

WP(C).23838/2021

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2025:KER:30823

"C.R."

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE THE CHIEF JUSTICE MR. NITIN JAMDAR

&

THE HONOURABLE MR.JUSTICE ZIYAD RAHMAN A.A.

WEDNESDAY, THE 9<sup>TH</sup> DAY OF APRIL 2025 / 19TH CHAITHRA, 1947

WP (C) NO. 23838 OF 2021

PETITIONER:

SUO MOTU WRIT PETITION INITIATED BY THE HIGH COURT.

RESPONDENTS:

- 1 STATE OF KERALA,  
REPRESENTED BY THE CHIEF SECRETARY,  
GOVERNMENT SECRETARIAT,  
THIRUVANANTHAPURAM - 695 001.
- 2 THE SECRETARY TO GOVERNMENT,  
HOME DEPARTMENT, GOVERNMENT SECRETARIAT,  
THIRUVANANTHAPURAM - 695 001.
- 3 THE SECRETARY TO GOVERNMENT,  
SOCIAL JUSTICE DEPARTMENT, GOVERNMENT  
SECRETARIAT, THIRUVANANTHAPURAM - 695 001.
- 4 THE REGISTRAR GENERAL,  
HIGH COURT OF KERALA, ERNAKULAM - 682 031.
- 5 THE REGISTRAR (DISTRICT JUDICIARY)  
HIGH COURT OF KERALA, ERNAKULAM - 682 031.

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6 THE SECRETARY, LAW DEPARTMENT,  
GOVERNMENT SECRETARIAT,  
THIRUVANANTHAPURAM - 695 001.  
ADDL. R6 IS SUO MOTU IMPEADED AS PER ORDER DATED  
27/02/2025 IN WP(C) 23838/2021.

R1 TO R3 & R6 BY ADV. SRI. GRASHIOUS KURIAKOSE,  
DIRECTOR GENERAL OF PROSECUTION  
BY ADV. SRI. P.NARAYANAN, ADDL.PUBLIC PROSECUTOR  
R4 & R5 BY SENIOR ADV. SRI. B.G.HARINDRANATH  
ADV. SRI. AMITH KRISHNAN H.  
BY SENIOR ADV. SRI. P. DEEPAK, AMICUS CURIAE

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR  
ADMISSION ON 09.04.2025, THE COURT ON THE SAME DAY  
DELIVERED THE FOLLOWING:

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“C.R.”

**JUDGMENT**

Dated this the 9<sup>th</sup> day of April, 2025.

**Nitin Jamdar, C.J.**

Public Prosecutors play an important role in the administration of justice. The importance of careful selection of Public Prosecutors is emphasised by the Hon’ble Supreme Court. The Public Prosecutors are required to perform statutory duties independently, having regard to various provisions contained in the Code of Criminal Procedure, 1973. The need to improve the quality of prosecution, in order to increase the certainty of conviction and punishment for most serious offenders and repeaters, cannot be stressed enough. The Hon’ble Supreme Court has underscored that the maintenance of law and order in the society and, to some extent, the maintenance of the Rule of law, which is the basic fibre for upholding the Rule of democracy, lies in the hands of the Public Prosecutors.

2. Despite the emphasis laid by the Hon'ble Supreme Court on the importance of Public Prosecutors as above and the need to improve their quality almost two decades ago, the Division Bench of this Court found that criminal trials in the State were being seriously affected by the lack of competent Prosecutors, who at times failed to follow even the basic procedure. Having noticed several such lapses, the Division

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Bench, by an order dated 23 September 2021, directed that a *suo motu* Writ Petition be registered to initiate measures for improving the quality of prosecution in the State.

3. This *suo motu* Petition concerns improving the procedure for appointing Public Prosecutors under Section 24(3) of the Code of Criminal Procedure, 1973 (Cr.P.C.) in the State and ensuring their timely appointment. There are several types of Government advocates and in this Petition reference to the 'Public Prosecutors' is to those mentioned in Section 24(3) of the Cr.P.C., now Section 18 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS).

4. We have heard Mr. Grashious Kuriakose, the learned Additional Director General of Prosecution, and Mr. B.G. Harindranath, the learned Senior Advocate representing the High Court Administration. We requested the learned Senior Advocate, Mr. P. Deepak, to assist the Court as the learned *Amicus Curiae*.

