

CHAPTER II

Constitutional Powers and Limitations

The rules of recruitment and conditions of service can be regulated by acts of appropriate legislature or the rules framed by competent authorities on whom the power is conferred or in the absence of statutory provisions the same may be regulated in exercise of executive power of the State. But the power of the State to regulate recruitment and conditions of service has to be exercised subject to the provisions of the Constitution as expressly indicated by the opening words of Articles 245 and 309. Therefore, any law made or rules framed cannot contravene the provisions of the Fundamental Rights guaranteed under Part III or Articles 310 and 311 of the Constitution. The extent of limitation imposed by those provisions are dealt with under the relevant Articles. There are other aspects relating to the power of the State to regulate recruitment, conditions of service and other matters pertaining to its services and they may be summarised as follows:—

1. Legislative Competence

(1) *Power to abolish posts* : For enacting a law affecting the government servants, the legislature must have competence under the Constitution. Power to create and abolish posts, is within the power of legislature. It is a power vested in every sovereign Government. It does not flow from Article 310 and is not controlled by Article 311. Hence a legislation providing for abolition of posts is valid though it results in the removal of a civil servant from the service under the State, as the said right guaranteed under Article 311(2) is only to hold the post so long it exists.²¹

(2) *Compulsory transfer of Government servant to a non-Governmental body* : While the State has the power to abolish any cadre or post though it results in the termination of service there is no legislative competence to provide for compulsory transfer of its servants to a non-Governmental body though it is consequent on the transfer of part of a departmental activity to a statutory corporation. The power of the State to regulate recruitment and conditions of service does not include such a power. Therefore, a law which provides for transfer of Government servants in a department of the State:

21 (a) N. Ramanatha Pillai V. State of Kerala—AIR 1973 SC 2641.
(b) Hanumantha Rao V. State of Mysore—1964(1) Mys. L.J. 50.
(c) K. Padmanabhan V. General Manager—SLR 1971 Mys. 64 at 66.

Government compulsorily to a non-Governmental body like the Agricultural University is devoid of competence. The Legislature has no competence to enact a law of such a nature. Such a law does not fall either under Entry 41 of List II relating to public services or under entry 11 relating to Education and Universities or Entry 14 relating to Agricultural Education.²²

(3) *Continuance of employment under corporate body at option* : However, when an entire establishment under the Government is converted into a statutory corporation by an Act of Legislature any provision of law made by the legislature for the continuance of the services of the Government employees who were appointed as members of the said establishment, in the service of the corporate body so constituted under the same terms and conditions or to retire by taking whatever retirement benefits are available to them under the rules is valid.²³

2. Delegation of Legislative Function

It is competent for the legislature to delegate to other authorities the power to frame rules to carry out the purposes of the law made by it. Delegation of Legislative function can be made to the executive authorities within certain limits but the essential legislative function can never be delegated. The essential legislative function consists in (1) the determination or formulation of the legislative policy and (2) formally enacting that policy into a binding rule of conduct. But it is open to the Legislature to formulate the policy broadly as little or as much as it thinks proper and it may delegate the rest of the legislative work to a subordinate authority.²² Applying the above principles it was held that Section 4 of the All India Services Act which delegates the power of framing rules to the President cannot be said to suffer from the vice of excessive delegation, because there is sufficient guidance in the Act particularly by the adoption of the pre-existing rules. Further, the Act provides that the rules framed should be placed before the Parliament before they were to come into force and they were subject to modification. The Parliament has not abdicated its authority and the delegation made in the Act therefore is within permissible limits.²⁴

3. Delegation of Rule Making Power

(1) *Essential legislative function cannot be delegated* : The power conferred on the President or the Governor under proviso to Article 309 of the Constitution to regulate recruitment and conditions of service is similar to legislative power of Parliament or the State Legislature as the case may be. Hence,

22 Papanna Gowda *V.* State of Mysore—1968(2) *Mys. L. J.* 479.
Sub-section (5) of Section 7 of the University of Agricultural Sciences Act, 1963 (Mysore) held invalid.

23 Amulyakumar *V.* Union of India—AIR 1960 Punj. 284.

24 (a) D. S. Garewal *V.* State of Punjab—AIR 1959 SC 512.

