

CONSTITUTIONAL PROTECTIONS FOR CIVIL SERVANTS IN PAKISTAN

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ABSTRACT

After independence Pakistan inherited a colonial service structure, wherein the status of a civil servant was no more than a personal slave. The services of the employees were on the pleasure of the Crown. For quite a long time, no steps were taken to reform the service structure so as to bring it in conformity with the principles of basic human rights. In the beginning, the Government of India Act, 1935 was adopted as the Provisional Constitution of Pakistan. Some important terms and conditions of employees were provided and guaranteed in the act but these were not compatible with the requirements of a modern welfare state. So the Government of Pakistan with the passage of time introduced some Constitutional Provisions that guaranteed the fundamental rights of the civil servants. This research work is an effort to make the employees of government or other agencies aware of all the Constitutional Provisions that protect their basic rights.

INTRODUCTION

When the British came to India as trading merchants, they did not bother much about the administration of justice. The basic idea of the foreign rulers was to capture power and not to impart justice to the people of the country. Subsequently, when they made their hold strong enough over the Indian soil, they started thinking of setting up some courts. Three Supreme Courts were constituted at the Presidency towns of Calcutta, Madras and Bombay in 1753, 1801 and 1823 respectively. These courts were under the direct authority of Governor General (Ayub, 1987). Lord Palmerston, the then Prime Minister of England introduced a Bill for the transformation of the Government of

India from the East India Company to the British Government (Kulshreshta, 1981). In 1858, Queen Victoria issued a Proclamation and the British Government formally assumed control over the administration of India after the proclamation. (Queen's Proclamation, Constitutional Documents (Pakistan), Vol: 1, 1964: 328-31).

Under this Proclamation civil and military officials in the service of the company were retained. The proclamation promised the Indians some fundamental rights. These included freedom of religion, safeguard against discrimination on the basis of race and creed or in service, equal and impartial protection of the law. In order to administer India in accordance with the

proclamation, the British Parliament Government of India Act, 1858. It was, in effect, a Constitutional document for the Sub-continent. (Act of 1858, in Constitutional Documents (Pakistan) Vol: 1, 1964: 332-362)

Three years after the assumption of control over the Indian administration, the Government introduced a piece of legislation, called 'The East India (High Courts of Judicature) Act, 1861'. Section, 2 of the Act provided for the establishments of High Courts in Calcutta, Bombay and Madras. These courts were empowered to decide all civil and criminal cases including the cases of civil servants (Shah, 1986). In 1935, the Government of India Act, 1858 was repealed by the Act of 1935. Section-200 of the new Act, provided for the establishment of a Federal Court for India. The court was to be the interpreter and guardian of the constitution and a tribunal for determination of disputes between the constituent units of the federation. It had three-fold jurisdiction; Original, Appellate and Advisory (Government of India Act, 1935, in Constitutional Documents 1964). Soon after independence the Government of India Act, 1935, governed the services of

passed a Bill, called the Pakistan; virtually we inherited a colonial service structure where, an employee of the Government was on the pleasure of the Crown or the Governor-General. The award of salary for service or the remuneration for labour was not considered to be a right but a bounty of the Crown. This concept was completely different from the injunctions of Islam as well as from the principles of basic human rights. Even than the colonial service structure was adopted with all its merits, demerits and deep-rooted evils. For quite a long time, no steps were taken to reform the service structure so as to bring it in conformity with Islamic injunctions and the principles of Fundamental Human Rights. Therefore, the pleasure of either the Crown or the President remained intact. Prior to the promulgation of a Constitution in 1973, the services of Pakistan were regulated under Article 240 (1) of the Government of India Act, 1935. The article says, "Except as expressly provided by this Act, every person who is a member of civil service of the Crown in Pakistan, holds office during His Majesty's pleasure". In 1956, when Pakistan received its first permanent Constitution,

Article 180 of the Constitution was embodied with the same concept of His Majesty's pleasure. It was as follow: Article 180 (a) "Every person who is a connection with the affairs of the Federation, shall hold office during the pleasure of the President, (b) a person connected with the affairs, of a Province shall hold office during the pleasure of Governor" (Constitution of 1956, Art 180). Pakistan introduced its second Constitution in 1962, regarding the services; the old material was reproduced in Article 176. Clause (a) of Article 176 says, "a person who is a member of All Pakistan service, or any of the defense service of Pakistan or of a civil service of the Centre, or who holds a post connected with defense or a civil post in connection with the affairs of the

