POSITION OF CIVIL SERVANTS IN INDIA AND CONSTITUTIONAL SAFEGUARDS APPLICABLE TO THEM

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INTRODUCTION

With the independence of our country, the responsibilities of the services have become onerous. They may make the efficiency of the machinery of administration, machinery so vital for the peace and progress of the country. A country without an efficient civil service cannot progress in spite of the earnestness of the people at the helm of affairs in the country. Whatever democratic institutions exist, experience has shown that it is essential to protect the public services as far as possible from political or personal influence.[1]

Articles 309 to 323 of the Constitution make elaborate provisions for the Central and State services. The civil servant is the indispensible to the governance of the country in the modern administrative age. Ministers frame policies and legislatures enact laws, but the task of efficiently and effectively implementing these policies and laws falls on the civil servants. The bureaucracy thus helps the political executive in the governance of the country. The Constitution, therefore, seeks to inculcate in the civil servant a sense of security and fairplay so that he may work and function efficiently and give his best to the country. Nevertheless, the overriding power of the government to dismiss or demote a servant has been kept intact, even though safeguards have been provided subject to which only such a power can be exercised.

The service jurisprudence in India is rather complex, intertwined as it is with legislation, rules, directions, practices, judicial decisions and with principles of Administrative Law, Constitutional Law, Fundamental Rights and Natural Justice. The role of the Courts in this area is crucial as they seek to draw a balance between the twin needs of the civil service. Viz., (1) the need to maintain discipline in the ranks of the civil servants; and (2) the need to ensure that the disciplinary authorities exercise their powers properly and fairly.

RECRUITMENT AND REGULATION OF CONDITIONS OF SERVICES:

[1] Dr. Pandey J. N.; The Constitutional Law of India; 45th Edition; Central Law Agency

Article 309 of the Indian Constitution: Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State:

Provided that it shall be competent for the president or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a state or such person as he may direct in the case of services and posts in connection with the affairs of the state, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act.

Article 309 empowers Parliament and the State Legislature to regulate the recruitment and the conditions of service of the persons appointed to public services and posts under the Union and the States, respectively. Until provision in that behalf is made by an appropriate legislature under Article 309, the President and the Governors may make rules for regulating the recruitment and conditions of service of persons appointed to such services and posts. The Constitution itself provides for the creation of the Public Service Commission for the Union and the States to assist in the recruitment of the Public services.

The mode of recruitment and the category from which ithe recruitment to a service should be made are all matters which are exclusively within the domain of the Executive. These are the

matters of policy and the Courts cannot sit in judgment over the wisdom of the executive in these matters.[2]

The opening words of Article 309, *"Subject to provisions of the Constitution"*, however, make it clear that the law-making power of Legislature and the rule making power of the Executive must not contravene any provision of the Constitution such as, Articles 301,311 and 320. Such laws and rules are also subject to other provisions of the Constitution contained in Article 14, 15, 16, 19, 98, 146, 187, 229, 234 (1).

The rule-making power is characterized as 'legislative' and not 'executive' power as it is a power which the legislature is competent to exercise but has not in fact exercised.[3]

Rules made by the Government under this power are regarded as legislative in character and so these rules can even be made to take effect retrospectively,[4] but the Supreme Court has said thet the President/Governor cannot make such retrospective rules under Art. 309 as contravene Arts. 14, 16 or 311 and 'affect vested right of an employee"[5]

In *T.R. Kapur v. State of Haryana*,[6] the Supreme Court has ruled that "the benefits acquired under the existing rule cannot be taken away by an amendment with retrospective effect, that is to say, there is no power to make such a rule under the proviso to Art. 309 which affects or impairs vested rights." Upholding the power to frame rules retrospectively, the Court has cumulatively held in *B.S Yadav v. State of Haryana*,[7] that the retrospective operation of the rule

[2] State of A.P. v. Sadanandan, AIR 1989 SC 2060.
[3] B.S Yadav v. State of Haryana, AIR 1981 SC 561: 1980 Supp SCC 524.
[4] B.S. Vadera v. Union Of India, AIR 1969 SC 118 : (1968) 3 SCR 575.
[5] R.N. Nanjundappa v. T. Thimmaiah, AIR 1972 SC 1767: (1972) 1 SCC 409
[6] AIR 1987 SC 415 : Supp(1) SCC 44
[7] Supra 3

will be struck down if there exist no reasonable nexus between the concerned rule and its retrospectivity."

The power conferred by Article 309 is exercisable subject to the provisions of Arts. 233, 234 and 235. Accordingly the Supreme Court has ruled in *State of Bihar v. Bal Mukund Sah* [8] that the Bihar Reservation of vacancies in Posts and Services (for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1991, in ultra vires the Constitution insofar as the Act seeks to reserve 50% of the posts in subordinate judiciary for these sections. The Act is inconsistent with Arts. 233 and 234. The State Legislature cannot lay down a statutory scheme of reservation in subordinate judiciary without consulting the High Court.

On the question of inter-relationship between Articles 235 and 309, the Supreme Court has observed in Registrar (Admin.), High Court of Orissa, Cuttack v. Sisir Kanta Satapathy,[9]

"… the mere fact that Art. 309 gives power to the executive and the legislature to prescribe the service conditions of the judiciary does not mean that the judiciary should have no say in the matter. It would be against the spirit of the Constitution to deny any role to the judiciary in that behalf, for theoretically it would not be impossible for the executive or the legislature to turn and twist against one of the seminal mandates of the constitution, namely, to maintain the independence of the judiciary."

