GOVERNMENT AS EMPLOYERS

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Significant problems of constitutional law revolve around the function of Government as employer. May Government apply the same criteria to applicants for positions normally permitted to the private employer? Is Government, by constitutional requirements, more circumscribed than the private employer who would terminate the services of an employee? This paper will explore these questions as they have arisen in India and in several countries influenced in large degree by the Indian Constitution.

I. Hiring by Government

In the absence of specific constitutional or statutory provisions there is no reason why Government is not free to use any criteria as to hiring that it chooses, however arbitrary and discriminatory. The common law knows no right to be treated fairly by one selecting a worker; and just as a private employer, where such employers are not restrained by positive provisions of law, [1] may reject an applicant for a job on the basis of his race or religion, his height, the colour of his hair, or for any other reason or no reason at all, so may Government, when not restrained by positive provisions of law. But many constitutions do impose restrictions on Government, requiring it in its policies of hiring to apply certain standards of fairness. [2]

The Indian Constitution, influenced by the Fourteenth Amendment of the United States Constitution, seeks to ensure standards of fairness in governmental hiring by the equality provisions of the Fundamental Rights section, Part III. Article 14 generally states the principle of equality before the law as to persons. Article 15 makes article 14 more specific by listing religion, race, caste, sex and place of birth as particular grounds on which the State may not discriminate against citizens. And article 16 addresses itself in precise terms to employment, promising "equality of opportunity for all citizens in

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1. A number of the states of the United States do restrain private employers from discrimination on certain grounds, such as race and religion, through so called Fair Employment Practices legislation.
2. In the absence of constitutional provisions state law may also restrict state Governments as well as private employers, as do many state Fair Employment Practices laws in the United States.

matters relating to employment or appointment to any office under the State". Clause 2 of article 16 repeats the same grounds of forbidden discrimination listed in article 15, except that it adds descent. [3] An exception is made to the equality principle by clause (4), which permits discrimination by the State in favour of any "backward class of citizens". The equal protection provision, as well as the concept that it is an appropriate function of Government to discriminate in favour of some particular class or classes, have been adopted in other countries following the Indian model. [4]

Interpreting the equality of employment provisions of the Indian Constitution poses a number of fundamental problems, three of which we shall consider here : [5]

(1) The question of identification or definition; that is to say, whether the act of the State is authorized or prohibited on the named grounds as to the petitioner;

(2) The issue of reasonableness of classification in instances other than those specifically indicated;

(3) The meaning of employment.

(1) Whether the State is discriminating on the basis of religion, race, caste, sex, descent or place of birth is likely to be the easiest of the three issues to face the courts. For often the State proceeds from an apparently salutary motive and does not seek to mask its act. Such an instance was presented by the case of *B. Venkataramana* v. *The State of Madras.* [6] In that case the Madras Public Service Commission announced that it would fill certain posts in the judicial Service on a communal basis. The Court found that reserving posts for various groups, except members of the backward classes, violated Article 16 of the Constitution. If the State's motives for discriminating were vicious it might seek to conceal its acts in ways far less open than the announcement in *Venkataramana.* Such an instance might then pose more difficult problems of proof for complainant and court. [7]

(2) The judicial issue presented by the generally phrased equality provision is the problem of classification. For it is clear that the courts do not interpret such provisions to mean that all persons must

3. The reason for the variation with Article 15 in this regard is unclear. It may be only a drafting oversight.
4. For example, the Constitution of the Federation of Malaya, Articles 8 and 153.
5. There are, of course, other problems, *e.g.*, whether one falls within the service protected.
6. A. I. R. 1951 S.C. 229.
7. See Groves, "States as 'Fair' Employers", 7 *How. L.J.* 1, 1961.

be treated alike. The protection goes on further than to prevent the State from arbitrary classifications upon which it then bestows unequal benefits. It may, of course, be that classification itself is impermissible, even assuming that the State does not purport to deal differently with the categories established.[8] But the fundamental principle is that if some rational basis can be found for the State's classification and the members of the class are treated fairly, no denial of equal rights arises. As an employer, Government is entitled to establish criteria reasonably related to the posts, criteria under which some applicants may come and some may not. In the case of *Banarsidas et al.* v. *State of Uttar Pradesh et al*[9], a large number of part-time employees of the Revenue Department of the Government tendered their resignations in an attempt to force the Government to accede to certain of their demands as to emoluments and conditions of service. The Government immediately accepted the resignations and announced the creation of a new category of service, excluding from consideration for employment those who had taken an active part in the agitation. The court found this to be a permissible category of classification, holding that the Government can establish qualifications for new recruits and that to exclude persons who had previously displayed a "lack of a proper sense of discipline" was reasonable discrimination.