5. The learned counsel informed that the current practice being followed in the State of Kerala before making every appointment of Public Prosecutors in the districts is as per Rule 8 of the Kerala Government Law Officers (Appointment and Conditions of Service) and Conduct of Cases Rules, 1978 (Rules of 1978). Rule 8 contemplates that the Government Law Officer at a District Court Centre, Additional District Court Centre or Sub Court Centre shall be

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appointed by the Government from a panel of names of Advocates furnished by the District Collector concerned. Sub-rule (2) of Rule 8 states that for preparing the panel, the District Collector shall follow the procedure that a list of advocates from the roll of advocates of the Bar Council of Kerala having at least seven years of practice in the Bar and who having regard to their qualification, experience, integrity, reliability, reputation and character and antecedents, are, in the opinion of the District Collector, fit to be appointed as a Government Law Officer shall be prepared and sent to the concerned District and Sessions Judge for consultation. The District and Sessions Judge shall return the list with his remarks within ten clear days from the date of receipt of the same by him. In preparing the list, it shall not be necessary to advertise the vacancies or invite applications for the appointment. It is also stated in clause (b) of sub-rule (2) that after the expiry of the time limit prescribed in clause (a) for the return of the list from the District and Sessions Judge, the District Collector shall prepare the panel of advocates based on the list forwarded by him to the District and Sessions Judge under the said clause. It is also stated that there is no direct interaction between the Sessions Judge and the District Magistrate concerned in the consultation process and there were instances where Advocates against whom adverse remarks were made by the Sessions Judges were ignored.

6. By order dated 13 February 2025, we directed that a joint meeting



be held between the stakeholders to ascertain how the concerns regarding the appointment of Public Prosecutors could be addressed. The meeting was held on 1 March 2025 by the Registrar General of the High Court with the Additional Chief Secretary, Home, Government of Kerala. The Director General of Prosecution, the Additional Director General of Prosecution, the Additional Law Secretary, the Public Prosecutor, and the learned *Amicus Curiae* also participated in the meeting. The Registrar General submitted a report on the proceedings of the meeting. The need to make the consultation process more effective was emphasised in the meeting. The Secretary relied upon the Rules of 1978 and stated that necessary amendments could be made to the Rules so as to make the consultation process more effective and called upon the High Court to prepare a proposal in this regard.

7. Thus, the State of Kerala relied on the methodology of selection under the Rules of 1978 and proceeded on the basis that the appointment of Public Prosecutors is governed by the Rules of 1978. During the proceedings, it emerged from the arguments that the parties were proceeding under the misconception that the appointment of Public Prosecutors is only governed by Rule 8 of the Rules of 1978. As we will expound later, the 'Public Prosecutors' under sub-sections (1) and (3) of Section 24 of the Cr.P.C (Sec.18 of BNSS) are not covered under Rule 8 of the Rules of 1978, and Rules of 1978 cannot be made applicable to the appointment of these Public Prosecutors.

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8. Kerala Public Services Act, 1968 (Act 19 of 1968) is an Act to regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the State of Kerala. Its preamble states that it was found necessary that the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the State of Kerala should be regulated by an Act of the Kerala State. Section 2 deals with the regulation of recruitment and conditions of service and enables the Government to make rules to regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the State of Kerala. Article 309 of the Constitution of India also empowers the appropriate Legislatures to regulate the recruitment and the conditions of service of persons appointed to public services. Section 3 states that all rules made under the proviso to Article 309 regulating the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the State of Kerala and in force immediately before 17 September 1968 shall be deemed to have been made under this Act and shall continue to be in force unless and until they are superseded by rules made under this Act. This public post in public services contemplated under Act 19 of 1968 is the one in the services of the State Government.

9. The Rules of 1978, with which we are concerned, are framed by



the State of Kerala under Act 19 of 1968 to govern the appointment and conditions of service of Government Law Officers. Quite clearly, therefore, the Rules of 1978 will apply to the Government law officers who hold a public post in public service of the State. Thus, the question is whether the Rules of 1978, which pertain to the appointment of Government Law Officers, having been framed in relation to "public post" under Act 19 of 1968, are applicable to these Public Prosecutors to be appointed under sub-section (3) of Section 24 of the Cr.P.C.