Constitutionality of Service Rules:

[8] AIR 2000 SC 1296 : (2000) 4 SCC 640.
[9] AIR 1999 SC 3265 : (1999) 7 SCC 725.

1. It is now settled that Acticle 14 is applicable to employment under the state so as to invalidate discriminatory rules or orders relating to employment, from the stage on initial appointment to its termination. A rule or order will be discriminatory if the classification made by it is not reasonable.
2. But Art.14 can be evoked only in the case of actual discrimination or distinguished from an abstract and theoretical inequality.
3. Where the rules framed under Art.309 of the constitution, are for the general good but cause hardship to an individual the same cannot be a ground for striking down the rules. Such rules are valid and do not suffer from any vice of unreasonableness so as to be violative of Art.14 of the constitution.[10]

It is thus settled law that the power under Article 309 can be exercised in relation to subordinate judiciary keeping "in view the opinion of the High Court of the concerned state and the same cannot be whisked away". The framers of the Constitution have separately dealt with the judicial services of the State and have made exclusive provisions[Arts. 233 to 237] for the purpose. These provisions stand on their own and quite independently of the general provisions dealing with State Services, viz, Arts. 308 to 323. Thus, Art. 309, which, on its express terms is made subject to other provisions of the Constitution gets circumscribed "to the extent to which from its general field of operation is carved out a separate and exclusive field for operation" by Arts 233 to 239 dealing with subordinate judiciary. In laying down this proposition, the supreme Court is guided by the premise that judicial independence is very essence and basic structure of the Constitution.

[10] D.D. Basu; Shorter Constitution of India;14th Edition; LexisNexis Butterworth Wadhwa Nagpur; p. 1860

Government Servant (no right to strike): In a landmark judgement in *T.R. Rangarajan v. Govt. of Tamil Nadu,*[11] a two judge bench of the Supreme Court has held that Government servant has no right to go on strike, neither moral nor statutory. In the year 2002 the Government of Tamil Nadu took an unprecedented action and terminated the services of 2 lakh employees under the Tamil Nadu Essential Services Maintenance Act, 2002 and the Tamil Nadu Ordinance, 2003. The Government employees had gone on strike for their demands. The Government employees had challenged the validity of the Tamil Nadu Act and the Ordinance. The court said that "Government employees cannot hold society to ransom by going on strike". The bench said that if the employees felt aggrieved by any government action, they should seek redressal from the statutory machinery provided under different statutory provisions for redressal of their grievances. The court said strike as a weapon is mostly misused which results in chaos and total maladministration. "Strike affects the society as a whole and particularly when two lakh employees go on strike *en masse* the entire administration comes to a grinding halt", the Court said. The court also agreed with the contention of the state Government that 90 per cent of the revenue raised through direct tax was spent on the 12 lakh Government employees in State. Thus in a society where there is a large scale unemployment and a number of qualified persons are eagerly waiting for employment "strike cannot be justified on any equitable ground".

The Court also said that though the trade unions have a guaranteed right for collective bargaining on behalf of employees, they have no right to strike. The Judges made it clear that "no political party or organization can claim a right to paralyze economic and industrial activities of a State or the nation or cause inconvenience to the citizens."

[11] AIR 2003 SC 3032

The court agreed with the suggestion of the Government counsel that the Government was agreeable to withdraw the dismissal orders against the large number of employees except 6072 whose cases would be resolved by a panel of three retired Judges. The court hoped that reinstated employees would "take care in future in maintaining discipline."[12]

DOCTRINE OF PLEASURE

In Britain, traditionally, a servant of the Crown holds office during the pleasure of the Crown. This is the common-law doctrine. The tenure of office of a civil servant, except where it is otherwise provided by a statute, can be terminated at any time at will without assigning any cause, without notice. The civil servant has no right at common-law to take recourse to the Courts, or claim any damages for wrongful dismissal. He cannot file a case for arrears of his salary. The Crown is not bound even by any special contract between it and a civil servant, for the theory is that the Crown could not fetter its future executive action by entering into a contract in matters concerning the welfare of the country.

The justification for the rule is that the Crown should not be bound to continue in public service any person whose conduct is not satisfactory.[13] The doctrine is based on public policy, the operation of which can be modified by an act of parliament. In practice, however, things are different as many inroads have been made now into the traditional system by legislation relating to employment, social security and labour relations.

[12] Dr. Pandey J. N.; The Constitutional Law of India; 45th Edition; Central Law Agency
[13] Shenton v. Smith (1895) AC 229

A similar rule is embodied in Article 310(1) which lays down that the defence personnel and civil servants of union, and the members of an All-India Service, hold office during the 'pleasure of the President'. Similarly, a civil servant in a state holds office 'during the pleasure of the Governor'.

This is the general rule which operates "except as expressly provided by the constitution". This means that the "doctrine of pleasure" is subject to general constitutional limitations. Therefore, when there is a specific provision in the Constitution giving to servant tenure different from that provided in Article 310. Then that servant would be excluded from the operation of the doctrine of pleasure. The supreme Court Judges [Art.124] , Auditor- General [Art.148], High Court Judges [Art.217,218] a member of a Public Service Commission [Art.,317 and the Chief Election Commissioner have been expressly excluded by the Constitution from the rule of pleasure.