(3) Issues may arise over the meaning of "employment" for which the State is to provide equal opportunity. The Indian courts have considered this term and concluded that it relates to a position of service, to the exclusion of a contractor for the supply of goods, for example. In *C. K. Achutan* v. *The State of Kerala*[10] the petitioner sought to invoke articles 14 and 16 in a complaint against the State for cancelling a contract awarded him for supply of milk to State institutions. While the Court chose to base the decision on a definition that one claiming under article 16 must have the status of "servant" it is submitted that the decision more importantly reflects the basic policy that the factors which the executive must consider in reference to the supply of goods or services through the device of tenders are much more complex than those involved in the employment of individuals. Relevant considerations as to the former

8. E. g., *Brown* v. *Board of Education*, 347 U. S. 483, 98 L. Ed. 873 (1954) in which classification of school children on the basis of race was held unconstitutional regardless of the "equality" of the facilities provided the racial groups.

9. A. I. R. 1956 S.C. 520.

10. A. I. R. 1959 S. C. 490.

may properly include not only objective factors, which a court might reasonably review, such as the amount of the bid, the worth of sureties, etc., but also subjective factors, important and perhaps controlling, yet peculiarly outside appropriate judicial review, such as the experience of the contractor, his relationship with his employees (relevant to the question of work stoppages by strikes), the likelihood of his substituting substandard goods, [11] etc. These are things which the executive must take into consideration but which are not readily amenable to judicial review, largely because a weighing of the factors may call for specialised knowledge and experience of an administrative character.

One of the most ubiquitous provisions of democratic constitutions is an equal protections clause. Its very presence imposes on Government the normally performed duty of drafting rules for entry into service which are fair on their face. Not many cases arise, nor should be expected to arise, challenging Government's hiring policies. If regulations are fair but their administration is unfair due to the policy of some individual or agency of Government, the wrong is frequently rectified through the administrative machinery—by an application to the discriminating person's superior, for example. Moreover, since entry into Government service is very frequently through examination or the application of other objective criteria to individuals unknown to the employing agency, discrimination in hiring would be expected to be infrequent. Even where it occurs, circumstances may negative the bringing of a legal action. Job-seekers, who are often unemployed, may not be financially able to undertake an action against Government. They are frequently discouraged by the thought of challenge to the Government monolith. It may seem a better, at least a simpler, course to seek employment elsewhere. Again, discrimination in hiring can be subtle, making it difficult for complainant or court to pinpoint the actual wrong.

But somewhat different factors are at play in the matter of termination of service. The job-holder is likely to be more sophisticated than the job-seeker, perhaps financially more secure, less fearful of the Government of which he is a part, more knowledgeable of his rights and the methods of enforcing them. So, as might be expected, cases are more numerous challenging the Government's attempts to terminate the services of employees.

11. See the complaints of the Deputy Director of Social Welfare of the Federation of Malaya to a Commission inquiring into the tenders system, *Straits Times*, May 30, 1961, p. 2, Col. 5.

II. Termination of service by Government

The termination of the services of one of its employees by Government may take several forms: reduction in rank, retirement, removal, dismissal and perhaps others. At Common Law servants of the Crown held office during the pleasure of the Crown and might be dismissed at any time; nor was there a requirement that any reason be assigned for dismissal. No action lay against the Crown regarding such dismissal, even if it were contrary to the express terms of the contract of employment. But the harsh results of the Common Law rules have been mitigated in many countries by statutory or constitutional provisions designed to improve the position of the employee vis-a-vis Government.

Part XIV of the Indian Constitution entrenches as constitutional rights many of the provisions of employment contained in the Government of India Act, 1935. The two most litigious clauses are (1) and (2) of Article 311. Clause (1) provides that no member of the civil service shall be dismissed or removed by an authority subordinate to that by which he was appointed. Clause (2) guarantees a reasonable opportunity of showing cause against the action proposed to be taken. Both clauses are in *pari materia* with clauses (2) and (3), respectively, of section 240, Government of India Act, 1935.

A. Opportunity to show cause

The case of *The High Commissioner for India* v. *I. M. Lall* [12] decided that the opportunity to show cause in section 240, Government of India Act, 1935, referred to the time when "a definite conclusion has been come to on the charges, and the actual punishment to follow is provisionally determined on ".[13] This means that if the accused has had one hearing on the charges, as was the situation in the instant case, he is entitled to a second hearing before the punishment is finally decided upon.