Constitutional Protections

When the scheme regarding the future constitution of India was worked out, the British Government issued a document known as the "White Paper" in March 1933. In April 1933, a committee of the British Parliament was appointed to examine and report on the Government proposals contained in the White Paper. The report was submitted in December 1934. A bill was drafted in the light of

member of defense service or of a civil service of the Federation, or of an All Pakistan Service, or holds any post connected with defense, or a civil post in Centre, shall hold office during the pleasure of the President". Clause (b) a person connected with the affairs of the Province shall hold office during the pleasure of Governor" (Constitution of 1962, Art 176). The (interim) Constitution of 1972 was a duplication of 1962 Constitution, however, the Constitution of 1973 made a clear departure from all the previous constitutions, it provided double benefits to the civil servants i.e. the protections under the clauses of fundamental rights through Article 199 and under the special laws through Service Tribunals.

the recommendations made by the Committee. In July 1935 both the Houses of British Parliament passed the bill and it received the Royal Assent in August 1935 (Bokhari, 1964). The same was titled as the "Government of India Act, 1935". Before the partition of Indian Sub-continent the Act served as a Constitutional document and the dominion of India was governed by it.

Even after partition, the Act remained in operation by the dictates of “Indian Independence Act, 1947.” As stated earlier the Government of India Act 1935 was a comprehensive legal document, which was given to India by its colonial masters. The same document with some modifications and adaptation was adopted as Provisional Constitution of Pakistan. It served the country from 1947 to 1956. The Act had 321 sections covering almost all the aspects of administrative and social sectors. Some important terms and conditions of service of employees in civil service of the State were provided for and guaranteed in the Act of 1935 (Rehman, 1996).The following constitutional protections were extended to the civil servants in Pakistan (Government of India Act, 1947, Sec-240): 1/ any person serving in the affairs of the federation appointed by the Secretary of State for India or the Secretary of State in Council, would not be dismissed by any authority subordinate to the Governor General.

2/ any such person serving in the affairs of a Province would not be dismissed from the service by any

authority subordinate to the Governor of a Province.

3/ any civil servant, not falling in the above categories, would not be dismissed from service by any authority subordinate to one by which he was appointed.

4/ Any civil servant as aforesaid would not be dismissed or reduced in rank until he was given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. However, this protection was not extended to the persons dismissed or reduced in rank on the ground of conduct leading to their conviction on a criminal charge. On 7th March 1949, the Constituent Assembly of Pakistan took the first step towards the framing of a constitution when it passed a resolution, popularly known as the “Objectives Resolution”. The resolution was moved by Liaqat Ali Khan, the then Prime Minister. It was resolved that the Constituent Assembly will frame a constitution for the sovereign independent state of Pakistan; Wherein the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed; Wherein shall be guaranteed

fundamental rights including equality of status, of opportunity and before law, social, economic and political justice and After presenting the resolution, Liaquat Ali Khan addressed the Assembly in which some important points of the resolution were further elaborated. Few important extracts from his speech are reproduced hereunder” (Mahmood, 1975). Sir, you would notice that the preamble of the resolution deals with a frank and unequivocal recognition of the fact that all authority must be subservient to God. It is quite true that this is in direct contradiction to the Machiavellian ideas regarding a polity where spiritual and ethical values should play no part in the governance of the people and, therefore, it is also perhaps a little out of fashion to remind ourselves of the fact that the State should be an instrument of beneficence and not of evil. All authority is a sacred trust, entrusted to us by God for the purpose of being exercised in the service of man, so that it does not become an agency for tyranny or selfishness. For this reason it has been made clear in the resolution that the State shall exercise its power

- i) A member of the civil service should not be dismissed or

freedom of thought, expression, belief, faith, worship and association, subject to law and public morality;

and authority through the chosen representatives of the people. You would notice, Sir, that the Objectives Resolution lays emphasis on the principles of democracy, freedom, equality, tolerance and social justice. Mr. President, it has become fashionable to guarantee certain fundamental rights but I assure you that it is not our intention to give these rights with one hand and take them away with the other. We want to build up a truly liberal Government where the greatest amount of freedom will be given to all its members. Every one will be equal before the law, we believe in the equality of status and justice”. In 1950, Prime Minister Liaquat Ali Khan submitted the interim report of the Basic Principles Committee. The report laid the foundation of the future constitution and provided some guiding principles. The first Constitution was based on the recommendations of the committee, which provided certain protections to the people in services of Pakistan. Those were the following;

- removed from service by an

- authority subordinate to that by which he was appointed;
- ii) No such person should be dismissed or removed or reduced in rank until he has been given reasonable opportunity of showing cause against the action proposed;
 - iii) The tenure and condition of the service of Government Servant should not be varied to his disadvantage during his term of office except when it becomes necessary to take action; and
 - iv) Every member of the civil service shall have the right to appeal against punishment and against altering or interpreting to his disadvantage any rules by which his conditions of service are regulated and also against the termination of his appointment otherwise than upon his reaching the age fixed for superannuation (Haq, 1983).