Implications of the Doctrine of Pleasure

The Supreme Court has recently justified the pleasure doctrine on the basis of 'public policy' , 'public interest' and 'public good' insofar as inefficient, dishonest or corrupt persons, or those who have become a security risk, should not continue in service.

Under Article 310, the government has power to punish any of its servants for misconduct committed not only in the course of official duties but even for that commintted by him in private life. The government has a right to expect that each of its servants will observe certain standards of decency and morality in his private life. For example, government has power to demand that no servant shall remarry during the life-time of his first wife, or that he shall not drink at social functions, or that he shall not lend or borrow or acquire and dispose of proverty. If the government were not able to do so, there would be a catastrophic fall in the moral prestige

of the administration. Thus, disciplinary action can be taken against a police constable for his behaving very rudely and improperly with a member of the public in his private life.

A rule emanating from the doctrine of pleasure in Britain is that no servant of the Crown can maintain an action against the Crown for any arrears of salary. The assumption underlying this rule is that the only claim of the civil servants is on the bounty of the Crown and not for a contractual debt.

The supreme Court in India refused to follow the abovementioned rule in the *state of Bihar v. Abdul Majid.* A sub-inspector of police, dismissed from service on the ground of cowardice, was later reinstated in service, but the government contested his claim for arrears of salary on the ground of contract or *quantum meruit, i.e.,* for the value of the service rendered.

Legislative power is subject to the doctrine of pleasure

The legislative power conferred on Parliament or state Legistrative, or the rule-making power conferred on the President or the Governor, by Article 309 is controlled by the doctrine of pleasure embodied in Article 310 for Article 309 opens with a restrictive clause, viz ‘subject to the provisions of the constitution. Therefore the power of the Legistrative or that of the Executive to make rules, to lay down conditions of service of public servants to subjects to ‘ the tenure at pleasure’ doctrine under Article 310.

Article 309 is , therefore to be read subject to Art. 310. A law or a rule cannot impringe upon the overriding power of the President or the governor to put an end to the tenure of a civil servant at

his pleasure. The inter-relationship between Arts. 309 and 310 has been explained by the Supreme Court as follows *i*n *Union of India v. Tulsiram Patel*[14]*:*

"The opening words of Art.309 make that article expressly subject to the provisions of this Constitution. Rules made under the proviso to Art.309 or under Acts referable to that Article must, therefore be made subject to the provisions of the Constitution if they are to be valid. Art. 310(1) which embodies the pleasure doctrine is a provision contained in the constitution. Therefore, rules under the proviso to Art. 309 or under referable to the Article are subjected to Art. 310(1). By the opening words of Art. 310(1) the pleasure doctrine contained therein operates "except as expressly provided by this constitution." Art 311 is an express provison of the constitution. Therefore, rules made under the proviso to Art. 309 or under Acts referable to Art.309 would be subject both to Arts. 310(1) and Art.311."

The result is that the rules made under Art.309 are not applicable to defence personnel as they remain subject the President's pleasure.

The position in India differs from that in Britain, because in Britain, the doctrine of pleasure being a common law doctrine, Parliament may by law supersede the doctrine of pleasure in any it likes. But, the same cannot be done in India. Here the doctrine of pleasure is sanctioned by the constitution and can, therefore be excluded only by a constitutional provision, such as Article 311, but not by any legislation or rules.

[14] AIR 1985 SC 1416

Disciplinary Action taken under Statutory Authority

Though a law (or the rules) made under Article 309 cannot restrict the pleasure of the President or the Governor, as noted above, yet a law or a rule can prescribe the procedure by which, and the authority by whom, disciplinary powers can be exercised over civil servants. Whatever this authority the does, it does so by virtue of the express power conferred on it by the law (or the rules), and not under the 'pleasure' of the President or the Governor.

The statutory power of the authority to take disciplinary action cannot be equated with the pleasure of the Governor or the President. The disciplinary authority has to act within the compass of its statutory power, and any infringement of this may result in the order being quashed by the Court.

For example in *Supdt. Of Police, Manipur v. R.K. Tomalsana Singh*[15],the power to take disciplinary action was conferred under the law on the Inspector- General of Police subject to the approval of the State Government. Dismissal of a sub-inspector of police by I.G. without the approval of the State Government would be invalid.

The pleasure of the President or the Governor is not required to be exercised by either of them personally. Such pleasure can be exercised by the President or the Governor acting with the aid and advice of the Council of Ministers. The Supreme Court has propounded the view in *Shamsher singh* and *Sripati Ranjan* that the constitution 'conclusively contemplates' a 'constitutional President' acting with the aid and advice of the council of Ministers. Appointment, dismissal or removal of civil servants is not a 'personal' but an 'executive' function of the President or the Governor. Wherever the Constitutional requires the satisfaction

[15] AIR 1984 SC 535

of the President or the Governor for the exercise by him of any power, it is not his personal satisfaction which required but satisfaction in the constitutional sense. Thus, an officer authorized under the rules of business can take the desired action in the name of the President or Governor as the case may be.

CIVIL SERVANT

The term civil servant includes members of a civil service of the Centre or a State, or of an all-India service, or all those who hold civil posts under the Centre or a State. A 'civil post' means an appointment or office on the civil side and includes all personnel employed in the civil administration of the Union or a State.

What, however, is necessary to make a civil post 'under the government' is the relation of master and servant between the state and the employee. Whether such a relationship exists is a question of fact to be decided in each case. A host of factors have to be taken into consideration to determine such relationship. None of these factors may be conclusive and no single factor may be considered absolutely essential.