The holding in *Lall's* case has been persuasive in subsequent Indian and Pakistan Supreme Court decisions interpreting the respective Constitutions. For example, in *Khem Chand* v. *Union of India*[14] the Supreme Court held that the Constitution requires that both the right to defend on the charges and to be heard prior to punishment be given the accused.[15]

12. A.I.R. 1948 P.C. 121.
13. *Id.* at 126.
14. A.I.R. 1958 S.C. 300.
15. The Constitution of the Federation of Malaya, Article 135(2) provides that no member of certain of the services "shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard ".

The Supreme Court of Pakistan, construing the Government of India Act, 1935, has held that the protections of section 240 must be afforded to a temporary employee the duration of whose service is undefined. In the same case the Court dealt with an interesting problem of terminology. The Government had indicated it was " terminating the services " of the affected employees. The Court found this phrase simply a synonym for removal or dismissal and attached no significance to the fact that the words actually used by Government were not those of the Act.

To determine when the constitutional protections are attracted to a termination of service when the employee is not entitled to his rank, the Indian Supreme Court has found it necessary to define the expressions "dismissed ", " removed " and " reduced in rank ". In the case of *Parshotam Lal Dhingra* v. *Union of India* [17] the appellant was relieved from a Class II appointment and reverted to a lower Class III appointment. The reason for the Government's action was indicated in correspondence as being necessitated by his high-handed treatment of subordinates and " generally unsatisfactory work ". The appellant pursued the administrative remedies afforded him, which was admittedly not the procedure required by Article 311, if it were applicable. The Court defined " dismissal ", " removal " and " reduction in rank " as being on occasion punishment, holding " that if the termination of service is sought to be brought about otherwise than by way of punishment, then the Government servant whose service is so terminated cannot claim the protection of Article. 311(2).[18] The Court said, further, " A termination of service brought about by the exercise of a contractual right is not per se dismissal or removal..... It is true that the misconduct, negligence, inefficiency or other disqualification may be the motive or inducing factor which influences the Government to take action under the terms of the contract of employment or the specific service rule, nevertheless, if a right exists, under the contract or the

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The Court of Appeal in the case of *Government of the Federation of Malaya* v. *Surinder Singh Kanda,* (1941) 27 M.L.J. 121, has held that " reasonable opportunity of being heard " is satisfied by a hearing on the charges and that the Constitution gives no further right to a hearing prior to imposition of punishment.

16. *Noorul Hassan et al* v. *The Federation of Pakistan,* P.L.D. 1956 S.C. (Pak.) 331. Nor does the Indian Supreme Court limit these protections, now found in the Constitution, only to permanent employees. See *Parshotam Lal Dhingra* v. *Union of India,* A.I.R. 1958 S.C. 36.
17. A.I.R. 1958 S.C. 36.
18. *Id.* at 47.

rules, to terminate the service the motive operating on the mind of the Government is.....wholly irrelevant. But even if the Government has, by contract or under the rules, the right to terminate the employment without going through the procedure prescribed for inflicting the punishment of dismissal or removal or reduction in rank, the Government may, nevertheless, choose to punish the servant and if the termination of service is sought to be founded on misconduct, negligence, inefficiency or other disqualification, then it is a punishment and the requirements of Article 311 must be complied with".[19] The Court was of the opinion that if the servant had a right to his particular rank, reduction would necesssarily operate as a penalty. But the Court did not conclude that the converse was necessarily true. It said that the real test for determining whether the reduction was punishment in cases where the servant had no right to his rank was "to find out if the order for the reduction also visits the servant with any penal consequences".[20] "Penal consequences" the Court defined as forfeiture of pay or allowances, loss of seniority in his substantive rank, or stoppage or postponement of his future chances of promotion. Applying these principles to the instant case, the Court found that the petitioner was appointed to the higher post on an "officiating" basis, *i.e.*, only to perform the duties of that post with no right to continue in the post. The Court also found that his reduction was visited with no "penal consequences" and that, therefore, Article 311 had no application. Justice Bose, in dissent, employs the phrase "evil consequences". In his view, any man who is visited with "evil consequences" that would not ensue from a "contractual termination" of some other man in the same position can claim the protections of Article 311. On the facts of this case Justice Bose noted the unfavourable comments regarding the petitioner's performance of his work. He concluded that the petitioner's promotion would necessarily depend upon some subsequent officer's opinion that he had overcome those faults, the reference to which would be a part of the petitioner's file. On a finding of these "evil consequences" Justice Bose felt Article 311 was attracted; and he would have allowed the appeal. The reasoning of the Bose opinion is impressive. It seems irrefutable that a man relieved from a post because of alleged high-handed behaviour and "generally unsatisfactory work", remarks as to which are placed in his record, is less promotable than one relieved for totally innocuous reasons such as the expiration of his contract or the conclusion of the job he was performing. One

19. *Id.* at 49.
20. *Ibid.*

might suppose that practical effect of the burden is little different where the record reflects reasons why a promoting authority would normally pass over the individual from what it would be if the conclusions were simply stated in his record to the effect that he was not promotable.