These recommendations were adopted by the Constituent Assembly in 1954 but the draft Constitution could not be promulgated. However these

recommendations were endorsed and adopted by the new Constituent Assembly in 1955. After nine years of struggle the 2nd Constituent Assembly of 1955, achieved the goal of framing Constitution for the sovereign independent state of Pakistan. The Constitution was prepared on the pattern of the interim constitution, as many provisions of the 1956 Constitution were copied from the Government of India Act, 1935 (Interim Constitution). The major departure from the pattern of interim constitution was the second part of a new constitution. Part II of the 1956 constitution dealt with Fundamental Rights. The text of interim Constitution i.e. the Act of 1935 did not contain a Bill of Rights, because the constitutional experts who drafted the Government of India Act 1935 were reluctant to incorporate such a Bill in the Act. The attention of the framers of 1956 constitution from the very beginning of their assignment in 1947 was engaged by the nature and content of Fundamental Rights. The Constitution of 1956 laid great emphasis on fundamental rights. Article 4 of the constitution asserted that if any existing law or custom or usage having the force of law on constitution day was inconsistent with any provision of fundamental rights, it would be void to the extent of such inconsistency and similarly no authority in Pakistan whether the Federal Government or Federal Legislature, Provincial Government or Legislature or

any local authority, was competent to make any law, regulation or any order which might be repugnant to any of the provisions of the fundamental rights and if any such law, regulation or order was made, it would to the extent of repugnancy be void. Article 5 of the constitution provided equality before law (Constitution of 1956 Arts-4 and 5). Mr. Brohi (1958: 309) while commenting on the constitutional provisions regarding the fundamental rights, observed, "These fundamental rights operate like a double edge sword. They not only destroy those portion of existing laws, which are in conflict with these rights but they operate also to render void any State action (whether in the legislative or executive field) which after the coming into force of the Constitution has the effect of taking away or abridging any of the fundamental rights". The Constitution of 1956 provided double protection to the civil servants. In the first instance, all the provisions for the terms and conditions of service that were provided in the Government of India Act 1935, as mentioned above, were fully incorporated in the constitution (Arts Pakistan v. Golam Moinuddin Ahmed, PLD 1966 Dacca 570 (DB) and Federation of Pakistan v. Shamsul Huda, PLD 1957 Dacca 148). On October 7, 1958 Martial Law was proclaimed in the country and on 10th of October 1958 the first Order of Military regime was issued, called the Laws (Continuance in Force) Order 1 of 1958. By virtue of which all the laws were continued in

181, 182) and the 2nd protection was made available to the civil servants of Pakistan under the provisions of fundamental rights. All the disputes arising from the administrative action or related with service matters, were in the jurisdiction of the ordinary law courts. Under Art 182 (3) (b) of the 1956 Constitution a right of appeal was also provided to a civil servant against the orders punishing him, altering or interpreting to his disadvantage any rule affecting his conditions of service, or terminating his employment otherwise than upon reaching the age fixed for superannuation. These constitutional protections were not available to the civil servants who were employed on temporary basis. The Superior Courts, however, extended some of the protections to the temporary civil servants particularly the requirement for reasonable opportunity of showing cause against proposed action. (Habib Khan v. The Federation of Pakistan, PLD 1954 Sindh 199; Federation of Pakistan v. Mrs. A.V. Isaacs, PLD 1956 SC (Pak) 431;

force and so did remain the laws for civil servants on the same terms and conditions with the exception of age of superannuation, under Article 6 of the Order (Chaudhary, ND). Most of the constitutional guarantees enshrined in 1956 Constitution were incorporated in the 1962 Constitution. The fundamental rights of

individuals were recognized in Articles, 2, 4 and 6. The provisions regarding dismissal or removal from service or reduction in rank were very much the same as were provided in 1956 Constitution. The new Constitution guaranteed reasonable opportunity of showing cause against the proposed action. Similarly the right of appeal was provided to a civil servant against the order punishing or formally censuring or such alteration or interpretation that has affected the terms and conditions of his service or his employment is terminated otherwise than upon reaching the age of superannuation. (Arts 177,178 of 1962 Constitution). Under Art 179, as per previous practice, the temporary employees in civil service were kept outside the umbrella of constitutional protections. But the Superior courts of Pakistan, following their own precedents, extended some of the rights to such civil servants who were employed on temporary basis. (M.G. Hassan v. Government of Pakistan, PLD, 1970 Lahore 518). The forecited provisions of the 1962 constitution regarding the services were more or less adopted and incorporated in the interim constitution of 1972 as well. However,