Some of these factors are:

(i) who selects the empolyee?

(ii) who appoints him?

(iii) who pays him the remuneration or wages ?

(iv) who controls the method of his work ?

(v) who has power to suspend or remove him from employment ?

(vi) who has a right to prescribe the conditions of service ?

(vii) who can issue directions to the employee ?

If the answer to all these questions is the Government then it is a civil post under the Government. Co-existence of all these indicia is not predicted in every case to make the relationship as one of master and servant. In special classes of employment, a contract of service may exist even in the absence of one or more, and these indicia. Ordinarily, the right of an employer to control the method of doing work, and the power of superintendence and control are strong indicators of the master and servant relationship.

A civil post outside the regularly constituted services does not have to carry a definite rate of pay; he may be paid on commission basis; the post need not be whole-time,it may be part-time and its holder may be even be free to engage himself in the other activities. What is important, however, is the existence of the master-servant relationship. Applying the above indicia, the Supreme Court has held the panchayat service in Gujarat created by a State law to be State civil service and its members as servants of the State.[16]

In *Jagannath Prasad v. State of Uttar Pradesh,*[17]The term ' civil servant' does not include a member of a defence service, or even a civilian employee in defense service who is paid salary out of the estimates of the Ministry of Defense. These persons, therefore, while falling under Articles 309 and 310 do not enjoy the protection of Article 311. A member of the police force, however, is a 'civil servant'.

[16] M.P. Jain; The Constitution Of India; 5th edition; Wadhwa nagpur;p.1434-1435
[17] AIR 1961 SC 1245

The statutory public corporations, or government companies registered under the Companies Act, although regarded as instrumentalities of the State and thus, 'authorities for the purposes of Art.12, yet have their own distinctive personality separate from the government. Accordingly, employees of such bodies are not regarded as employees of the government and do not, thus, fall within the term 'civil servants' and do not, therefore, fall under the scope of Arts.310 and 311.

Officers and members of a High Court are Civil servants.

RESTRICTIONS ON THE DOCTRINE OF PLEASURE

The Doctrine of Pleasure embodied in Article 310, though not subject to legislative power is not, however, unlimited. On its exercise, the Constitution imposes the following several qualifications:

1. The 'pleasure' under Art.310 cannot be exercised in a discriminatory manner and is controlled by the Fundamental rights, especially Arts. 14, 15 and 16.

Art. 14 can be invoked when a person's services are terminated in a discriminatory manner. Art. 15(1) comes into play if a person's services are terminated on account of religious bigotry, racial prejudice, casteism, provincialism or gender. Art. 16(1) imposes equable treatment and bars arbitrary discrimination.

2. Under Art. 320(3)(c), the Union or the State Public Services Commission is to be consulted on all disciplinary matters affecting a person serving in a civil capacity under the Central or State Government.

3. When a person (not being a member of a defense service or an All-India service or a Civil service) is appointed to a civil post on contract for a fixed term, the contract may (if the President or Governor, as the case may be, deems it necessary in order to secure the services of a person having special qualifications) provide for the payment of compensation to him if, before the agreed period, the post is abolished, or that person is required to vacate that post for reasons not connected with misconduct on his part [Article 310(2)].

In *State of Gujrat v. P.J. Kampavat,*[18] The Chief Minister and the Ministers appointed certain persons of their choice in their respective establishments. the order appointing the employees expressly stated not only that their services shall be terminated at any time without giving any notice and without assigning any reason but also that their appointment was foa a limited period conterminous with the concerned minister's tenure. These employees were also asked to execute an undertaking in the above terms. They did execute such an undertaking.

The Supreme Court ruled that their appointment was purely a contractual appointment conterminous with the tenure of the Minister's establishment, at whose choice and instance they were appointed. The appointees in question could not be treated as temporary government servants. As soon as the tenure of the ministers at whose instance and on whose recommendation they were appointed came to an end, their services also came to an end simultaneously. Neither an order of termination as such, nor any prior notice was necessary for putting an end to their service. "They ought to go out in the manner they have come in."[19]

4. An important limitation on the doctrine of pleasure is imposed by Article 311(1). According to this constitutional provision, no civil servant is to be dismissed or removed by an authority

[18] AIR 1992 SC 1685
[19] AIR 1992 SC 1685

'subordinate' to the authority by which he was appointed. Dismissal or removal of a civil servant by an authority subordinate to the appointing authority is invalid.

This requirement does not mean that the removal or dismissal must be by the appointing authority itself, or its direct superior. It is enough if the removing authority is of the same or co-ordinate rank or grade as the appointing authority.

The government can confer powers on an officer other than the appointing authority to dismiss a government servant provided he is not subordinate in rank to the appointing authority. This means that a person appointed by secretary cannot be dismissed by the Deputy Secretary. A person appointed by the Central Government can be dismissed by it but not by the State Government. A rule authorizing a junior officer to dismiss employees appointed by a senior authority is invalid as contravening Article 311(1).

The purpose underlying Article 311(1) is to ensure a certain amount of security to civil servants. The Article bars dismissal or removal by subordinate authorities in whose judgment the civil servants may not have much faith. This requirement is not a restriction on the pleasure of the President or The Governor, for he may always dismiss a servant whether appointed by him or by someone subordinate to him. In effect, it constitutes a restriction on subordinate appointing authorities. In their case, the power of dismissal is to be exercised by authorities of the same rank as the appointing authorities.