The majority in *Parshotam Lal Dhingra's* case found an "implied term" under the "general law" to terminate at any time the appointment of one officiating in a post. A similar result was reached by the Pakistan Supreme Court in *Pakistan* v. *Hikmat Hussain*, [21] although there the appointment in an officiating capacity was accompanied by the specific proviso that it was subject to further orders.

It would appear manifestly reasonable that where the contract for employment by its specific terms or by reference to rules forming a part of the contract provides for termination at a given time or at the Government's discretion, termination according to those provisions should not fall within the constitutional protections, at least in cases in which no element of punishment is present. In such a case Justice Bose has said, "of course the State can enter into contracts of temporary employment and impose special terms in each case, provided they are not inconsistent with the Constitution, and those who chose to accept those terms and enter into the contract are bound by them even as the State is bound". [22]

Compulsory retirement also involves element of contract, since the terms of retirement are either a part of the contract itself or are incorporated in it through the service rules. Such retirement will not attract the constitutional protections for the reason that the officer does not lose the pension or other benefits he has already earned. It is true that he may lose certain expectations at continuing his employment at probably greater income and it may well be that his retirement is invoked because of fault found in him which the Government might be hard pressed to prove. Nevertheless, for the reason stated above, he cannot claim the right to show cause. [23] In some significant aspects this result seems less harsh than that of *Parshotam Lal Dhingra's* case. In both cases nothing is taken from the employee to which he is absolutely entitled. One is not entitled to remain in an officiating position or even to be promoted, any more than he is entitled to continue working after reaching the age of retirement. But if he is retired under a cloud of suspicion as to his integrity or doubt as to his

21. P.L.D. 1959 S.C. (Pak.) 107.

22. *Satish Chandra Anand* v. *The Union of India*, A.I.R. 1953 S.C. 250, 252.

23. *Shyamlal* v. *State of Uttar Pradesh*, A.I.R. 1954 S.C. 369.

ability, yet is denied no rights to which he would be entitled if retired with accolades of praise, his material loss, at any event, cannot but be limited, for the reason that retirement is equated with the end or near end of the average productive employable years. In *Parshotam La Dhingra's* case the damage might have come very early in the employee's career.

A variation of the "officiating" appointment arises on a deputation, as of a State or Provincial officer to a post in the Central Government. It is of the nature of such deputation that the officer retains his rank and benefits in the original service, to which he may be recalled. The issue has arisen as to whether he is entitled to show cause when he is relieved from a post to which he has been deputed which is higher in rank than the post which he occupies in his own service. The Pakistan Supreme Court has answered this question in the negative, reaching this conclusion regardless of the fact that the higher post occupied is a "tenure post", *i.e.*, a permanent, as opposed to a temporary, one.[24] The Court held, "where an officer of a Provincial Cadre is occupying on deputation, a post in the Central Government, he does not acquire any right in himself to hold that post. The right which he can claim to be vested in himself, as a member of his Service, is to be given a post appropriate to his grade in the Province to which he belongs".[25]

The Pakistan Court has applied the same principle even where the order of appointment of the deputed officer to the new and higher post was for a stated term. The Court has said, "The reversion may be due to the exigencies of the public service or in the public interest and no individual legal right is thereby infringed. The reversion can neither found estoppel nor can amount to a breach of contract because such a tenure is necessarily subject to the condition that the Government servant will be kept on the particular post for the full period indicated only if the public interests are not thereby adversely affected".[26]

As indicated earlier, the mere fact that an appointment is temporary does not remove it from the application of the show cause provision. However, where an appointment has not become permanent for the reason that it is subject to review, termination of that appointment may not attract the constitutional protections.[27] And as appointment which was terminated not as punishment but because the

24. *Pakistan* v. *Fazal Rahman Khundar*, P.L.D. 1959 S.C. (Pak.) 82.
25. *Id.* at 88.
26. *Pakistan* v. *Moazzam Hussain Khan*, P.L.D. 1959 S.C. (Pak.) 13.
27. *Province of East Pakistan* v. *Muhammad Miah*, P.L.D. 1959 S.C. (Pak.) 276.

appointee was underqualified and was not eligible for the appointment has failed to attract the constitutional guarantee. [28]

