all these things, be not the servant of anyone, save the law itself. No Minister of the Crown can tell him that he must, or must not keep observation on this place or that; or that he must, or must not prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone.”

The Supreme Court, after quoting the above observations, observed:

“According to the Code of Criminal Procedure, 1973, the formation of the opinion as to whether or not there is a case to place the accused for trial is that of the police officer making the investigation and the final steps in the investigation is taken only by the police and by no other authority, see Abhinandan Jha v. Dinesh Mishra: (AIR 1968 SC 117). This must be borne in mind as also that the scope and purpose of a proceeding like the present is to ensure a proper and faithful performance of its duty by the police officer, by resort to the prerogative writ of mandamus”

Thus, the police are expected to enforce the law, without any influence from the Executive.

Public Prosecutor in the criminal justice system:

It is worthwhile to go into the role of a Public Prosecutor in the criminal justice system.

“The Prosecutor has a duty to the State, to the accused and to the Court. The Prosecutor is at all times a minister of justice, though seldom so described. It is not the duty of the prosecuting counsel to secure a conviction, nor should any prosecutor even feel pride or satisfaction in the mere fact of success. Still less should he boast of the percentage of convictions secured over a period. The duty of the prosecutor, as I see it, is to present to the tribunal a precisely formulated case for the Crown against the accused, and to call evidence in support of it. If a defence is raised incompatible with his case, he will cross-examine dispassionately and with perfect fairness, the evidence so called, and then address the tribunal in reply, if he has the right, to suggest that his case is proved. It is not rebuff to his prestige if he fails to convince the tribunal of the prisoner’s guilt. His attitude should be so objective that he is, so far as humanly possible, indifferent to the result. It may be argued that it is for the tribunal alone, whether magistrate or jury, to decide guilt or innocence” (Christmas Humphreys (1955 Criminal Law Review 739 (740-741))).

The Law Commission of India in its 154th Report on ‘Code of Criminal Procedure, 1973’ (in chapter III, para 15) quoted Babu v. State of Kerala : 1984 Cr LJ 499 (Ker H.C.) to the following effect:

“Public Prosecutors are really Ministers of Justice whose job is none other than assisting the State in the administration of justice. They are not representatives of any party. Their job is to assist the Court by placing before the Court all relevant aspects of the case. They are not there to see the innocent sent to the gallows; they are also not there to see the culprits escape conviction”

‘Public Prosecutor’ is defined in some countries as a “public authority who, on behalf of society and in the public interest, ensures the application of the law where the breach of the law carries a criminal sanction and who takes into account both the rights of the individual and the necessary effectiveness of the criminal justice system”.

Prosecutors have duties to the State, to the public, to the Court and to the accused and, therefore, they have to be fair and objective while discharging their duties.

Public Prosecutor has to act independently from the Police:

The ‘independence’ of the prosecutor’s function stands at the heart of the rule of law. Prosecutors are expected to behave impartially. (Report of the Criminal Justice Review in Northern Ireland, 2000) Prosecutors are gatekeepers to the criminal justice process as stated by Avory J in R v. Banks 1916 (2) KB 621. The learned Judge stated that the prosecutor,

“throughout a case ought not to struggle for the verdict against the prisoner but... ought to bear themselves rather in the character of minister of justice assisting the administration of justice”

It is now too well-settled that Prosecutors are independent of the police and the Courts. While the police, the Courts and the prosecutors have responsibilities to each other, each also has legal duties that separate them from others. The prosecutor does not direct police investigations, nor does he advise the police. Public Prosecutors are part of the judicial process and are considered to be officers of the Court.

Public Prosecutor must act on his own independent of Executive influence:

The Government should ensure that public prosecutors are independent of the executive, and are able to perform their professional duties and responsibilities without interference or unjustified exposure to civil, penal or other liability. However, the public prosecutor should account periodically and publicly for his official activities as a whole. Public prosecutors must be in a position to prosecute without influence or obstruction by the executive or public officials for offences committed by such persons, particularly corruption, misuse of power, violations of human rights etc.

