

## CHAPTER - 3

### Judicial Approach

3.1 The Constitution of India provides for some basic principles and enabling provisions in governing the services, however detailed instructions on recruitment and conditions of service have been left to the Union and States to be regulated by the Acts of the appropriate legislature. Substantive part of Article 309 of the Constitution provides for the appropriate legislature to enact laws regulating the recruitment and conditions of the service in relation to the public servant serving under the Union or the State. However, pending legislation, the proviso to Article 309 confers rule making power to the President or the Governor as the case may be for regulating such services. Such delegated legislation would necessarily have to be within the ambit of the provisions relating to Fundamental Rights in the Constitution and conform to doctrine of pleasure enshrined in Article 310 and safeguards provided for in Article 311. The proviso is in the nature of legislative power.<sup>11</sup> The power is derived directly from the Constitution and not from any mandate of legislature.<sup>12</sup>

3.2 In a democratic government, the significance and importance of codified provisions of recruitment need no emphasis in providing free access to all citizens in the matters of public employment. The Constitution of India has provided comprehensive provisions for Services under the Union and the States and equality before law and nondiscrimination on the basis of caste, sex, religion and place of birth are mandated as fundamental rights.

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<sup>11</sup> B.S.Yadav v. State of Haryana, 1980 (Supp) SCC 524

<sup>12</sup> N.Srinivasan v. State of Kerala, AIR 1968 Ker 158 (FB).

Keeping in view such ethos and need for merit selection in a democratic government, the recruitment rules /service rule play an important role in the appointment process and lay down the method of appointment, eligibility criteria etc. Except for All India Services Act, 1951, enacted in pursuance of Article 312 of the Constitution, the civil services and civil posts under the governments in the Centre and States are largely covered by the rules for recruitment made by the respective Governments under the enabling provision of Article 309. For other authorities like statutory corporations, instrumentalities and agencies of the State, such rules are often made pursuant to the powers conferred by the statute setting up such authorities. Article 14 of the constitution provides for equality before law and Article 16 expressly provides for equality of opportunities in matters relating to public appointments. The adherence to these fundamental rights guaranteed by the Constitution is to be observed in all appointment processes.

### ***Judicial Review***

3.3 A reading of Article 309 of the Constitution of India would make it clear that any Act or rule made under this provision would be *ultra vires* if they contravene any of the provisions of the Constitution. The Fundamental Rights as enshrined in Part III of the Constitution impact all aspects of recruitment process and are enforceable through a Court of Law and any infringement is remediable by the High Court and Supreme Court. The provision of judicial review of legislative action including delegated legislation pertaining, among other, to Services under the Union and State Governments is an essential feature of the Constitution of India. The law declared by the Supreme Court is ‘

binding on all courts within the country' (Article 141 of Constitution), therefore all rules made under Article 309 must conform to such case law.

### ***Case Law Pertaining to Article 309:***

3.4 Article 309 is an enabling provision and does not impose any duty to legislate or make rules<sup>13</sup>. It also clarifies that any act done by the government in exercise of its executive powers cannot be invalidated on the grounds that rules on that aspect have not been made. However rules once framed would have binding effect on government<sup>14</sup>. The opening words of Article 309 'Subject to the provision of the Constitution ' refer to Articles like 14,15,16,19,229, 310 and 311<sup>15</sup>. It has also been held in *Padmanabhacharya*<sup>16</sup> that Article 309 enables the executive to make rules to regulate recruitment but no power is conferred to validate an order which was invalid when made. The implications of this is that any illegal, irregular recruitment or appointment made on ad-hoc basis in absence of rule cannot be validated retrospectively.

3.5 It is well settled now that Article 14 would be applicable for employment under the State so as to invalidate any discriminatory rule or order from the stage of initial appointment to its termination<sup>17</sup>. A rule or order would be discriminatory if the

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<sup>13</sup> *Nagarajan v. State of Mysore*, (1966) S.C.(C.A.430/64).

<sup>14</sup> *Bhatnagar A.K.v. Union of India*,(1991)1 SCC 544(para 13)

<sup>15</sup> *Motiram vs. N.E.F. Railway*, A.1964 S.C. 600 (610) and *State of Mysore v. Padmanabhacharya*,A. 1966 SC 602 (605) ( A. Bhattacharjya: Recruitment Rules and Civil Services pg 112)

<sup>16</sup> *State of Madras v. Padmanabhacharya*,A. 1966, S.C. 602(605), cited in A. Bhattacharjya: Recruitment Rules and Civil Services pg 113

<sup>17</sup> *Ganga Ram v. Union of India*(1970) IISCCR 221 (224) and *State of Punjab v. Joginder A.* 1963, S.C. 913).

classification involved is not reasonable, however the Article 14 would be attracted only in case of actual discrimination as distinct from an abstract or hypothetical inequality<sup>18</sup>.