(b) A. K. Kraipak *V.* Union of India—AIR 1970 SC 150—1970(1) SCR 457.

the principle governing the delegation of legislative power equally applies to the exercise of power by the Governor under proviso to Article 309 and therefore it is not competent for the Governor to delegate essential legislative functions while framing rules of recruitment.²⁵

(b) *Power to fix minimum marks for a pass cannot be delegated* : Competitive examination are of two types. In one case examination is conducted for the purpose of preparation of a list of successful candidates and to make appointments out of the list as against immediately available vacancies as well as against vacancies arising in future during a specified period. For preparing the list of successful candidates prescription of minimum marks is absolutely necessary. Another type of competitive examination which is also sometimes adopted is to first determine the number of candidates to be appointed and after holding the examination to select the required number of candidates according to merit. Even in this type of examination, specification of qualifying marks would be necessary, although such specification is meant only for exclusion and not for selection. Prescription of minimum qualifying marks is the determination of minimum standard required of a candidate. Therefore, in the scheme of an examination, specification of minimum qualifying marks is of very great importance and cannot be considered as unimportant as it would dwarf the importance of the barrier separating success from failure and to belittle the question of attainment and merit whose discovery is the chief and primary purpose of a competitive examination. Hence, the Governor is under a duty to make a rule prescribing the minimum marks for success in such examination and therefore he himself should make it. The power so committed to him by the Constitution cannot be delegated.²⁵

(c) Similarly a rule framed by the Governor regulating recruitment to the services under the State which provides that for purposes of promotion, passing of an 'Examination' is the qualification and the rules do not prescribe any of the important matters like the syllabus, the maximum marks or the qualifying marks relating to the conduct of the said examination, such a rule is bad for not exercising essential legislative function.²⁶

4. Delegation of Power to Assess Suitability

(1) The Governor having prescribed the minimum qualification and method of recruitment could provide that selection should be made on the basis of a test and interview prescribed by the Public Service Commission. When in pursuance to such a rule, the Public Service Commission proceeded to notify the nature of competition and made the selection, the delegation made

25 Chandrasekhara V. State of Mysore—1962 Mys. L. J. 87.

26 Channappa V. State of Mysore—1962 Mys. L. J. Suppl. 170.

by the Governor to the Public Service Commission to prescribe the details of test and interview is not bad as under proviso to Article 309 of the Constitution, it is open to the authority to whom the power is delegated by the Governor to prescribe rules relating to recruitment and conditions of service.²⁷

(2) Similarly, a rule framed by the Governor which provided that recruitment should be made by selection by the Public Service Commission by assessing the suitability of candidates including intellectual and social traits of personality at an interview it is a valid rule and having regard to the nature of selection prescribed by the Governor there was no necessity to prescribe either the subjects or the marks and therefore such a rule cannot be held invalid on the ground of impermissible delegation of legislative function.²⁸

(3) The rule making authorities have the power to delegate matters relating to Constitution of Departmental Promotion Committees and prescribing syllabi for the Departmental Tests prescribed as qualification for promotion to a designated authority.²⁹

5. Illegal Orders cannot be Validated

Article 309 confers power on the Governor to frame rules regulating recruitment and conditions of service. The rules which the Governor is empowered to frame are rules of general nature governing the recruitment to the State services and the conditions of service of persons appointed to the State services. It is not competent for the Governor to validate illegal orders by the issue of a notification under proviso to Article 309 of the Constitution. Therefore, a notification issued by the Governor under proviso to Article 309 validating the retirement of civil servants made in contravention of the statutory rules cannot be considered as a rule regulating the condition of service and therefore there is no competence for the Governor to issue such a notification under Article 309.³⁰⁻³¹

6. Rules will have Effect—Subject to the Acts of Legislature

The power conferred on the Governor under proviso to Article 309 of the Constitution is to frame rules regulating recruitment and conditions of service until provisions are made by or under an Act of appropriate legislature. It is further provided that the rules framed by the Governor will have effect subject to the law made by the legislature. Hence, the rules framed by the Governor regulating recruitment to any services under the State does not automatically cease on the mere promulgation of an Act of legislature under

27 *Narayan Singh Killedar V. State of Mysore*—1965(2) *Mys. L. J.* 404.

28 *G. N. Gudigar V. State of Mysore*—1972(2) *Mys. L. J.* 202.

29 *Ram Labhaya V. State of Punjab*—SLR 1972 P & H 775.

30 *Padmanabhacharya V. State of Mysore*—1962 *Mys. L. J.* 146.