Even in regard to withdrawal of prosecutions under sec. 321 of the Code of Criminal Procedure, 1973, the Supreme Court has pointed out in Balvant Singh v. State of Bihar: AIR 1977 SC 2265 that it is the statutory responsibility of the public prosecutor alone to apply his mind and decide

about withdrawal of prosecution and this power is non-negotiable and cannot be bartered away in favour of those who may be above him on the administrative side. In Subhash Chander v. State (AIR 1980 SC 423) the Supreme Court stated that it is the public prosecutor alone and not any other executive authority that decides withdrawal of prosecution. Consent will be given by the Public Prosecutor only if public justice in the larger sense is promoted rather than subverted by such withdrawal. In doing so, he acts as a limb of the judicial process, and not as an extension of the executive. He has to decide about withdrawal by himself, even where displeasure may affect his continuance in office. None can compel him to withdraw a case. The public prosecutor is an officer of the Court and is responsible to the Court. These principles were reaffirmed by the Constitution Bench in the second case going by the citation, Sheonandan Paswan v. State of Bihar: AIR 1987 SC 877.

Public Prosecutor not to involve himself in investigation of the case:

The Public Prosecutor should not be involved in the investigation process. As held by the Supreme Court in R. Sarala v. T.S. Velu: AIR 2000 SC 1731, “investigation and prosecution are two different facets in the administration of criminal justice. The Role of the public prosecutor is inside the Court, whereas the role of investigation is outside the Court. Normally, the role of the public prosecutor commences after investigation agency presents the case in the Court on the culmination of investigation. Involving the public prosecutor in investigation is unjudicious as well as pernicious in law..... The Investigation Officer cannot be directed to consult the public prosecutor and submit a chargesheet in tune with the

opinion of the public prosecutor.... Public prosecutor is appointed for conducting any prosecution, appeal or proceedings in the Court. He is an officer of the Court. The public prosecutor is to deal with a different field in the administration of justice and cannot be involved in investigation”.

Summary:

Therefore, the Public Prosecutor has to be independent of the executive and all external influences, also independent of the police and the investigation process. He cannot advise the police in the matters relating to investigation. He is independent of Executive interference. He is independent from the Court but has duties to the Court. He is in charge of the trial, appeal and other processes in Court. He is, in fact, a limb of the judicial process, officer of Court and a minister of justice assisting the Court. He has duties not only to the State and to the public to bring criminals to justice according to the rule of law but also duties to the accused so that innocent persons are not convicted.

Therefore, any scheme of appointment of PPs/Addl. PPs, as well as Asst. PPs, must result in the creation of an independent body of prosecuting officers, free from the executive and all external influences, free from police and must be able to enforce the rule of law without fear or favour, advance public interest in punishing the guilty and protecting the innocent.

Chapter III

Government of India and States: Legislation and procedure for appointment of Public Prosecutors and Art. 14

We now come to the question of legislative power and its dimensions and Art. 14 of the Constitution of India. Our proposals are intended to provide a scheme of appointment of PPs/Addl PPs which will produce an efficient and honest band of officers and that the scheme must be such as would provide no scope for arbitrary appointments or outside interference at the time of making appointments.

Legislative powers of Parliament and State Legislatures in regard to appointment of Public Prosecutors:

The power to legislate on the process of appointment and promotion of public prosecutors is governed by Item 2 of List III, Concurrent List of the VII Schedule of the Constitution which deals with

“2. Criminal procedure, including all matters included in the Code of Criminal Procedure at the commencement of the Constitution”

At the time of commencement of the Constitution, the procedure for appointment of Public Prosecutors was contained in sec. 492 of Code of Criminal Procedure, 1898 and hence the subject falls under Item 2 of the Concurrent List.

Therefore, under Art. 246(2), it is open to the Parliament to legislate on the subject of appointment of Public Prosecutors but it is also open to the State Legislatures to amend Parliamentary legislation by following the procedure in Art. 254(2) of the Constitution, by reserving the State Amendment Bill for the assent of the President of India.