the authority to retire a civil servant in the public interest on the completion of 25 years of civil service which was the prerogative of President and Governors of the provinces, it was extended to the “Competent Authority”. (Art 220-222 of 1972 Interim Constitution). Before the promulgation of interim constitution in 1972, no such machinery existed in the country that could be exclusively responsible for the settlement of administrative disputes, particularly the problems of civil servants. It was Art 216 of the interim constitution of 1972, whereby the Federal Legislature was empowered to establish one or more Administrative Courts or Tribunals to exercise exclusive jurisdiction in respect of matters relating to the terms and conditions of persons in the service of Pakistan. There was also a clause in the same Article ousting the jurisdiction of all other law courts in the matters to which the jurisdiction of such Administrative Courts or Tribunals extended. In spite of the great authority given to the Federal Legislature for the creation of such administrative tribunals, no law was passed under the interim constitution regarding the creation of such courts or tribunals and hence

Article-216 was not put into effect. (1972 Constitution, Art 216).

Present Scenario

Since the day of independence till the promulgation of interim constitution in 1972, certain important terms and conditions of service of employees in the civil service of the State were provided and guaranteed in the Government of India Act, 1935 and in successive Constitutional instruments. The civil servants took full advantage of these rights and frequently moved the ordinary law courts especially the High Courts in the country for the redressal of their grievances. After becoming the President, Mr. Z.A.Bhutto reiterated the fulfillment of his pledge, which he had made during election campaign for extensive administrative reforms to cut down the powers and privileges of the bureaucrats. For this purpose a high-powered committee was appointed in 1972, chaired by Khursheed Hassan Mir, Federal Minister without Portfolio. The members of the committee were Mr Ghulam Mustafa Jatoi, Minister for Political affairs and Communications; Mr Justice Faizullah Khan Kundi, Chairman Federal Public Service Commission and Mr Vaqar Ahmed,

Federal Secretary, Establishment Division (The Administrative Reforms Cell, Establishment Division report, March 1975: 9). The Committee submitted a report with considerable number of recommendations, but only two amongst these were related with the present study. 1/ the terms and conditions of service of the civil servants were to be brought under the legislatures' control through ordinary legislation and

2/ Administrative Tribunals were to be set up as forums where Government officials could get their grievances redressed (Khan, 2000). In the light of the above recommendations two completely new provisions were inserted in the Constitution of 1973. The first of these was Article 212, which permitted the appropriate legislature to establish administrative tribunals with exclusive jurisdiction in certain matters, explained in the said article. The second was Article 240 where by the terms and conditions of persons in the service of Pakistan were to be determined by the Act of Parliament and the Provincial Assemblies and similarly the safeguards were, also, to be provided by the Acts of forecited entities.

Prior to adoption of 1973 Constitution, the Constitutional protections regarding the terms and conditions of civil servants were provided by the Constitutional instruments, as mentioned earlier but the present Constitution made a clear departure from all the previous constitutions. Under the provision of new Constitution, terms and conditions of services of persons in the service of Pakistan were declared to be controlled by the Parliament and Provincial Assemblies.

Article 240 of 1973 Constitution deals with the service matters. It lays down as such: "Subject to the Constitution, the appointments to and the conditions of service of persons in the service of Pakistan shall be determined:

- a) In the case of the services of the Federation, posts in connection with the affairs of the Federation and All-Pakistan Services, by or under the Act of Majlis-e-Shoora (Parliament): and
- b) In the case of the services of a Province and posts in connection with the affairs of a Province, by or

under the Act of Provincial Assemblies.

The words of the said article made it quite clear that if a person is in the service of Federation, his appointment to the service and his terms and conditions of service has to be regulated by the Act of Parliament and similarly if a person is serving in connection with the affairs of a Province, his appointment to the service and the terms and conditions of his service shall be regulated by the Act of Provincial Assembly.

Justice Munir, (1996) while elaborating the forecited Article added that any terms and conditions of service which are provided in this law shall have binding force both on the Government concerned and the government servant. Any infringement of the terms and conditions of service is open to challenge before the administrative tribunals, set up under article 212 (1) (a) of the 1973, Constitution.