31 *State of Mysore V. Padmanabhacharya*—AIR 1966 SC 602—(1966) 1 SCR 994.

which power is conferred on the State Government to frame rules. All that the proviso to Article 309 means is that if there is any inconsistency or repugnancy between the provisions of the Act and the Rules made thereunder, the rule shall yield to the provisions of the Act. Therefore, if there is no such inconsistency or repugnancy the rules will continue to operate. Further, until the rules are made by the Government in exercise of the power conferred under the statute even the question of inconsistency or repugnancy between the two rules, namely, the rules framed under the Act and the rules framed by the Governor under proviso to Article 309 does not arise.³²

7. Supersession of Rules Framed under Proviso to Article 309 by Legislation

Rules framed under proviso to Article 309 of the Constitution can be repealed either by the provisions contained in an Act of Legislature or by the rules framed by the rule making authority under an Act of Legislature. The language of the proviso to Article 309 does not support the proposition that the rules made by the Governor under proviso to Article 309 of the Constitution can be repealed only by an express provision in an Act made by the appropriate legislature. An express repeal of the rules made by the Governor can be brought about either by the statute itself or rules made under the said statute.³³

8. Inconsistency between Rules and Act of Legislature

The power of the Governor to frame rules under proviso to Article 309 can be exercised subject to any Act of Legislature. If any rule framed by the Governor under proviso to Article 309 contravenes any of the provisions of legislative enactment such a rule is invalid on the ground of inconsistency.³²

Applying the above principle it was held that when under the provisions of legislative enactment servants of Local bodies are directed to be absorbed in Government service, a person so absorbed in Government service is entitled to count the entire service for seniority. Hence, any rule framed by Governor under proviso to Article 309 providing that only fifty per cent of the service rendered in the local bodies alone should be counted for seniority is invalid.³⁴

9. Rules are Subject only to a Law made under Article 309

Rules regulating recruitment and conditions of service promulgated by the President or the Governor as the case may be in exercise of powers under proviso to Article 309 of the Constitution must be given full effect.

32 C. S. Narasimha Murthy *V.* State of Mysore—1968(2) *Mys. L. J.* 366.

33 K. Hanumantha Rao *V.* State of Mysore—1971(1) *Mys. L. J.* 524.

34 State of Mysore *V.* A. G. Hasabnis—1967(2) *Mys. L. J.* 310.

Rule 3 of the District Local Board Engineers (Absorption in the Mysore Engineering Service) Rules, 1964, held invalid as contravening Section 242 of the Mysore Village Panchayats and Local Boards Act, 1959.

It is subject to only the provisions of an Act of appropriate legislature. But such an Act of Legislature must be one contemplated under Article 309. An ordinance made by a University constituted under an Act of Legislature, prescribing rules of recruitment and conditions of service is not a provision contemplated by Article 309 of the Constitution. The power to legislate on matters relating to University falls under Entry 11, List II which deals with the subject "Education including Universities". The power to regulate matters relating to recruitment and conditions of service relating to "Public Services" is a different legislative field falling under Entry 41 of List II of VII Schedule to the Constitution. Having regard to the pith and substance of law constituting a University it falls within entry 11. Therefore, the field of operation of ordinances framed by the University is restricted to the question of affiliation of the Colleges concerned with the University. Persons appointed to the posts under the State cannot be said to be holding their posts without authority of law on the ground that they do not possess the qualifications prescribed in the ordinances framed by the University when they do possess the qualification prescribed by the rules framed by the Governor under proviso to Article 309 of the Constitution.³⁵

10. Power to Frame Rules with Retrospective Effect

The power conferred on the Governor to frame rules under proviso to Article 309 of the Constitution is a legislative power and is only subject to the law made by the legislature. Article 309 clearly provides that any rules so made shall have effect subject to the provisions of any such Act. The clear and unambiguous expression used in the Constitution must be given their full and unrestricted meaning unless hedged in by any limitations. If the appropriate legislature has passed an Act under Article 309, the rules framed under the proviso will have effect subject to that Act. But in the absence of any Act of the appropriate legislature on the matter, the rules made by the President or the Governor as the case may be, shall have full effect both prospectively and retrospectively. Apart from the limitations pointed out above, namely, that the rules made are subject to the provisions of any law made by the appropriate legislature, there is no other limitation imposed by the proviso to Article 309. Unless the rule is impeached on the ground of violation of Part III or any other provisions of the Constitution the rule is enforceable even if it has retrospective effect.³⁶

11. Retrospective Rule by Delegated Authority Not Valid

Power to make legislation with retrospective effect is a part of sovereign power. Hence, it is competent for the Parliament and State Legislatures to make legislation with retrospective effect within the respective legislative