3.6 The recruitment rules framed under Article 309 generally contain provision for relaxation. In Sandeep Kumar Sharma<sup>19</sup> (1997), it has been held by Supreme Court that the power for relaxation could either be for mitigating hardship or to meet a special deserving situation. It further cautioned that arbitrary exercise of power be guarded against.

3.7 It is a settled principle that an administrative instruction cannot operate in a field covered by statutory rules but an exception might occur where rules are unworkable<sup>20</sup>.

### ***3.8 Case Law relating to Recruitment***

The process of recruitment has been subject to intense judicial scrutiny in number of cases decided by the courts of law. Some of the basic tenets of service law in the field of recruitment are as follows:-

- (1) Question of recruitment would not arise without the existence of posts or vacancies.<sup>21</sup>
- (2) Employer is not bound to fill up any post or posts. Filling up of a vacancy is a managerial function depending upon administrative necessity<sup>22</sup>.

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<sup>18</sup> Kishori v. Union of India, A. 1962 S.C. 1139), A. Bhattacharjya: Recruitment Rules and Civil Services pg 114

<sup>19</sup> Sandeep Kumar Sharma v. State of Punjab ((1997) 10 SCC 298, Samaraditya Pal, Service Law relating to Government & Public Undertakings, pg 35

<sup>20</sup> State of Sikkim v. Dorjee Tshering Bhutia, AIR 1991 SC 1933

<sup>21</sup> Himachal Road Transport Corporation v. Parveen Kumari, (1996) 4 SCC 560 )

<sup>22</sup> State of Haryana v. Subhash Chander Marwaha, (1974) 3 SCC 220

(3) **Process of Recruitment:** The process of recruitment involves deciding based on recruitment rules, (a) the method of appointment i.e. whether it is to be recruitment from open market, (external source) or promotion from feeder grades or tenure appointment on deputation or absorption (internal Source) (b) qualifications, age requirement for the appointment (c) inviting applications from eligible, qualified candidates and (d) making selection. The case law abounds on each aspect. Some of the important independent principles as deduced from the case laws are compiled as below

(i) It is fully within the competence of the Government to decide as a matter of policy, the source from which personnel required for manning the service are to be drawn.<sup>23</sup>

(ii) **Direct recruitment:**

a) Publicity regarding vacancies is the surest means of fulfilling the fundamental rights conferred by Article 14 and 16 of the Constitution.<sup>24</sup>

b) From the point of view of publicity, advertisement is commonest and most effective means of inviting applications. Amongst media available, newspapers have wide circulation and would naturally be the most effective instrument<sup>25</sup>. However, keeping in view the financial consideration, publication in any other reasonable manner also possible like putting up notices on notice board of commonly visited public offices.<sup>26</sup>

(c) In *N. Hargopal*<sup>27</sup> 1987, the Supreme Court has held that the equality of opportunity would be available to all eligible candidates if a public establishment notifies vacancies

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<sup>23</sup> S.S. Moghe v. Union of India, AIR 1981 SC 1495 at 1510

<sup>24</sup> B.S.Minhas v. Indian Statistical Institute 1983 (3) SLR 150 at 159)

<sup>25</sup> B.N.Nagarajan v. State of Mysore, Air 1966 SC 1942 (1945): 1966) 3 SCR 682) B.N.Nagarajan v. State of Mysore, Air 1966 SC 1942 (1945): 1966) 3 SCR 682)

<sup>26</sup> G.Trilochan Rao v. The Principal, Andhra Pradesh Residential School for Backwater classes, 1992 (1) SLR 341 at 342 (AP).

<sup>27</sup> N. Hargopal, AIR 1987 SC 1227

to Employment Exchange in terms of the Employment Exchange Act and also uses other means of publicity like newspapers having wider circulation, radio, television, employment news bulletin.

(d) It is the prerogative of appointing authority to lay down requisite qualification for recruitment to Government service<sup>28</sup>.

(e) The prescribed qualifications must have reasonable nexus with the requirement of concerned service and should be constitutionally valid. In *Panduranga*<sup>29</sup>, the principles as summarized by Basu<sup>30</sup> in this regard read as follows: "With a view to secure fair and efficient administration of justice, it would be competent for a State to prescribe knowledge of local laws, knowledge of regional language, or adequate experience at the Bar as qualification for appointment to the judicial service, but it cannot be provided that only advocates practicing in that State High Court shall be eligible, so as to disqualify advocates practicing in other High Courts though they belong to the same class, without any rational basis for such disqualification."

(f) Recruitment in deviation of the published qualification would be violative of Article 14 and 16 of the Constitution. But the non deviation principle is to be applied reasonably. Where minimum qualifications are prescribed, persons with higher qualifications can also be considered<sup>31</sup>.