10. On the question of whether Public Prosecutors hold public posts / Civil posts in public services, the Hon'ble Supreme Court, in the case of *Johri Mal*, has clarified this position by observing as follows:

*"37. The Legal Remembrancer's Manual clearly states that appointment of a Public Prosecutor or a District Counsel would be professional in nature. It is beyond any cavil and rightly conceded at the Bar that the holder of an office of the Public Prosecutor does not hold a civil post. By holding a post of District Counsel or the Public Prosecutor, neither a status is conferred on the incumbent.*

*38. A distinction is to be borne in mind between appointment of a Public Prosecutor or Additional Public Prosecutor, on the one hand, and Assistant Public Prosecutor, on the other. So far as Assistant Public Prosecutors are concerned, they are employees of the State. They hold Civil posts. They are answerable for their conduct to higher statutory authority. Their appointment is governed by the service rules framed by the respective State*



*Government. (See Samarendra Das, Advocate v. State of West Bengal and Ors. [JT 2004 (2) SC 413]).*

*39. The appointment of Public Prosecutors, on the other hand, is governed by the Code of Criminal Procedure and/ or the executive instructions framed by the State governing the terms of their appointment. Proviso appended to Article 309 of the Constitution of India is not applicable in their case. Their appointment is a tenure appointment. Public Prosecutors, furthermore, retain the character of legal practitioners for all intent and purport. They, of course, discharge public functions and certain statutory powers are also conferred upon them. Their duties and functions are onerous but the same would not mean that their conditions of appointment are governed by any statute or statutory rule.”*

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(emphasis supplied)

Therefore, it is clear that Public Prosecutors are appointed on tenure and retain the character of legal practitioners. The Supreme Court has emphasised that the appointment of Public Procurators is governed by the provisions of the Cr.P.C.

11. The Rules of 1978 are framed by deriving power from Act 19 of 1968, which applies only to public posts. Even assuming that the Rules of 1978 are traceable to Article 309 of the Constitution of India, that would pertain only to public service. Once it is established that Public Prosecutors do not hold public posts, the Rules of 1978, insofar as they



relate to Public Prosecutors, would have no application to them.

12. It has to be noted that the Rules of 1978 were published in the Kerala Gazette on 20 June 1978, prior to the amendment in Section 24 of the Cr.P.C. brought about by the Cr.P.C. (Amendment) Act, 1978, with effect from 18 December 1978. Section 24 of the Cr.P.C., as amended, reads as follows:

*“24. Public Prosecutors.*

*(1) For every High Court, the Central Government or the State Government shall, after consultation with the High Court, appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors, for conducting in such Court, any prosecution, appeal or other proceeding on behalf of the Central Government or State Government, as the case may be.*

*(2) The Central Government may appoint one or more Public Prosecutors, for the purpose of conducting any case or class of cases in any district or local area.*

*(3) For every district, the State Government shall appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors for the district:*

*PROVIDED that the Public Prosecutor or Additional Public Prosecutor appointed for one district may be appointed also to be a Public Prosecutor or an Additional Public Prosecutor, as the case may be, for another district.*



*(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 Prosecutors or Additional Public Prosecutors for the district.*

*(5) No person shall be appointed by the State Government as the Public Prosecutor or Additional Public Prosecutor for the district unless his name appears in the panel of names prepared by the District Magistrate under sub-section (4).*

*(6) Notwithstanding anything contained in sub-section (5), where, in a State there exists a regular Cadre of Prosecuting Officers, the State Government shall appoint a Public Prosecutor or an Additional Public Prosecutor only from among the persons constituting such Cadre:*

*PROVIDED that where, in the opinion of the State Government, no suitable person is available in such Cadre for such appointment that Government may appoint a person as Public Prosecutor or Additional Public Prosecutor, as the case may be, from the panel of names prepared by the District Magistrate under sub-section (4).*

*[Explanation.- For the purposes of this sub-section,-*

*(a) “regular Cadre of Prosecuting Officers” means a Cadre of Prosecuting Officers which includes therein the post of a Public Prosecutor, by whatever name called, and which provides for promotion of Assistant Public Prosecutors, by whatever name called, to that post;*



*(b) “Prosecuting Officer” means a person, by whatever name called, appointed to perform the functions of a Public Prosecutor, an Additional Public Prosecutor or an Assistant Public Prosecutor under this Code.*

*(7) A person shall be eligible to be appointed as a Public Prosecutor or an Additional Public Prosecutor under sub-section (1) or sub-section (2) or sub-section (3) or sub-section (6), only if he has been in practice as an advocate for not less than seven years.*