Law regarding appointment of Public Prosecutor will violate Art. 14 if it permits arbitrary appointment without proper checks:

The provision in sec. 24(4) that the District Magistrate must consult the Sessions Judge in the matter of preparation of a panel of lawyers for appointment as Public Prosecutors or Addl. Public Prosecutors is an essential check on arbitrary appointments. The Sessions Judge who has knowledge of the caliber, experience and character of lawyers practising in the Sessions Courts is well suited to suggest the best names of lawyers so that the interests of prosecution, the interests of the accused are fully taken care of. This being the logic behind the provision for consultation, any amendment by the States deleting the check on arbitrary appointments of Public Prosecutors, will be violative of Art. 14 of the Constitution.

The fundamental point - which has to be remembered – is that any law made by the Centre or State Legislature in regard to appointment of Public Prosecutors must conform to the principles governing administration of criminal justice in which the public prosecutor has an independent and special role as stated in Chapter II . In as much as the Public Prosecutor is a ‘limb of the judicial process’ and ‘an officer of Court’ as stated by the

Supreme Court (see Chapter II), any method of appointment which sacrifices the quality of the prosecution or which enables State Governments to make appointments at their choice without proper screening, proper assessment of the qualifications, experience or integrity of the individuals, be they the Public Prosecutors selected from the Bar or appointed from among the Prosecuting Officers, will not stand the test of non-arbitrariness under Art. 14 of the Constitution of India. The scheme must provide for appointing Public Prosecutors who shall bear all the qualities mentioned in Chapter II.

As pointed by the Supreme Court, Public Prosecutor's functions are inside the Criminal Courts. PPs/Addl PPs deal with the cases of highest importance in the Sessions Courts which try persons accused of murder and other serious offences. The Judiciary, - namely the Sessions Court and the High Court - have a stake in the appointment of these officers. Inefficiency or lack of integrity on the part of the Public Prosecutors not only affects society but may also reflect sadly on the judicial system. That is why, in the matter of appointment of these officers from the Bar as well as appointments from the Cadre, there must be adequate safeguards precluding arbitrary appointments by the Executive. Any scheme which permits arbitrary appointments without checks will be in violation of Art. 14 of the Constitution.

Earlier Reports of Law Commission: Procedure for appointment:

In the 14th Report of the Law Commission (1958), authored by Sri M.C. Setalvad and other luminaries, it was stated (Chapter 34, para 12),

adverting to the then existing procedures of appointing Police Prosecutors as Public Prosecutors as follows:

“12. Public Prosecutors and their functions: It is obvious that by the very fact of their being members of the police force and the nature of the duties they have to discharge in bringing a case in Court, it is not possible for them to exhibit that degree of detachment which is necessary in a prosecutor. It is to be remembered that a belief prevails amongst the police officers that their promotion in the Department depends upon the number of convictions they are able to obtain as prosecuting officers. Finally, the only control or supervision of the work of these prosecuting officers is that exercised by the Departmental officials”

The remedial measures suggested were as follows (para 15):

“Suggested remedial measure: We therefore suggest that as a first step towards improvement, the prosecuting agency should be completely separated from the Police Department. In every district, a separate Prosecution Department may be constituted and placed in charge of an official who may be called a ‘Director of Public Prosecutors’. The entire prosecution machinery in the District should be under his control. In order to ensure that he is not regarded as a part of the Police Department, he should be an independent official directly responsible to the State Government. The departments of the machinery of criminal justice, namely, the

Investigation Department and the Prosecuting Department should thus be completely separated from each other”

There have also been recommendations by the National Police Commission in its 4th Report and also in the 154th Report of the Law Commission (1996) that there should be a prosecution system under the control of an independent Director of Prosecution.

Supreme Court in S.B. Shahane’s case (1995): Public Prosecutors must be independent of the Police:

In S.B. Shahane v. State of Maharashtra 1995 Suppl. (3) SCC 37, the Police Prosecutors functioning under the control of the IG of Police were appointed as Asst. Public Prosecutors by a notification issued under sec. 25 of the Code of Criminal Procedure, 1973. The Supreme Court held that such Asst. Public Prosecutors could not be allowed to function under the control of the head of the Police Department. The State Government was directed to constitute a separate cadre of Asst. Public Prosecutors by creating a separate Prosecution Department. A Police Prosecutor, it was held, was not eligible for being appointed as Asst. Public Prosecutor because the Public Prosecutor must be independent of the Police.