Art. 311(1) does not debar a superior authority from entrusting the function of making an inquiry to a subordinate and then acting on his report.

In *State of Madhya Pradesh v, Shardul Singh*[20], a departmental enquiry was initiated against a sub-inspector of police by Superintendent of Police, after holding an enquiry; he sent his report to the Inspector General of Police who ultimately dismissed the sub-inspector from service. The order of dismissal was challenged on the ground of its being inconsistent with Art. 311(1). It was arued that the inquiry held by the superintendent of police infringed the mandate of Art.311(1) as the sub-inspector was appointed by the Inspector General of Police.

The Supreme Court refused to agree with the proposition that the guarantee given by Art.311(1) 'includes within itself a further guarantee that the disciplinary proceedings resulting in dismissal or removal of a civil servant should also be initiated and conducted by the authorities mentioned in Art.311(1). Thus, the initiation of a departmental proceeding and conducting an inquiry can be by an authority other than the one competent to impose the proposed penalty.

In *Director General, ESI v. T. Abdul Razak,*[21] The legal position is now well settled that it is not necessary that the authority competent to impose the penalty must initiate the disciplinary proceedings and that the proceedings can be initiated by any superior authority who can be held to be controlling authority who may be an officer subordinate to the appointing authority.

5. The most important limitation imposed on the doctrine of 'pleasure' is by Art.311(2). According to this provision, no civil servant can be dismissed, removed or reduced in rank

[20] (1970) 1 SCC 108.
[21] (1996) 4 SCC 708

except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.

It may be pointed out that there are two kinds of penalties in service jurisprudence -major and minor. Amongst the minor penalties are: censure, withholding promotion, withholding increments. The major penalties are: dismissal, removal from service, compulsory retirement and reduction in rank. Art.311(2) applies only to three major penalties, viz dismissal, removal or reduction in rank.

6. The rule of reasonable opportunity embodied in Art.311(2) does not however apply in three situations as mentioned in the second proviso to Art. 311(2) in clauses (a) (b) (c). These constitutional provisions are discussed later.

It will be seen from the above that the two main limitations on the doctrine of pleasure are as follows:

(1) A civil servant cannot be dismissed by any disciplinary authority which is subordinate to the authority by which the appointment in question was made.

(2) A civil servant cannot be dismissed, removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him.

These two qualifications on the President's/Governor's pleasure are in reality two safeguards which the constitution extends to a civil servant.

The two restriction (mentioned in (1) and (2) above) on the doctrine of pleasure are imperative and mandatory. If any of these restrictions is infringed, the matter is justifiable and the aggreived party is entitled to suitable relief at the hands of the courts.

DISMISSAL, REMOVAL,REDUCTION IN RANK

These are regarded as major punishments awarded to a civil servant. Art.311(1) applies to the cases of 'dismissal' or 'removal', while Art. 311(2) cover all these three punishments. Art.311(1) is thus narrower than that of Art.311(2) insofar as 'reduction in rank' falls within the ambit of the latter but not the former. Over the years, through judicial exposition, these terms have acquired a somewhat technical significance.

Termination of service of a civil servant when the post held by him is abolished does not involve any punishment and is, thus neither dismissal nor removal, and so does not attract Art.311(2). Whether any post is to be retained or abolished is essentially a matter for the government to decide. But a decision to abolish a post should be taken in good faith. It will lose its effective character if it has been made arbitrarily, *mala fide* or as a cloak to take penal action against the concerned employee which falls within the meaning of Art.311(2). In such a case, abolition of the post will suffer from a serious infirmity.

'Dismissal' and 'removal' are practically similar concepts except that in 'dismissal' the person concerned is barred from future employment but not in case of removal.

Both dismissal and removal involve termination of service, but every case of termination of service does not amount to dismissal or removal for purposes of Art.311(2). this matter can discussed under the following several heads.

(a) Permanent Post

If the employee has the right to hold the post either under the terms of contract of employment express or implied, or under the rules governing the conditions of service,then the termination of his service attracts Art.311(2).

A person appointed substantively to a permanent post in government service normally acquires a right to hold the post until he attains the gae of superannuation. Termaination of service of such a person is regarded *per se* as punishment, for it operates as a forfeiture of his rights and brings about a premature end of his employment. He is therefore entitled to the protection of Art.311(2).

(b) Quasi- Permanent

According to the government service rules, a person appointed to a post temporarily assumes *quasi*- permanent status when he has been in continuous service for more than three years and has been certified by the appointing authority as fit for employment in a quasi-permanent capacity.

(c) Fixed tenure service

The service of a person appointed to a post for a fixed term cannot, in the absence of a contract or a service rule permitting its premature termination, be terminated before the expiry of the stipulated period unless he has been guilty of some misconduct, negligence, inefficiency or the other disqualifications and appropriate proceedings are taken under Art.311(2). The premature

termination of the service of a servant so appointed will *prima facie* be a dismissal or removal from service by way of punishment and so would fall within the preview of Art.311(2).

(d) Temporary post

It is an implied term of a temporary appointment, other than the one for a fixed term that their service of the appointee may be terminated on a reasonable notice, usually one month's notice.

A temporary government servant has no right to be post he is holding. The character of employment in his case is transitory. His service is liable to be terminated at any time by giving him one month's notice without assigning any reason either under the terms of the contract or under the service rules. This does not *per se* amount to dismissal or removal and accordingly Art.311(2) is not attracted.