*(8) The Central Government or the State Government may appoint, for the purposes of any case or class of cases, a person who has been in practice as an advocate for not less than ten years as a Special Public Prosecutor:*

*PROVIDED that the Court may permit the victim to engage an advocate of his choice to assist the prosecution under this sub-section.*

*(9) For the purposes of sub-section (7) and sub-section (8), the period during which a person has been in practice as a pleader, or has rendered (whether before or after the commencement of this Code) service as a Public Prosecutor or as an Additional Public Prosecutor or Assistant Public Prosecutor or other Prosecuting Officer, by whatever name called, shall be deemed to be the period during which such person has been in practice as an advocate.”*

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Thereafter, certain State Governments, such as Bihar, Haryana, Karnataka, Madhya Pradesh, Maharashtra, Rajasthan, Tamil Nadu, Uttar Pradesh, and West Bengal, have carried out State amendments to Section 24 of the Cr.P.C. There was no State amendment to Section 24 of the Cr.P.C. in the State of Kerala.

13. Now, a corresponding provision exists under the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS), namely Section 18, which reads as follows:

*“18. Public Prosecutors*

*(1) For every High Court, the Central Government or the State Government shall, after consultation with the High Court, appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors, for conducting in such Court, any prosecution, appeal or other proceeding on behalf of the Central Government or the State Government, as the case may be:*

*PROVIDED that for National Capital Territory of Delhi, the Central Government shall, after consultation with the High Court of Delhi, appoint the Public Prosecutor or Additional Public Prosecutors for the purposes of this sub-section.*

*(2) The Central Government may appoint one or more Public Prosecutors for the purpose of conducting any case in any district or local area.*

*(3) For every district, the State Government*



*shall appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors for the district:*

*PROVIDED that the Public Prosecutor or Additional Public Prosecutor appointed for one district may be appointed also to be a Public Prosecutor or an Additional Public Prosecutor, as the case may be, for another district.*

*(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 Prosecutors or Additional Public Prosecutors for the district.*

*(5) No person shall be appointed by the State Government as the Public Prosecutor or Additional Public Prosecutor for the district unless his name appears in the panel of names prepared by the District Magistrate under sub-section (4).*

*(6) Notwithstanding anything in sub-section (5), where in a State there exists a regular Cadre of Prosecuting Officers, the State Government shall appoint a Public Prosecutor or an Additional Public Prosecutor only from among the persons constituting such Cadre:*

*PROVIDED that where, in the opinion of the State Government, no suitable person is available in such Cadre for such appointment, that Government may appoint a person as Public Prosecutor or Additional Public Prosecutor, as the case may be, from the panel of names prepared by the District Magistrate under sub-section (4).*



*Explanation: For the purposes of this sub-section, -*

*(a) “regular Cadre of Prosecuting Officers” means a Cadre of Prosecuting Officers which includes therein the post of Public Prosecutor, by whatever name called, and which provides for promotion of Assistant Public Prosecutors, by whatever name called, to that post;*

*(b) “Prosecuting Officer” means a person, by whatever name called, appointed to perform the functions of a Public Prosecutor, Special Public Prosecutor, Additional Public Prosecutor or Assistant Public Prosecutor under this Sanhita.*

*(7) A person shall be eligible to be appointed as a Public Prosecutor or an Additional Public Prosecutor under sub-section (1) or sub-section (2) or sub-section (3) or sub-section (6), only if he has been in practice as an advocate for not less than seven years.*

*(8) The Central Government or the State Government may appoint, for the purposes of any case or class of cases, a person who has been in practice as an advocate for not less than ten years as a Special Public Prosecutor:*

*PROVIDED that the Court may permit the victim to engage an advocate of his choice to assist the prosecution under this sub-section.*

*(9) For the purposes of sub-section (7) and sub-section (8), the period during which a person has been in practice as an advocate, or has rendered (whether before or after the commencement of this Sanhita) service as a Public*



*Prosecutor or as an Additional Public Prosecutor or Assistant Public Prosecutor or other Prosecuting Officer, by whatever name called, shall be deemed to be the period during which such person has been in practice as an advocate.”*

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These statutory provisions govern the appointment of Public Prosecutors.