B. Removal by unauthorized authority

Two types of constitutional provisions establishing the agency authorized to remove a Government servant are common. Both present essentially the same issues; for they are expressive of the same principle; that the removal of a Government servant shall be a deliberate act by a responsible and experienced administrative person or body. The Indian provision states that a member of the civil service shall not be dismissed or removed by an authority subordinate to that by which he was appointed. [29] The Indian Supreme Court has interpreted this provision to mean that the removing authority may be of the same grade as the appointing authority, and need not be the very same authority who made the appointment or his direct superior. [30]

The Constitution of Ceylon exhibits a differently phrased provision based on the same principle. It vests appointment, transfer, dismissal and disciplinary control of public officers in the Public Service Commission. [31] But it permits that Commission to delegate its powers to any public officer, with a right of appeal to the Commission, whose decision is final. [32] These provisions came up for consideration in the case of *Silva* v. *The Attorney-General.* [33] In that case the petitioner, a village cultivation officer, received an order of dismissal from the Government Agent of the North-Central Province, who had not been delegated such powers by the Public Service Commission. When the petitioner appealed to the Public Service Commission on the grounds that the Government Agent was without authority to dismiss him, an authority which had been delegated to the Director of Irrigation, the Public Service Commission itself considered the original charges and ordered the petitioner's dismissal. The Supreme Court held the order of the Public Service Commission, to be ultra vires the Constitution. It reasoned that the Public Service Commission, having delegated its power to dismiss, could only exercise its appellate powers, whereas by its action here it was both an original and appellate tribunal.

In cases where the attempted dismissal has been wrongful, the injured employee is normally entitled to sue the Government for the

28. *Munusamy* v. *The Public Service Commission,* (1960) 26 M.L.J. 220.
29. Art. 311 (1).
30. *Mahesh Prasad* v. *State of Uttar Pradesh,* A.I.R. 1955 S.C. 70.
31. Sec. 60 Ceylon Orders in Council, 1946 and 1947.
32. Sec. 61 Ceylon Orders in Council, 1946 and 1947.
33. 60 N.L.R. 145 (1958).

arrears of his salary, the Common Law rule that the Crown cannot be sued by a civil servant for money or salary or for compensation having generally been abandoned in the modern era [34].

That cases should arise with any degree of frequency under either provisions like those of article 311(1) of the Indian Constitution or sections 60 and 61 of Ceylon Oders in Council, 1946 and 1947, is surprising and can, perhaps, be explained by a failure of Government to advise its officers of the limits of their powers. The Court in the *Silva* case was of the opinion that the Government Agent was totally ignorant of the fact that he lacked the authority to dismiss the petitioner. Unlike the cases where the right to show cause against dismissal is invoked, cases involving an attempted removal or dismissal by an authorized agent may be expected to present more the issue of procedure than of substance. For most often the action could have been accomplished had it simply been performed by the proper authority. This type of case may naturally be anticipated to occur more often when a country has just assumed its administration, as upon independence from foreign domination, with such cases diminishing as Governments settle in, as it were, with the principles of administration becoming routine and well known.

Summary

It would appear that Government *qua* Government is not more restricted than an ordinary employer in either hiring or the termination of the services of employees. But constitutional and statutory provisions and rules with the force of statutes have generally been adopted imposing certain minimal standards of fairness on Government. Much emphasis is placed upon procedure under the not unreasonable assumption that orderly consideration of personnel problems by experienced organs of Government may be normally expected to produce fair results. In this area that often overworked maxim that justice must not only be done but must be seen to be done has very real application.

34. See, e.g., *The State of Bihar* v. *Abdul Majid*, A.I.R. 1954 S.C. 245.

RESPONSIBLE CRITICISM

One of the greatest assets to any judiciary, small or large, is the constant, careful, independent and responsible criticism by law professors and the bar. Some of this is performed by the Annual Survey of American Law and by annual surveys in many of the state jurisdictions. This is a hopeful sign, and it may be predicted that this type of activity will increase in the future. What any court needs is the type of incisive and trenchant criticism that was employed by the late Thomas Reed Powell. It is not without significance that this clarion call for responsible criticism has come from the deans of many law schools. Professional criticism about the work of the judiciary from the law office and the law school is not only welcomed by a court but is a distinct advantage to it in its future work. Such criticism needs to be encouraged rather than suppressed and analyzed rather than dismissed out of hand. The judicial process will be the richer if this is done in good faith year in and year out by men of goodwill.

—Frank R. Kenison, "The State Appellate Judge Today", 61 *Col. L. Rev.* 707-'8 (May, 1961)