Without a cadre of prosecuting officers in existence, appointment of Asst. Public Prosecutors as PPs/Addl. PPs is not permissible:

In K.J. John Asst. Public Prosecutor v. State of Kerala, 1990 CrI. LJ 1777, (SC), the Supreme Court, while dealing with sec. 24(6) of the Code held that there must be a cadre of officers consisting of Public Prosecutor,

Addl. Public Prosecutor, Asst. Public Prosecutor or other Prosecuting Officers and unless such a cadre is available, prosecuting officers who are not part of such a cadre cannot be appointed as PPs/Addl PPs under sec. 24 (6).

Police officer cannot be appointed as Director of Prosecution:

In Krishan Singh Kundu v. State of Haryana, 1989 Cr1 LJ 1309 (P&H), it was held that the action of the State Government in appointing a police officer as Director of Prosecution i.e. in charge of the Prosecution Agency of the State was wholly illegal and violative of the letter and spirit of ss. 24, 25 of the Code and the appointment was quashed.

Summary:

Thus, the provisions of the Constitution of India enable the Parliament and State Legislatures to legislate on the subject of appointment of Public Prosecutors and Addl. Public Prosecutors, the State Legislatures can amend the Central law, even when Parliament re-legislates the law. Police Prosecutors cannot be appointed as Public Prosecutors. Where a Regular Cadre of Prosecuting Officers is not in existence, there is no scope for appointing Asst. Public Prosecutors as Public Prosecutors/Addl. Public Prosecutors under sec. 24(6).

Appointment procedure laid down in any legislation cannot give arbitrary discretion to State Governments. There must be proper checks in the matter of appointment of Public Prosecutors/Addl. Public Prosecutors in

the Sessions Court so that they can be efficient in their functioning, objective and independent of the Police and the Executive. Any scheme of appointments without proper checks will be violative of Art. 14 of the Constitution of India.

If the central legislation expressly requires consultation with Sessions Judge and that he should assess merit, experience and good character as a necessary condition for appointment as Public Prosecutors under sec. 24(4), then any State Amendment which deletes the provision relating to consultation with the Sessions Judge and to the above qualities required of the appointee, then such deletion by the State Legislature amounts giving a licence for arbitrary appointments and will violate Art. 14. In such cases, assent of the President to the State Amendment can be justifiably refused.

Chapter IV

Recommendations of Law Commission on the three suggestions of PMO

- (1) **Making of appointment of Public Prosecutors/ Additional Public Prosecutors only from amongst persons constituting regular Cadre of Prosecuting Officers – in terms of s. 24(6) of the Code of Criminal Procedure, 1908 (sic 1973), as originally legislated by Parliament - may need to be legislatively restored to override various State Amendments. Further, a time limit may need to be prescribed by law to require creation of such cadres in a definite timeframe, while simultaneously incorporating a ‘sunset clause’ in s. 24(4) of the Cr.P.C.**

This suggestion No.1 can be split into two parts.

- (a) Question is whether the State Legislatures can be precluded from amending sec. 24(6) so as to disable the States from making amendments permitting appointments as Public Prosecutors and Addl. Public Prosecutors from outside the cadre of Asst. Public Prosecutors?

It is obvious that having regard to the fact that the subject of ‘criminal procedure’ is in Entry No.2 of the Concurrent List (List III) of the VII Schedule to the Constitution of India, State Amendments to the Central enactment cannot be prevented. In view of Art. 254(2), the State Amendments will prevail over Parliamentary legislation if the President gives assent to the State Amendments. Even if any new amendments to sec.

24(6) are made by Parliament in mandatory language, it will not preclude the State Legislatures from amending sec. 24(6) and making it discretionary to appoint from outside the Regular Cadre of prosecuting officers and seeking assent of the President of India for such further amendment.

But, this problem can be solved in a different way and providing a scheme in the Central Act which will be in conformity with Art. 14 of the Constitution of India and in that event, deviations by the States from that scheme will be in violation of Art. 14. We are suggesting such a scheme, consistent with Art. 14, in our discussion under suggestion (3).