14. The learned Senior Advocate representing the High Court Administration submitted that in the absence of a State amendment to Section 24 of the Cr.P.C. (now Sec.18 of BNSS), the procedure for appointment of Public Prosecutors is governed by Section 24 of the Cr.P.C. The learned *Amicus Curiae* also supported the argument that the Public Prosecutors do not hold public posts and will be governed only by Section 24 of the Cr.P.C. and not by the Rules of 1978. The learned Additional Director General of Prosecution did not advance any contrary position and, on the other hand, submitted that the main endeavour of the State is to appoint the best possible Public Prosecutor, in consultation with the District and Sessions Judge, as required by law.

15. Therefore, the appointment of Public Prosecutors having been governed by Section 24 of the Cr.P.C. (18 of BNSS), the procedure to be adopted while making such appointments will have to be as per Section 24 of the Cr.P.C., which itself provides guidance. Apart from the procedure stipulated under Section 24 of the Cr.P.C., the law laid



down by the Hon'ble Supreme Court emphasizing the importance of the consultative process is also binding under Article 141 of the Constitution of India.

16. In the case of *Johri Mal*, the Hon'ble Supreme Court has emphasised the aspect of effective consultation with the District Judge. Reference was made to the decision in the case of *Mundrika Prasad Singh v. State of Bihar*<sup>1</sup>, wherein the Hon'ble Supreme Court has observed that it is in the best interest of the State that it should engage competent lawyers and one of the effective methods of achieving this object is to act on the advice of the District Judge regarding the choice of Government Pleaders and Public Prosecutors. On the aspect of the consultation, the Hon'ble Supreme Court, in the case of *Johri Mal*, observed as follows:

*“84. Keeping in mind the aforementioned legal principles the question which arises for consideration in these appeals is, the nature and extent of consultation, a Collector is required to make with the District Judge.*

*85. The age old tradition on the part of the State in appointing the District Government Counsel on the basis of the recommendations of the District collector in consultation with the District Judge is based on certain principles. Whereas the District Judge is supposed to know the merit, competence and capability of the concerned lawyers for discharging their duties; the District Magistrate is supposed to know their conduct*

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1 (1979) 4 SCC 701



outside the court vis – a – vis the victims of offence, public officers, witnesses etc. The District Magistrate is also supposed to know about the conduct of the Government counsel as also their integrity.

86. We are also pained to see that the State of Uttar Pradesh alone had amended sub-section (1) of Section 24 and deleted sub-sections (3), (4) and (5) of Section 24 of the Code of Criminal Procedure. Evidently, the said legislative step had been taken to overcome the decision of this Court in *Kumari Shrilekha Vidyarthi [(1991) 1 SCC 212]*. We do not see any rationale in the said action. The learned counsel appearing for the State, when questioned, submitted that such a step had been taken having regard to the fact that exhaustive provisions are laid down in *Legal Remembrancer Manual* which is a complete code in itself. We see no force in the said submission as a law cannot be substituted by executive instructions which may be subjected to administrative vagaries. The executive instructions can be amended, altered or withdrawn at the whims and caprice of the executive for the party in power. Executive instructions, it is beyond any cavil, do not carry the same status as of a statute.

87. The State should bear in mind the dicta of this Court in *Mundrika Prasad Singh v. State of Bihar [(1979) 4 SCC 701]* as regard the necessity to consult the District Judge. While making appointments of District Government Counsel, therefore, the State should give primacy to the opinion of the District Judge. Such a course of action would demonstrate fairness and reasonableness of action and, furthermore, to a large extent the action of the State would not be dubbed as politically motivated or otherwise arbitrary.



*As noticed hereinbefore, there also does not exist any rationale behind deletion of the provision relating to consultation with the High Court in the matter of appointment of the Public prosecutors in the High Court. The said provision being a salutary one, it is expected that the State of U.P. either would suitably amend the same or despite deletion shall consult the High Court with a view to ensure fairness in action.”*

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*(emphasis supplied)*

17. In the case of *State of Punjab v. Brijeshwar Singh Chahal and Another*<sup>2</sup>, the Supreme Court had an occasion to consider whether the appointment of law officers by the State Government could be questioned or whether the process by which such appointments are made could be assailed on the grounds of arbitrariness and violation of Article 14 of the Constitution of India. In this context, the Hon'ble Supreme Court has referred to the decision in the case of *Johri Mal*. The observations of the Supreme Court in the case of *Brijeshwar Singh Chahal* are as follows:

*“38. While dealing with the nature of office the Government counsel hold, this Court declared that the State Government Counsel holds an office of great importance. They are not only officers of the Court but also the representatives of the State and that Courts repose a great deal of confidence in them. They are supposed to render independent, fearless and non – partisan views before the Court irrespective of the result of litigation*

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2 (2016) 6 SCC 1



*which may ensue. So also the public prosecutors have great responsibility. They are required to perform statutory duties independently having regard to various provisions contained in the Code of Criminal Procedure. The State Government counsel represents the State and thereby the interest of the general public before a Court of law. This requires that Government counsel have character, competence, sufficient experience as also standing at the Bar. The need for employing meritorious and competent persons to maintain the standard of the high office cannot be minimized, observed the Court, particularly, when the holders of the post have a public duty to perform. The Court also expressed anguish over the fact that in certain cases the recommendations are made by the District Magistrate having regard to the political affinity of the lawyers to the party in power and that State is not expected to rescind the appointments with the change in the Government because a new party has taken over charge of the Government. This Court also recognized the age – old tradition of appointing the District Government Counsel on the basis of the recommendations of the District Collector in consultation with the District Judge. The fact that the District Judge, who is consulted while making such appointment knows the merit, competence and capability of the lawyer concerned, was also recognized by the Court.*

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*(emphasis supplied)*

18. The Hon'ble Supreme Court referred to the reports of the Law Commission and observed as follows:

*“43. What then are the ways out of the situation which has been as a governmental fiefdom that is immune to*



*judicial review and correction? The Law Commission has, it is heartening to note, addressed a similar question at some length and made meaningful recommendations in its 197<sup>th</sup> Report. The Commission while examining issues concerning appointment of public prosecutors observed:*

*".....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 Article 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 Article 14 of the Constitution of India. The scheme must provide for appointing Public*



*Prosecutors who shall bear all the qualities mentioned in Chapter II".*

*(emphasis supplied)*

*44. Dealing with the appointment procedure of Public Prosecutors and the need to provide for proper checks as also the validity of any State amendment to Section 24, removing these checks from the scheme of Section 24, the Commission observed:*

*"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 Article 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 Section 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 Article 14. In such cases, assent of the President to the State Amendment can be justifiably refused."*

*(emphasis supplied)*



*45. The Commission unequivocally supported the need for consultation with the Sessions Judge and with the High Court, as the case may be, for appointment of the Public Prosecutors for those Courts in the following words:*

*"We may reiterate that, so far as Section 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 Section 24(4) with the Sessions Judge cannot be dispensed with, we propose some extra provisions in Section 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 Article 14. This is so far as the posts of Public Prosecutor and 50% of posts of Addl. Public Prosecutor in the District are concerned."*

*(emphasis supplied)*

*46. Consultation with the Sessions Judge for a Public Prosecutor in the District judiciary and with the High Court for one in the High Court is statutorily prescribed because of the importance of the appointment and the significance of the opinion of the Courts where the appointee has to work,*



*as to his or her capacity and professional ability. The Statute does not admit of an appointment in disregard of the requirement of consultation. The Law Commission has, therefore, rightly held the consultative process to be a check on the power of appointment which cannot be left unregulated or uncontrolled, lest a person not suited or competent enough gets appointed to the position for other reasons or considerations. Consultation, in that sense, lends reassurance as to the professional ability and suitability of the appointee. The Commission has on that premise placed a question mark on the validity of State amendment that deletes from Section 24 of the Code of Criminal Procedure Code the need for consultation with the Sessions Judge or the High Court.*

*47. Taking a cue from the provisions of Section 24, we are inclined to hold that what serves as a check on the power of the Government to appoint a Public Prosecutor can as well be a check on the appointment of the State Counsel also. That is because, while the Public Prosecutor's power under the Code of Criminal Procedure Code gives him a distinctive position, the office of a State Counsel, in matters other than criminal, are no less important. A State Counsel by whatever designation called, appears in important civil and constitutional matters, service and tax matters and every other matter where substantial stakes are involved or matters of grave and substantial importance at times touching public policy and security of State are involved. To treat such matters to be inconsequential or insignificant is to trivialise the role and position of a State Counsel at times described as additional and even Senior Additional Advocate General. What holds good for appointment of a Public Prosecutor as a check on arbitrary exercise of power must, therefore, act as a check on the State's power to appoint a State Counsel as well especially in situations where the appointment is*