It is now well settled that a temporary servant can be discharged if it is found that he is not suitable for the post which he is holding without complying with Art.311(2). Suitability does not depend on mere proficiency or excellence in work.

(e) Permanent appointment on Probation

The object of appointment on probation is to test the suitability of the appointee; if the appointing authority finds that the candidate is not suitable, it has power to terminate the services of the employee either during or at the end of the period of probation and normally this is not regarded as amounting to imposing the punishment of dismissal attracting the application of Art.311(2).

Probationer,termination of services ; whether stigmatic order:-

One of the judicially evolved tests to determine whether in substance an order of termination is punitive is to see whether prior to the termination there was:

i) A full scale formal inquiry;

ii) Into allegation involving moral turpitude a misconduct which ;

iii) Culminated in a finding of guilt.

If all these three factors are present the termination has been held to be punitive irrespective of the form of the termination order. All these three factors must be present before an order of termination can be punitive.[22]

In *State of Orissa v Ram Narayan Das*[23], a sub-Inspector of Police on probation was discharged from service on the ground of 'unsatisfactory work and conduct'. An inquiry was held against him under Rule 55B of the Civil Services (Classification, Control and Appeal) Rules,1930. Under the rule, when a probationer's service is proposed to be terminated for any specific fault, or on account of his unsuitability, the probationer is to be apprised of the grounds of such proposal and given an opportunity to show cause against it, and only then an order of termination of service can be passed. The Supreme Court held that the purpose of an inquiry under this rule is not to punish the servant concerned, but is merely to ascertain whether he is fit to be confirmed. Therefore, it was not a case of dismissal and Art.311(2) would not apply to such an inquiry.

[22] D.J. De; The Constitution Of India; 3rd Edition; Asian Law House Hyderabad; p. 665
[23] AIR 1961 SC 177

In *Champaklal v. Union of India*[24], a memorandum containing four charges was served on a temporary government servant, who was asked to explain why disciplinary action should not be taken against him. No formal departmental inquiry was held against him and after six months his services were terminated without assigning any reason. The Supreme Court ruled that, as no formal inquiry was held against him, the action taken against him was not punitive and, therefore, Art.311(2) was not attracted. Issue of a memorandum of charges was not material as no formal inquiry was held thereafter. The Court pointed out that, generally, a preliminary inquiry is held to determine whether a *prima facie* case for a formal inquiry is made out or not . The preliminary inquiry and the formal inquiry should not be confused with each other. The preliminary inquiry is only for enabling the authority to decide whether punitive action should be taken against the servant concerned or he should be discharged under the terms of the contract or the relevant service rules. Therefore, Art.311(2) would apply only to a formal inquiry and not to a preliminary inquiry.

Reduction in Rank

The expression 'reduction in rank' means reduction of an employee from higher to a lower rank. The principles discussed above regarding dismissal or removal applies *mutatis mutandis* to reduction in rank as well. When reduction in rank is imposed as a punishment Art.311(2) becomes applicable but not otherwise.[25]

When a civil servant has a right to a particular rank his reduction from that rank operates as a penalty as he loses the emoluments and privileges of that tank. If, however an employee is appointed temporarily to or to officiate in a higher post, his appointment is of transitory nature

[24] AIR 1964 SC 1854

[25] M.P. Jain;Constitution Of India: 3rd Edition; Wadhwa publication,p. 1444

and he acquires no right to the higher post and therefore his reduction to his original substantive post does not *per se* attract Art.311(2). But even in such a case reduction by way of punishment attracts Art.311(2), as when the employee is visited with penal consequences such as, forfeiture of his pay or allowances or loss of seniority in his substantive rank or stop-page or postponement of his future chances of promotion, or if a stigma as attracted to him or when a full scale formal inquiry was held before his reversion.

In *Wadhwa v. Union Of India*[26], the appellant was officiating as Additional Superintendent of Police. He was reverted to his substantive post on the ground that he was found to be immature as a Supdt. of Police.The record showed that he was not reverted because of the refurn of the paermanent incumbent from leave, and other officers junior to him continued while he was reverted. The record also revertd that an enquiry was not resorted to for the reason that it would take a long time. His reversion was regarded as reduction in rank.

REASONABLE OPPORTUNITY TO SHOW CAUSE

Under Art.311(2), a civil servant is not to be dismissed, removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. Art. 311(2) gives a constitutional mandate to the principles of natural justice. The disciplinary proceedings before a domestic tribunal are of *quasi*-judicial character.

A mass of case-law has gathered around the question: what constitutes a 'reasonable opportunity' for purposes of Art.311(2)? The courts have laid down a number of norms to define the content of and elements constituting this concept. A full discussion of these various norms

[26] AIR 1964 SC 423

falls appropriately within the realm of Administrative Law and not within the scope of this work, but a few salient principles may be noted here.

The concept of ‘reasonable opportunity’ being a constitutional limitation on the doctrine of ‘tenure at pleasure’, Parliament or State Legislature can make law defining the content of ‘reasonable opportunity’, and prescribing procedure for affording the said opportunity to the accused government servant. Pending legislature, rules can be made by the executive for the purpose under Art.309.

Neither the law nor the rules are, however, decisive of the content of the concept of ;reasonale opportunity’. It is finally for the courts to ascertain whether or not the law or the rules provide a reasonable opportunity and the courts can thus test the validity of the law or the rules from this point of view. The reason is that the word ‘opportunity’ in Art.311(2) is prefixed by the word ‘reasonable’. In each case, therefore, it is for the courts to see whether on the facts of the case, a reasonable opportunity was given to the government servant or not.