(b) Whether the provisions of sec. 24(6) which permit only Asst. Public Prosecutors in the Regular Cadre of Prosecuting Officers to be appointed as PPs/Addl PPs are to be continued or have to be modified?

This part of the question requires a deeper consideration of issues which have not received consideration in any previous Report of the Law Commission.

The Law Commission has given its anxious and deep consideration to the question whether invariably all the posts of Public Prosecutor and Addl. Public Prosecutor must be filled from the cadre of Asst. Public Prosecutors.

In our view, the existing scheme of appointment referred to in sec. 24 (6) in the Central legislation which requires all these posts in the Sessions Courts to be filled by Asst. Public Prosecutors from the cadre, where a Regular Cadre of Public Prosecutors exists, requires some changes.

Public Prosecutors/Addl. Public Prosecutors have to conduct trials in the Sessions Courts in relation to serious offences which, under the Code, which are triable only by the Sessions Courts. The Asst. Public Prosecutors who have practised in the Magistrates Courts had no opportunity to handle cases of that importance or magnitude. The nature of offences triable by a Sessions Court, the procedure for trial and the nature of the evidence are totally different. Normally, Magistrates can try only cases where sentence does not exceed seven years, whereas in Sessions cases, the sentence may be death or life imprisonment.

Therefore, the Public Prosecutors in the Sessions Courts, having regard to the important duties and responsibilities cast on them must, in our opinion, have the inputs of a fair combination of direct recruitment element (from the Bar of the Sessions Court in consultation with the Sessions Judge) and of appointment from the cadre of Asst. Public Prosecutors. Such a combination is available in most of the services in the Central and State governments and its virtues have never been questioned.

As stated above, Asst. Public Prosecutors might have worked in the Courts of the Magistrates as stated in sec. 25 for longer period, but the offences which they handled are not normally of the same magnitude or seriousness as those triable by a Sessions Court. On the other hand, lawyers with seven years or more experience who have practised in the Sessions Courts and defended cases of murder or other serious offences where punishment can be death or life imprisonment or imprisonment for more than 7 years, are always available and it is in public interest to include them for appointment to the posts of Public Prosecutor or Addl. Public

Prosecutor. In fact, it is absolutely necessary to appoint them to some of these posts and make use of their vast experience in handling cases triable by a Sessions Court. A provision which combines appointment of Asst. Public Prosecutors who have been appearing for the prosecution for a large number of years in the Magistrates Courts and of practitioners with sufficient experience who have been appearing for the defence in Sessions Courts, should make a very fine combination and serve public interest. Some of these lawyers in the Sessions Courts might have indeed been Public Prosecutors earlier in those Sessions Courts. The Sessions Court must have the benefit of experience of persons from both sources. The Public Prosecutors appointed from among Asst. Public Prosecutors can benefit by interacting with the Public Prosecutors appointed from the Bar in consultation with the Sessions Judge and vice-versa. The prosecution process will get greater strength and efficiency on account of the varied but different experience of the persons from the two sources. Of the efficacy of this scheme and the good results that may flow from this scheme, the Commission has no doubts whatsoever.

The Law Commission does not, therefore, favour an exclusive or single source, namely, the source of Asst. Public Prosecutors who have, as on date of appointment to the higher post, not handled any Sessions cases where higher stakes are involved. It is not in the interests of the criminal judicial system that all the Public Prosecutors and Addl. Public Prosecutors must be manned only from the source of Asst. Public Prosecutors. Those appointed from the cadre of Ast. Public Prosecutors will take considerable time to gain experience in dealing with cases which come for trial before the Sessions Court. It will not therefore be in the interests of the prosecution

or in public interest to exclude lawyers who have been handling Sessions cases over a long period.

In fact, the State Legislatures, in the opinion of the Law Commission, are fully justified in going for a combination of recruitment from both sources, - recruitees from the Bar for 3 years each time and from among Asst. Public Prosecutors. The view expressed in the first suggestion that all posts of Public Prosecutors and Addl. Public Prosecutors must be filled only by officers from the source of Asst. Public Prosecutors, wherever a cadre is available, has obviously not taken the above aspects into consideration, which from a practical point of view, is in the overall interests of the prosecution and in public interest.