Alongside the Constitutional provision for enactment of separate laws for the civil servants, the Constitution of Pakistan, also, vested certain rights in the public servant as against the state and their employer. Article 4 of the 1973 Constitution, which corresponds to

Article 2 of 1962 Constitution, furnishes every citizen of Pakistan wherever he may be within Pakistan with a Constitutional guarantee that he will not be called upon to do something or refrain from doing anything unless there is a valid law in existence to that effect nor any action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law. This Article provides the guarantee to its citizens that rights shall not be invaded upon except by law.

Article 25 of the 1973 Constitution goes a step further in providing the equality before law. Justice Munir (1996: 195,403) elaborates that the fundamental principle involved in the equality of all citizens before law is that every law must have universal application for all citizens. The essence of the protection guaranteed under this Article is that State action must not be arbitrary but must be based on some valid principle.

The Constitution of 1973 provides double benefits to the civil servants and the private employees against their employer, first they enjoy the protection under Part II of the Constitution that deals with Fundamental Rights and

secondly they get relief under the special laws related to them.

Some forty years ago A. R. Cornelius (1964), Chief Justice of Pakistan had pointed out the significance of judicial review. He said “it is practically universal in all civilized countries to allow judicial review when fault is found with the administrative action”. In Pakistan, the High Courts did have the Constitutional jurisdiction or writ jurisdiction e.g. the Government of India Act, 1935 (Amended in 1954) under Article 223-A the High Courts were empowered to issue writs, in the Constitution of Islamic Republic of Pakistan, 1956, Article 170 the same pattern was adopted as was employed in the Act of 1935. In the Constitution of 1962, the framers of the Constitution conferred this extraordinary jurisdiction under its Article 98. Realizing the necessity and importance of judicial review the Government of Pakistan, once again, decorated the Constitution of 1973 with a provision, in its Article 199. Article 199 of the present Constitution provides as follow:

Art 199 (I) Subject to the constitution, a High Court may, if it is satisfied that no

other adequate remedy is provided by law;

(1) (c) on the application of any aggrieved person, make an order giving such directions to any person or authority, including any Government exercising any power or performing any function in, or in relation to, any territory within the jurisdiction of that Court as may be appropriate for the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II. Despite the fact that Article 212 clause (2) of the existing Constitution has ousted the jurisdiction of High Courts but in a case of *I. A. Sherwani and others Vs Government of Pakistan* the Supreme Court observed that a combined reading of Art 212 (2) and Section 4 of the Service Tribunal Act, 1973 will make it abundantly clear that the jurisdiction of the courts including Constitutional jurisdiction of the High Courts is excluded only in respect of the cases in which the Service Tribunal has the jurisdiction under Section 4 (1). It must, therefore, follow that if the Service Tribunal does not have jurisdiction to adjudicate upon a particular type of grievance, the jurisdiction of High Court remains intact (*I.A Sherwani v.*

Government of Pakistan, SCMR 1991: 1041).

In another case the High Court of Lahore held that it is a wrong notion to consider that bar of jurisdiction under article 212 (2) is absolute and jurisdiction of all courts including High Courts is totally ousted (*Muhammad Azhar v. General Manager (operation) Power WAPDA, PLD 1990 Lahore, 352*). Lahore High Court, while commenting upon the jurisdiction of High Court, in cases of civil servants, maintained that “the High Court would come to the aid of victims of administrative tyranny, to scrutinize the matter and in a deserving case was prone to give relief to the oppressed and victimized person” (*Muhammad Afzal v. Secretary Education Government of Punjab, PLC 1992 CS 117*).

CONCLUSION

Pakistan has a sizeable number of civil servants, not because the government is the biggest provider of jobs to its people but, in fact without having a good size of civil servants the dream of a Welfare State could not be realized, the dream that the founder of Pakistan Quaid-e-Azam Muhammad Ali Jinnah saw and shared it with the people in his speech of 1947 to the first Constituent Assembly

and the same was repeated by Liaqat Ali Khan while presenting the “Objectives Resolution” in the Constituent Assembly.

Civil services play a crucial role in the administration of a country; particularly in a state like Pakistan it has to play a more important role because it is the duty of civil servants to execute the policies and the programmes of government. Civil Servants are, therefore, expected to be effective, independent, dynamic and committed but it is unfortunate that the image that was portrayed in the minds of general masses has gone down. Today the

general impression is that civil servants have become, political, usable and pliable. Unfortunately this impression is growing due to the insecure position of civil servants. In fact, they are not insecure, but their unawareness from law and Constitution has made them so.

The Constitution of 1973 provides double benefits to the civil servants and the private employees against their employer, first they enjoy the protection under Part II of the Constitution that deals with Fundamental Rights and secondly they get relief under the special laws related to them.

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