The concept of “reasonable opportunity to show cause’ is synonymous with natural justice. According to the Supreme Court Art.311 (2) gives a constitutional mandate to the principles of natural justice.

But natural justice does not have a fixed connotation ; it cannot be put in a straight –jacket. Natural justice depends on the circumstances of each case- the nature of inquiry , the rules under which inquiry is being held, the subject-matter which is being dealt with and so forth. The essential point is that the person concerned should act fairly, impartially and reasonably. The duty is not so much to act ‘judicially’ but ‘fairly’.

A few general propositions may however be stated here.

There must be an inquiry into the charges made against a government servant before any of the three punishments is awarded to him. A statutory departmental inquiry was held into a railway accident. The inquiry committee came to the conclusion that the accident was due to the negligence of the Asst. Station Master. He was later served with a show cause notice as to why he should not be reduced in rank. Therefore, he was reduced in rank. The Supreme court held that the inquiry into the accident was not directed against the appellant as such. The findings reached by the statutory inquiry committee could not be said to be findings madeagainst the appellant for the alleged neglect of duty. It was necessary to give him a chance to show his innocence by holding an inquiry in the charge that he was responsible for the accident before imposing any major punishment on him. The order was thus set aside.

The constitution guarantees to the government servant a fair inquiry into his conduct, the inquiry should therefore be in accordance with the principles of natural justice.

The delinquent officer should be informed of the charges against him. This requirement is specifically laid down in Art. 311(2). The charges must be clear, precise and accurate. If a charge is vague, the inquiry may be vitiated. Along with the charges the government servant concerned should also be informed of the evidence by which those charges are sought to be substantiated against him. Copies of relevant documents must be supplied to the concerned employee. The inquiry is vitiated if the non-supply of documents has prejudiced the case of the concerned employee.

In *Chandrama tewari v. Union Of India ,*[27] The Court has insisted that the opportunity of hearing must be an effective opportunity and not a mere pretence.

[27] AIR 1988 SC 117

Not all documents need be supplied to him. If a document has no bearing on the charges, or if it is not relied upon by the enquiry officer to support the charges, or the material was not necessary for the purpose of cross examination, it need not be supplied. Many a time, witnesses are examined in the preliminary enquiry in the absence of the person charged, and on the basis of this evidence, charges are framed later. It is therefore necessary that copies of these statements be supplied to him. If this is not done, it may vitiate the inquiry. After the charges have been intimated to the servant concerned, and his formal reply thereto has been received, the disciplinary authority has to apply his mind to decide whether a further inquiry is called for. If after deliberation and due consideration, the disciplinary authority has come to an affirmative decision, a formal inquiry is to be held into those charges.

Personal hearing is a part of reasonable opportunity, and, if it is demanded by the delinquent servant it cannot be refused. Ordinarily all evidence must be given in his presence.

No material should be relied on against the accused employee without giving him an opportunity to explain it.

In *State of Mysore v. Shivabassappa*,[28] Strict rules of evidence as laid down in Indian Evidence Act do not apply to disciplinary enquiries.

The inquiry officer, however, cannot delegate his functions. The inquiry is improper if the inquiry officer delegates the task of hearing witnesses to someone else and then decides the case upon the mere record of evidence. In case an inquiry is held by someone other than the authority, the latter can order a re-inquiry, or a fresh inquiry superseding the earlier inquiry.

[28] AIR 1963 SC 375

EXLUSION OF ART. 311(2)

The second proviso to Art. 311(2), in clauses (a), (b) and (c): Lays down three stuations where Art. 311 (2) does not apply. They are as follows:

(a) ***Where a civil servant is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge [Art. 311(2) (a)]***

The Supreme Court has emphasized that under Art. 311 (2) (a), the disciplinary authority to regard the conviction of the concerned civil servant as sufficient proof of misconduct on his part. The authority is to decide whether conviction demands the imposition of any penalty and, if so, what penalty. For this purpose, the authority has to take into consideration the judgment of the criminal court, the entire conduct of the civil servant, the gravity of the offence, the impact of the offence on the administration, whether the offence was of a technical or trivial nature, and the extenuating circumstances, if any. This disciplinary authority has to do ex parte and without giving a hearing to the concerned civil servant.

(b) Where an authority empowered to dismiss or remove a civil servant or reduce him in rank is satisfied that, for some reason to be recorded by it in writing, it is not reasonably practicable to hold such inquiry [Art. 311(2)(b)]

The important thing to note is that this clause applies only when the conduct of the government servant is such as he deserves the punishment of dismissal, removal or reduction in rank. Before denying a government servant his constitutional right to an inquiry, the paramount consideration is whether the conduct of the government servant is such as justifies the penalty of dismissal, removal or reduction in rank.

Explaining the scope of the clause, the Supreme Court has said in *Union of India v. Tulsiram Patel,*[29] "… Whether it was practicable to hold the inquiry or not must be judged in the context of whether it was practicable to hold the inquiry or not must be judged in the context of whether it was reasonably practicable to do so. It is not a total or absolute impracticability which is

[29] AIR 1985 SC 1416

required by clause (b). What is requisite is that the holding of the inquiry is not practicable in the opinion of a reasonable man taking a reasonable view of the prevailing situation."

The reasonable practicability of holding an inquiry is a matter of assessment to be made by the disciplinary authority. The disciplinary authority is the best judge of the situation.