One other important recommendation of ours is that the post of Public Prosecutor in the district must be filled only by the person selected under sec. 24(4) from the panel of lawyers prepared by the District Magistrate in consultation with the Sessions Judge. It will be in the interests of the criminal justice process if the principal post in the district in this behalf, namely, the post of Public Prosecutor is manned by an Advocate selected on the recommendation of the Sessions Judge.

With a view to combine both sources, we are of the view that the posts of Addl. Public Prosecutor must be available to the Bar and the Asst. Public Prosecutors in the ratio of 50% : 50%.

But there is a caveat in regard to the procedure for appointment, which we shall discuss under (3).

(2) Whether requirement of consultation with Sessions Judge under sec. 24(4) may need to be restored to override State Amendments?

There is no doubt that consultation process with the Sessions Judge must be restored so far as sec. 24(4) is concerned.

We note that certain States have dispensed with consultation with the Sessions Judge by amending sec. 24(4). We agree with the PMO that this has to be prevented or put an end to.

But, as stated earlier, while reiteration by a fresh Parliamentary law can be made, such reiteration cannot solve the problem in view of the powers of State Legislatures unless we introduce some provisions which are consistent with Art. 14 so that in case they are deleted by the States, such deletions can be attacked as being in violation of Art. 14.

In order to preclude arbitrary State Amendments, we, therefore, propose to bring in a higher constitutional principle to compel a fair, transparent procedure of appointment to be followed. Once, such a procedure is introduced into sec. 24 by Parliament, then whenever the States do away with such a procedure, that will clearly attract Art. 14. States cannot make a provision which is arbitrary and which permits them to appoint Public Prosecutors or Addl. Public Prosecutors at their sweet will or whomsoever they like or on political considerations.

We shall explain this new scheme in detail when we come to suggestion No.(3).

(3) Institutional mechanisms and safeguards like eligibility, assessment of past performance, adequate tenure etc. should be considered for preventing arbitrariness in appointments:

In the context of this suggestion, we shall refer to the new scheme which we propose.

As stated earlier, the Public Prosecutors have their functions inside the Court. They cannot be involved in the investigation process. If their functions are in the Court and if, in fact, they are limbs in the judicial administration and are officers of Court, the method of appointment must be such as to achieve the objects of efficient assistance to the Court, bringing the culprits to book and protecting the innocent. If there is a transparent scheme covering the selection process of both the members of the Bar under sec. 24(4) and the Asst. Public Prosecutors under sec. 24(6), then such a scheme cannot be done away with by State legislations which will then become vulnerable to attack under Art. 14.

The appointment of Asst. Public Prosecutors to the higher post, as well as the appointment directly from the Bar for 3 years must always satisfy basic requirements of knowledge, experience and integrity. As stated earlier, the Sessions Judge has the advantage of knowing who is good at the Bar in all these respects practising in the Sessions Courts.

In the above background, the constitutional principles mentioned by the Commission in Chapters II and III are of great relevance and will curtail State Amendments which may permit arbitrary appointments. The Public Prosecutor being part of the judicial process, being a limb in the judicial administration, being an officer of the Court, we must have a procedure which includes the safeguards like the consultation process for purposes of sec. 24(4) and the appointment procedure for purposes of sec. 24(6) to exclude arbitrary appointments or appointment of persons not competent or not bearing good character.

Section 24(4):

We may reiterate that, so far as sec. 24(4) is concerned, the Public Prosecutor's selection and appointment at the level of the Districts and the High Court cannot be left to the sweet will of the Government. Such a procedure has the danger of persons without adequate experience of conducting Sessions cases, or who lack in adequate knowledge of criminal law being appointed. There is even the likelihood of some of such appointees not maintaining the highest standards of conduct expected of a Public Prosecutor. Thus, while consultation under sec. 24(4) with the Sessions Judge cannot be dispensed with, we propose some extra provisions in sec. 24(4) requiring that the Session Judge must give importance to experience in Sessions cases, merit and integrity. If such a provision is dispensed with by State Legislatures, obviously such amendments will violate Art. 14. This is so far as the posts of Public Prosecutor and 50% of posts of Addl. Public Prosecutor in the District are concerned.