*unregulated by any constitutional or statutory provision. Such a requirement is implicit in the appointing power of the State which power is in trust with the Government or the public body to be exercised only to promote public interest. The power cannot be exercised arbitrarily, whimsically or in an uncanalised manner for any such exercise will fall foul of Article 14 of the Constitution of India and resultantly Rule of law to which the country is committed.”*

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*(emphasis supplied)*

This position of law was reaffirmed by the Hon'ble Supreme Court in its recent decision in *Mahabir and Others v. State of Haryana and Others*<sup>3</sup>, wherein it was observed that time and again, the Supreme Court has held in so many of its decisions that such appointments, be it in the High Court or the district judiciary, should only take into consideration the merit of the candidate and no other consideration should weigh in such appointments. This legal position laid down by the Hon'ble Supreme Court is equally applicable to Section 18 of the BNSS.

19. Therefore, while making appointments to the post of Public Prosecutor under Section 24 of the Cr.P.C. (now Sec.18 of the BNSS), the State Government has to give primacy to the opinion of the District Judge and shall not disregard it or follow a contrary practice. The State Government can issue guidelines for internal administrative discipline regarding the appointment of Public Prosecutors, strictly in consonance

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with Section 18 of the BNSS, and such guidelines have to contain the stipulations and a methodology for ensuring that primacy is given to the opinion of the District Judge. Though the appointment of Public Prosecutors is to be made by the State Government, there is no free charter. The Cr.P.C. / BNSS not only mandates consultation with the District Judge but also requires that the consultation be effective, with due regard given to the opinion of the District Judge. Any stipulation in the internal guidelines issued by the State to the contrary would be contrary to the law laid down by the Hon'ble Supreme Court.

20. The learned Additional Director General of Prosecution submitted that the State Government would issue such internal guidelines in consonance with the mandate of Section 18 of the BNSS and the law laid by the Hon'ble Supreme Court, which is emphasised above, preserving the primacy of the opinion of the District Judge, and these guidelines would be sent to the Registrar General of this Court within three months from today for information. In case these internal guidelines issued by the State to all District Judges are found to be contrary to the above-mentioned mandate, then the Court may consider reviving this *suo motu* writ petition.

21. We now turn to the second concern affecting the dispensation of justice; the delay in appointing Public Prosecutors in criminal cases. Here, we refer to all categories of public prosecutors. The report on



record highlights the district-wise vacancies of Prosecutors in various courts. It is pointed out that, at present, there are 18 vacancies of Public Prosecutors in the State, and in 14 courts, the post of Public Prosecutor has not yet been created. Among these, two posts of Special Public Prosecutors remain vacant in the Protection of Children from Sexual Offences (PoCSO) Courts at Pathanamthitta and Alappuzha; one in Fast Track Special Court, Thrissur; one in Special Court for Trial of Scheduled Caste/Scheduled Tribe (SC/ST) cases, Ernakulam, and one in Special Courts for Banning of Unregulated Deposit Schemes (BUDS) cases in Alappuzha. The data also shows that on 38 occasions in the past five years, the post of Public Prosecutor remained vacant for more than two months before they were filled up.

22. The State Court Management Systems (SCMS) Committee of this Court has compiled district-wise data on the vacancies of Public Prosecutors and has prepared a report. The Report is placed before us which shows the position in various courts as follows:

*“Compilation of district wise pending vacancies*

<i>Sl. No.</i>	<i>District</i>	<i>APP</i>	<i>DDP</i>	<i>SPP/ GP/PP</i>
<i>1</i>	<i>Kollam</i>	<i>1</i>		<i>1</i>
<i>2</i>	<i>Pathanamthitta</i>			<i>1</i>
<i>3</i>	<i>Alappuzha</i>			<i>2</i>
<i>4</i>	<i>Ernakulam</i>	<i>2</i>		



5	<i>Thodupuzha</i>	1		
6	<i>Thrissur</i>			1
7	<i>Palakkad</i>	2		
8	<i>Manjeri</i>		1	
9	<i>Kozhikode</i>			1
10	<i>Wayanad</i>	1	1	
11	<i>Thalasserry</i>	2		
12	<i>Kasargod</i>	1		
<i>Total</i>		10	2	6

*Compilation of data with respect to Courts where prosecutor post has not been created.*