35 Ram Gopal V. State of Rajasthan—1970(2) SCR 559 at 564 and 565.

36 Vadera B. S. V. Union of India—AIR 1969 SC 118—1968 (3) SCR 575.

fields as specified in the Constitution. Similar power is also vested in the President or the Governor or any person authorised by them in this behalf as they are the select legislative organs on whom the power to legislate in matters relating to recruitment and conditions of service of persons appointed to services and posts under the Union or the State as the case may be, is conferred under proviso to Article 309 of the Constitution. But no subordinate or delegated authority on whom the power to make rules or regulations is conferred can frame rules or regulations with retrospective effect.³⁷

12. Commencement of Rules

There is no rule or law prescribing the mode of publication of the rules framed by the Governor under proviso to Article 309 of the Constitution. Therefore, it cannot be said that the rules do not come into force unless published in the Gazette. If the rules are printed authoritatively and distributed fairly giving due publicity to all the Government servants concerned, it amounts to sufficient publication and it cannot be said that the rules have not come into force just because they have not been published in the official Gazette.³⁸ In the absence of any specific provision specifying the method of publication of subordinate legislation, the rules can be regarded as having taken effect when it is published through the channel now customarily recognised in our country as the appropriate channel through which official orders are made known to the public *viz.*, in the official Gazette.³⁹ The underlying object of making rules is to make them known to the class of persons who would be affected by them. Publication is therefore an ordinary prerequisite for the coming into force of any rules, or orders which have to be given the status of rules. They must therefore be held to come into operation only when they are published.³⁹⁻⁴⁰

13. Limitations on the Executive Power

(1) *Power can be exercised in the absence of statutory provisions* : (a) In the absence of any law made by the legislature or the rules framed by the President or the Governor, as the case may be, it is open to the executive to act and to lay down principles relating to recruitment and conditions of service. Unless specific rules regulating recruitment are framed by the Governor a general rule contained in the General Recruitment Rules framed by the Governor to the effect that recruitment shall be made in accordance with special rules of recruitment does not deprive the State of its executive power. But

37 K. D. Vasudeva *V.* Union of India—SLR 1971 P & H 487.

38 (a) Dharnappa *V.* State of Mysore—1971(1) Mys. L. J. S.N. P. 24.

(b) Harla *V.* State of Rajasthan—AIR 1951 SC 467—1952 SCR 110.

39 (a) R. Narayana Reddy *V.* State of Andhra Pradesh—SLR 1969 AP 736.

(b) State of Maharashtra *V.* Mayer Hans George—AIR 1965 SC 722—1965(1) SCR 123.

40 Sita Ram *V.* Speaker, Haryana Vidhana Sabha—SLR 1972 P & H 756.

once the statutory rule or an Act of Legislature is made the executive must abide by that Act or rule and it cannot in the exercise of its executive power ignore or act contrary to the Rule.⁴¹

(2) Similarly, in the absence of rules framed under Article 309 or under a statute it is open to the State to issue appropriate instructions regarding the principles to be followed in the matter of promotion. While it is not open to the Government to amend or supersede statutory rules by such instructions if the rules are silent on any particular point, it is open to the Government to fill up the gap and supplement the rules and issue instructions not inconsistent with the rules already framed.⁴²

(3) But where the recruitment rules provide for promotion of persons in the lower category to the higher category without prescribing any departmental examination for promotion, it is not open for the Government to issue executive orders requiring the passing of certain departmental examination as a qualification for such promotion as it amounts to amendment of the rules and not supplementing it.⁴³

(4) Even where the rules merely prescribe that passing of prescribed departmental examinations are necessary for promotion, the only competent authority to prescribe the examination is the Governor by rules made under proviso to Article 309 of the Constitution. No departmental examination could be enforced by issue of an executive order in the absence of any prescription in the rules framed by the Governor.⁴⁴

(5) Similarly, while it is no doubt competent for the State to issue administrative instructions to supplement the statutory rules, it is not competent for the State to issue instructions in the guise of supplementing the rules, which conflict with the rules.⁴⁵

(6) Where an executive order issued by the State Government raising the age of superannuation of all Government servants from 55 to 58 years also contained a Clause that Government may retire any Government servant at

41 B. N. Nagarajan *V.* State of Mysore—AIR 1966 SC 1942—Mysore Civil Services General Recruitment Rules 1957—Rule 3 interpreted.

42 (a) Sant Ram Sharma *V.* State of Rajasthan—1967 SC 1910—(1968) 1 SCR 111.

(b) Lalit Mohan *V.* Union of India—AIR 1972 SC 995.