Section 24(6):

Even in regard to those who are to be appointed under sec. 24(6) from the posts of Asst. Public Prosecutors who are in the Regular Cadre, they should not be appointed just on the basis of seniority or suitability unless screened by a State Level Committee. In as much the cadre is State-wide, it is desirable that a panel is prepared by a State Level Committee from among the Asst. Public Prosecutors of the State for purposes of such appointment. The State level Committee must, in our opinion, consist of

- (a) a sitting or retired Judge of the High Court, nominated by the Chief Justice of the High Court of the State,
- (b) the Law Secretary of the State (or officer of equivalent post by whatever name called),
- (c) an officer of the State Govt. not below the rank of Secretary to State Government,
- (d) the Director of Prosecution, if any.

The Committee must expressly be required to assess the merit, integrity, past record of performance etc. before empanelling the Asst. Public Prosecutors for appointment to the 50% posts of Addl. Public Prosecutors in the District.

One other important suggestion of ours, as stated earlier, is that the Public Prosecutor in the Sessions Court must always be from the Bar and there should be 50% : 50% ratio as between appointments made from

among the members of the Bar practising in the Sessions Court as submitted by the District Magistrate under sec. 24(4) and those from the panel prepared by the Committee, for manning the 50% posts of Addl. Public Prosecutor in the District for purposes of sec. 24(6). The 50% from the panel of Asst. Public Prosecutors prepared by the Committee will be eligible only for the posts of Addl. Public Prosecutor and not for the post of Public Prosecutor.

The Law Commission is, therefore, of the following opinion – in respect of the three suggestions:

- (i) that, having regard to the legislative competence of the State Legislatures and Art. 254(2) of the Constitution of India, it is not possible to prevent the State Legislatures from amending ss. 24(4) and 24(6) of the Code of Criminal Procedure, 1973 and seeking assent of the President for such amendment;
- (ii) that the procedure of filling posts of Public Prosecutors and Addl. Public Prosecutors in the Sessions Court (on contract basis for 3 years each time) under sec. 24(4) from among members of the Bar who have had experience in conducting Sessions cases is more in the interests of the prosecution system and in public interest. The law must expressly provide that the Sessions Judge must give weight to experience in conducting Sessions cases and to good character while selecting members of the Bar.
- (iii) that excluding members of the Bar who are experienced in conducting Sessions cases and exclusively appointing Asst. Public Prosecutors – who have been conducting prosecution in

Magistrates' Courts, in relation to less serious offences, to these higher posts as now provided by sec. 24(6) is not a beneficial scheme at all;

- (iv) that a combination of appointments from (a) among Asst. Public Prosecutors belonging to the cadre of prosecuting officers, with a long period of service and (b) of direct recruitment on contract basis from the Bar from among those who have conducted Sessions cases, is necessary and will be a fair and efficient prosecution system. The ratio between the two sources to the posts of Addl. Public Prosecutor must be 50% to 50%;
- (v) that the post of Public Prosecutor in the District must always be manned by a member of the Bar who has been empanelled by the District Magistrate in consultation with the Sessions Judge;
- (vi) that it must be ensured that those Asst. Public Prosecutors empanelled for appointment to the posts of Addl. Public Prosecutors are properly screened by way of an interview by a State level Committee consisting of a retired High Court Judge or a sitting High Court Judge, nominated by the Chief Justice of the High Court of the State and Secretary to State Government, the Law Secretary and the Director of Prosecution;
- (vii) that any amendment by the States which dispenses with the safeguards of interview for appointments from the cadre or which dispenses with consultation with the Sessions Judge in the matter of selecting efficient persons from the Bar on contract basis will amount to arbitrary exercise of power, and will be violative of Art. 14 of the Constitution of India. The fact that State Legislatures can amend sec. 24(4) does not mean that they can introduce a

procedure for making appointments arbitrarily from the Bar without a proper selection process consisting of adequate checks against arbitrariness. The Public Prosecutor being a person with huge responsibilities in the criminal justice system, and he being part of the judicial process, only if the methods of recruitment suggested above are followed, it can ensure an effective system, otherwise it will be violative of Art. 14;

- (viii) that so far as appointees from the cadre are concerned, as stated above, any recruitment through the State Public Service Commission will lead to abnormal delays and the posts lying vacant for long periods. Hence, it is advisable to have a State Level Committee as suggested above.
- (ix) that so far as fixing a time limit for constituting a Cadre of Prosecuting Officers is concerned, namely, (a) the Asst. Public Prosecutors in the State and (b) the 50% posts of Addl. Public Prosecutors in each District, we propose to fix a period of six months for the States to constitute such a regular Cadre. The six months period will be counted from the date of commencement of the proposed Criminal Procedure (Amendment) Act.