(c) Where the president or the Governor, as the case may be, is satisfied that, in the interest of the security of the state, it is not expected it to give to a civil servant such an opportunity [Art. 311 (2)(c)]

While under Clause b, the satisfaction has to be that of the disciplinary authority under Clause (c) it is that of the President or the Governor, as the case may be. The satisfaction of the President or the Governor must be with respect to the expediency or inexpediency of holding an inquiry in the interest of the security of the state. Security of the State being paramount, all other interests are subordinated to it.

The Supreme Court has upheld the order passed under Art. 311(2)(c) *inter alia* in the following situations.

i) In *A.K. Kaul v. Union of India,*[30] The appellant was employed as Deputy Central Intelligence Officer in the Intelligence Bureau in the Ministry of Home Affairs, Govt. of India. The employees in the Intelligence Bureau formed an Association and the appellant was elected as its general secretary. He was dismissed from service without holding an enquiry under art. 311(2)(c). the President was satisfied, said the order, that "in the interest of the security of the state it is not expedient to hold an inquiry" in his case. Having regard to the facts and

[30] AIR 1995 SC 1403

circumstances of the case, the court refused to hold that the order was malafide or was based on wholly extraneous or irrelevant grounds.

ii) In *Union of India v. Balbir Singh,*[31] the respondent who was one of the accused in the assassination of Prime Minister Indira Gandhi was dismissed from Delhi Police without holding an inquiry. The dismissal was based on the recommendations of a High-powered Committee of advisors constituted according to the directive of the Central Government. The Committee considered information and documents collected by the Intelligence Bureau having a bearing on the security of the state.

The Court upheld the dismissal observing that this was not a case where there was absolutely no material relating to the activities of the respondent prejudicial to the security of state. Though the respondent was acquitted in criminal trial against him, yet the material placed before the committee was not confined to assassination only; it related to various other activities of the respondent as well, which the authorities considered as prejudicial to the security of the state and, therefore, acquittal did not make any difference to the order which was passed by the President on the totality of material which was before the authoritieds long prior to the conclusion of the criminal trial.

[31] AIR 1998 SC 2043

SOME OTHER INCIDENTS OF GOVERNMENT SERVICE

Art. 311(2) refers to three incidents of government service, viz, dismissal, removal and reduction in rank. But there are many other incidents of government service besides the above mentioned three incidents. An effort is made to throw some light on some of these other incidents of government service which fall outside the purview of Art. 311(2).

a) Appointments:

An authority has freedom to devise procedure for selecting candidates for posts under it, but it does not mean and imply that the employer can do so at the cost of "Fairplay, good conscience and equity."

In *State of Mysore v. Narasinga Rao,*[32] It was held by the supreme court that it is the prerogative of the Executive to creat and abolish a post. Demarcation of the cadres or gradation in the same cadre on higher and lower qualifications is common phenomenon for fixing hierarchy in service. It is valid basis of classification.

b) Seniority:

Seniority is an incident of service which cannot be eroded or curtailed by a rule which operates discriminately. A person entering government service should feel secure of equality in continuance, promotion, etc. Any executive action violating it cannot be upheld.

[32] AIR 1968 SC 349

c) Transfer:

A government servant has no legal right to insist fot being posted at any particular place. A person holding a transferable post has no choice in the matter of posting unless specifically provided in his service conditions. The transfer of a public servant made on administrative grounds or in public interest is not to be interfered withunless there are strong and compelling reasons rendering the transfer order improper and unjustifiable. A court would not interfere with a bona fide orderb of transfer.

d) Promotion :

Promotion means appointment of a person of any category or grade of a service or a class. The Supreme Court has observed that promotion means that a person already holding a position would have a promotion he is appointed to another post which satisfies either of the two conditions, viz : that the new post is in a higher category of the sameservice, or that the new post carries higher grade in the same service or class.

e) Suspension :

Suspension of an employee pending disciplinary proceedings against him is not a punishment. Its purpose is to forbid or disable an employee to discharge the duties of the post held by him. The purpose is to refrain him from availing further opportunity to perpetuate the same misconduct, or from scuttling the enquiry, or investigation, or to win over the witnesses. Suspension of a government servant pending an inquiry against him does not amount to dismissal inspite of his suspension though he is not permittedto work and he draws only a subsistence allowance which is usually less than the salary.

CONCLUSION

Articles 309 to 323 of the Constitution make elaborate provisions for the Central and State services. The civil servant is the indispensible to the governance of the country in the modern administrative age. Ministers frame policies and legislatures enact laws, but the task of efficiently and effectively implementing these policies and laws falls on the civil servants. The bureaucracy thus helps the political executive in the governance of the country. The Constitution, therefore, seeks to inculcate in the civil servant a sense of security and fairplay so that he may work and function efficiently and give his best to the country. Article 309 empowers Parliament and the State Legislature to regulate the recruitment and the conditions of service of the persons appointed to public services and posts under the Union and the States, respectively. Until provision in that behalf is made by an appropriate legislature under Article 309, the President and the Governors may make rules for regulating the recruitment.

Article 310(1) lays down that the defence personnel and civil servants of union, and the members of an All-India Service, hold office during the 'pleasure of the President'. Similarly, a civil servant in a state holds office 'during the pleasure of the Governor'. This is similar to the doctrine of pleasure in England.

In India "doctrine of pleasure" is subject to general constitutional limitations.

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