43 (a) Chief Secretary to the Government of Mysore *V.* Chandraiah—SLR 1967 SC 155.

(b) State of Haryana *V.* Shamsheerjang—AIR 1972 SC 1546.

44 H. A. Ramanuja *V.* State of Mysore—1971(2) *Mys. L. J.* 601.

45 (a) State of Punjab *V.* Kirpal Singh—SLR 1970 P & H 239.
Administrative instructions issued by I.G.P. Punjab which ran counter to Rule 13 (10) of the Punjab Police Rules struck down as invalid.

(b) N. Rajeshwari *V.* The Director of Health and Family Planning—
W.P. No. 432/72—DD 26-7-1972 (Mysore).
Administrative instructions contrary to Rule 10 of Mysore Directorate of Health Services Recruitment Rules 1965 held invalid.

the age of 55 years giving 3 months notice and without assigning any reason and the said order was replaced by a rule framed under Article 309 of the Constitution which incorporated only the provision relating to enhancement of age of retirement but, did not contain the Clause relating to the power of Government to retire at 55 years, any retirement of Government servant at the age of 55 years after the promulgation of the rules on the basis of the earlier executive order is illegal.⁴⁶

(7) Where according to rules framed by the Governor, certain specified qualifications are prescribed for appointment, it is not open for the Government to issue any executive orders prescribing some other alternative or equivalent qualification.⁴⁷

(8) When the rules of recruitment prescribed the procedure for recruitment and the Public Service Commission was entrusted with the duty of making selection to certain classes of services under the State, it is not open to the Government to issue executive order diverting the power of the Public Service Commission and entrusting the same to a different authority prescribing different procedure for purposes of making selection to the said classes of service.⁴⁸

(9) When the Village Officers were being paid an annual remuneration under the hereditary offices Act and the said Act was repealed and they were continued as Village Accountants under the new set up under the State by virtue of a provision contained in a legislative enactment and the pay scales were fixed for the said post by the rules framed by the Governor, it was not open for the Government to pay the old remuneration which is contrary to the pay scale fixed in the rules.⁴⁹

14. No Retrospective Effect can be Given

It is not open for the executive to issue orders to take effect retrospectively so as to take away the rights vested in a Government servant.⁵⁰ Similarly, it is not competent for the Government to change the conditions of service with retrospective effect in exercise of its executive powers.⁵¹

46 I. N. Saxena *V.* State of Madhya Pradesh—AIR 1967 SC 1264.

47 N. Rajasekharappa *V.* State of Mysore—1967(2) *Mys. L. J.* 523.

48 (a) Govindappa Tirappa *V.* I.G. of Registration—1964(1) *Mys. L. J.* 478.

(b) Mohd. Nazeeruddin *V.* Director of Employment and Training—W.P. No. 3939/1969 (DD 18-7-72) Mysore.

49 Subba Rao *V.* State of Mysore—1970(2) *Mys. L. J.* 286.

Section 16(2) of the Mysore Law Revenue Act, 1964, and the Mysore General Services Revenue Subordinate Branch (Village Accountant) Cadre and Recruitment Rules, 1961 (interpreted).

50 (a) G. V. B. Naidu *V.* State of Mysore—1970(2) *Mys. L. J.* 296.

(b) N. C. Singhal *V.* Director General of Armed Forces—AIR 1972 SC 628.

51 (a) Suresh Kumar *V.* Union of India—AIR 1969 Punjab 257.

(b) Jagdish Ram *V.* State of Himachal Pradesh—SLR 1971(1) H.P. 457.

15. Effect of Amendment of Executive Order by Rules

When certain orders regulating recruitment and conditions of service are issued by the State in exercise of executive power they have only the status of Administrative instruction. But when an amendment is made to those orders by the President or the Governor in exercise of power under proviso to Article 309 of the Constitution, the entire body of rules contained in the Government order becomes statutory rules by incorporation.⁵²

16. Orders Issued Under Statutory Rules

Any order or letter containing directions in matters relating to recruitment or conditions of service issued in pursuance to power conferred under a statutory rule has statutory force and is binding on the State.⁵³ Therefore, an order prescribing quota as between direct recruitment and promotion issued in pursuance to a statutory rule is mandatory and binding.⁵³ Similarly the pay scale fixed by Government as provided in a statutory rule has statutory force.⁵⁴

52 *Bachan Singh V. Union of India*—SLR 1972 SC 397.

53 *Jaisinghani V. Union of India*—AIR 1967 SC 1427.

54 *Union of India V. Kripal Singh*—SLR 1972 P & H 402-408.