Before parting, we are also of the view that appointment of Public Prosecutors and Addl. Public Prosecutors in the High Court under sec. 24(1) by dispensing with consultation with the High Court is clearly violative of Art. 14 as it not only permits arbitrary appointments but excludes the consultation with the High Court in the matter of appointment of these officers which is crucial.

Just as the provision for consultation of the Chief Justice of a High Court in the matter of appointment of Judges of the High Court is mandatory, on the same analogy, sec. 24(1) is of highest importance, though it is not a constitutional provision. Absence of consultation process with the High Court will, in our opinion, clearly violate Art. 14 of the Constitution.

We are also enclosing a Draft Bill for substitution of sec. 24(4) to (6) by Parliament.

We recommend accordingly.

(Justice M. Jagannadha Rao)
Chairman

(R.L. Meena)
Vice-Chairman

(Dr. D.P. Sharma)
Member-Secretary

Dated: 31st July, 2006

ANNEXURE

Draft Amendment to subsections (4) to (6) of sec. 24 of Code of Criminal Procedure, 1973 in supersession of all amendments including amendments by the Criminal Procedure (Amendment) Act, 2005:

Subsections (4) to (6) of sec. 24 of the Code of Criminal Procedure, 1973, shall be substituted by the following:

- “(4) The District Magistrate shall, in consultation with the Sessions Judge, prepare a panel of names of persons who are, in his opinion, fit to be appointed as Public Prosecutor or Addl. Public Prosecutor
provided that the Sessions Judge shall recommend only such names from among the advocates practising in the Sessions Court or Addl. Sessions Courts, who have personally conducted substantial number of Sessions cases and who bear good character.
- (5) No person shall be appointed by the State Government as Public Prosecutor and, subject to the provisions of subsection (6), as Addl. Public Prosecutor for the District, unless his name appears in the panel of names prepared by the District Magistrate under subsection (4).
- (6) Fifty percent of the posts of Addl. Public Prosecutor in a District shall be filled out of the panel prepared under subsection (6B) from the cadre referred to in subsection (6A) and the remaining fifty percent

posts of Addl. Public Prosecutor in a District shall be filled out of the panel prepared under subsection (4).

provided that, where in the opinion of Selection Committee referred to in subsection (6B), no suitable person is available in the cadre for the appointment to the post of Addl. Public Prosecutor, the State Government may appoint any person on the post of Addl. Public Prosecutor from the panel of names prepared by the District Magistrate in subsection (4).

(6A) The State Governments shall, within six months from the date of commencement of the Code of Criminal Procedure (Amendment) Act, 2006, constitute a cadre of Regular Prosecuting Officers consisting of fifty percent of posts of Addl. Public Prosecutor in each District and the total number of posts of Asst. Public Prosecutors in the State.

(6B)(1) For the purpose of selection of Asst. Public Prosecutors to be appointed to fifty percent of the posts of Addl. Public Prosecutor referred to in subsection (6), the State Government shall constitute a State Level Committee consisting of

(a) a sitting Judge or a retired Judge of the High Court of the State, nominated by the Chief Justice of the High Court of that State,

(b) an officer of the rank of Secretary to the State Government,

(c) the Secretary, Law Department of the State or the officer holding equivalent post by whatever name called, and

(d) the Director of Prosecution, if any.

- (2) The Committee shall, from time to time, prepare a panel of Asst. Public Prosecutors from the Regular Cadre of Prosecuting Officers, fit to be appointed as Addl. Public Prosecutor and for the purpose of judging their fitness, assess their merit, experience, their previous record of performance and ensure that they are persons bearing good character.”