<i>Sl. No.</i>	<i>District</i>	<i>APP</i>	<i>SPP/GP/PP</i>
1	<i>Thiruvananthapuram</i>	1	
2	<i>Kollam</i>		1
3	<i>Kottayam</i>	1	
4	<i>Ernakulam</i>		1
5	<i>Palakkad</i>	2	
6	<i>Manjeri</i>	3	1
7	<i>Kozhikode</i>	1	
8	<i>Thalassery</i>	1	2
<i>Total</i>		9	5

The learned Senior Advocate for the High Court Administration pointed out that, at times, when the Government establishes new criminal courts, the post of Public Prosecutor is often not created;

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instead, charge is given to some other Prosecutor, thereby defeating the very purpose of establishing new courts. An instance is the Fast Track Special Court at Muvattupuzha, where a Prosecutor was appointed after one year of its establishment. Until then, another Prosecutor was given charge, who attended the court only once a week.

23. The delay in filling up the vacancies of Public Prosecutors in the State, and the failure to create the posts of Prosecutors in the criminal courts in time, directly affect the justice delivery system in the State. The State Government is under a duty to take measures to ensure the vacancies are filled in time. The learned Additional Director General of Prosecution submitted that the State has taken note of this position and is committed to filling up the vacancies for Public Prosecutors expeditiously. In view of this assurance given by the learned Additional Director General of Prosecution, we refrain from issuing any mandatory time-bound direction at present. However, we may be constrained to do so in future if the vacancies of Public Prosecutors are not filled in a timely manner.

24. In light of the above discussion, we issue the following directions:

24.1 It is declared that the State Government is under mandate to give primacy to the opinion of the District Judge in the consultative process contemplated under Section 18 of the Bharatiya Nagarik Suraksha Sanhita (Section 24 of the Code of Criminal Procedure) while making

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appointments to the post of Public Prosecutor under Section 18(3) of the Bharatiya Nagarik Suraksha Sanhita (Section 24(3) of the Code of Criminal Procedure).

24.2 The State Government will frame internal administrative guidelines in strict conformity with Sections 18(3) of the Bharatiya Nagarik Suraksha Sanhita and the law laid down by the Hon'ble Supreme Court enumerated above. Such guidelines will contain the stipulations and methodology to ensure that the opinion of the District Judge is given primacy. Any guideline issued by the State Government that contravenes this requirement or dilutes the primacy of the District Judge's opinion will be contrary to the law laid down by the Hon'ble Supreme Court in the aforesaid decisions.

24.3 The commitment made on behalf of the State by the learned Additional Director General of Prosecution, that the vacancies of Public Prosecutors will be filled expeditiously, is accepted. The State Government will issue necessary directions in this regard and set up a protocol to ensure that the vacancies of Public Prosecutors are filled without delay. The State will also consider sanctioning posts of Public Prosecutors simultaneously with the establishment of new Courts, so as to avoid delays.

25. If the internal guidelines issued by the State as above are found to be contrary to the above-mentioned mandate or the delay in appointing

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the Public Prosecutor persists, the Court will consider reviving this *suo motu* Writ Petition.

26. The proceedings stand closed in the above terms.

Sd/-  
**NITIN JAMDAR,**  
**CHIEF JUSTICE**

Sd/-  
**ZIYAD RAHMAN A.A.,**  
**JUDGE**

krj/-

//TRUE COPY//

P.A. TO C.J.

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APPENDIX OF WP(C) 23838/2021

**PETITIONER'S EXHIBITS:**

**EXT.P1** OFFICE NOTES AND ORDERS OF HON'BLE MR. JUSTICE  
K.VINOD CHANDRAN & HON'BLE MR. JUSTICE ZIYAD  
RAHMAN A. A DATED 23.09.2021.

**EXT.P2** OFFICE NOTES AND ORDERS OF THE HON'BLE THE  
CHIEF JUSTICE DATED 11.10.2021.

**RESPONDENTS' EXHIBITS/ANNEXURES:**

**ANNEXURE A** MINUTES OF THE STATE COURT MANAGEMENT COMMITTEE  
DATED 10.02.2025 A/W THE REPORTS SUBMITTED  
BEFORE THE COMMITTEE

**ANNEXURE B** MINUTES OF THE COMMITTEE FOR JUVENILE JUSTICE  
AND TO REGULATE AND MONITOR THE PROGRESS OF  
TRIALS UNDER THE POCSO ACT DATED 02.04.2024.