(g) In *Lila Dhar v. State of Rajasthan*<sup>32</sup>, the supreme court has recognized the importance of competitive exams and has deliberated on the merits of written exam and interview. In

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<sup>28</sup> *Banarsidas v. State of U.P.*, AIR 1956 sc 520: 1956 SCR 357

<sup>29</sup> *Panduranga v. APPSC*, A. 1963 SC 268 (271)

<sup>30</sup> Durga Das Basu *Shorter Constitution of India*, Thirteenth edition, 2001, Wadhwa and Company, Nagpur pg 1311

<sup>31</sup> *Sant Lal v. State of Haryana*, 1978 (1) SLR 133 (P&H) per S.S. SANDHAWALIA, J., at p. 136)

<sup>32</sup> AIR 1981SC 1777

general a view has been taken that there can be no rule of thumb regarding precise weight to be given to each method and it must vary from service to service according to the requirements of service, the minimum qualifications prescribed, the target age group etc.

(h) A mistake of the authorities cannot confer eligibility to an appointee and authority concerned can terminate their services by issuing a show cause notice.<sup>33</sup>

(i) It is the exclusive function of the selection committee to categorize the candidates in the light of relevant records as well as to determine what norms are to be applied in making the assessment of candidate. In discharging its function the selection committee must apply same norms and tests and the relevant rules.<sup>34</sup>

(j) The law as it stood at the point when selection process commenced would have to be followed for completion of selection process<sup>35</sup>. However there is no absolute obligation on part of the Government to complete selection process and selection process can be reviewed and stopped e.g. when Government decides to revise the eligibility criteria for appointment<sup>36</sup>.

(k) Appointing authority is not obliged to accept the recommendations of selection committee<sup>37</sup>. But incase there are statutory obligation to accept recommendation; the same would need to be followed. It has also been held that if appointing authority appoints a person less qualified, the appointment is illegal<sup>38</sup>.

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<sup>33</sup> Kishorilal Charmarkar v. Distt. Education Officer, (1998) 9 SCC 395

<sup>34</sup> Union Public Service Commission v. Hiranyalal Deb, (1988) 2 SCC 242

<sup>35</sup> P. Mahendran v. State of Karnataka AIR 1990 SC (405) (1990) 1 SCC 411

<sup>36</sup> Jai Singh dala v. State of Haryana, 1993 Supp (2) SCC 600: 1993 Lab IC 844.)

<sup>37</sup> H. Mukherjee v. Union of India, 1994 Supp (1) SCC 250: AIR 1991 SC 1612: (1991) 2 SCR 779)

<sup>38</sup> Udai Bhan Rai v. State of U.P., 1994 (1) SLR 491(SC): 1994 Supp (3) SCC 401: AIR 1994 SC 1603.

**(iii) Promotion:**

- a) In case of promotion a judicial stand seems evident that the opportunity for advancement is essential as stagnation would impact the efficiency of public services<sup>39</sup>, however the principle of avoiding stagnation would not be with reference to a particular individual employee but the test would be if rules provide for avenues of promotion.<sup>40</sup>
- b) Another important tenet of law on promotion is that although an employee has no right to be promoted but he has a right to be considered for promotion within the meaning of Article 16 (1) of the Constitution if eligible in terms of rules.<sup>41</sup>
- c) In the matter of promotion to selection post, the government has prescribed a zone of consideration<sup>42</sup> so as to avoid infructuous work of assessing all eligible candidates in feeder grade irrespective of number of vacancies available. The same has also been upheld in context of right to be considered for promotion.<sup>43</sup>
- d) Requirement of specific qualification for eligibility for promotion, unless that requirement was totally unreasonable is not violative of Article 14 & 16.<sup>44</sup>
- e) Based on evaluation of case law, the general principles to be followed by committees have been summarized by Pal<sup>45</sup> as follows a) The consideration must be fair and reasonable (b) In the rating to be given to the candidate for promotion,

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<sup>39</sup> CSIR v. K.G.S.Bhatt AIR 1989 Sc 1972

<sup>40</sup> State of J.&K v. Shiv Ram Sharma, (1999) 2 SLR 247

<sup>41</sup> General Manager Southern Railway v. Rangachari, AIR 1962 Sc 36

<sup>42</sup> DoP&T OM No.22011/2/2002-Estt(D),06/01/2006

<sup>43</sup> Ajit Singh v. State of Punjab, (1999) 7 SCC 209

<sup>44</sup> K. Jagdeesan v. Union of India, (1990) 2 SCC 228

<sup>45</sup> Samaraditya Pal: Service Law relating to Government and Public Undertakings Second Edition 2004, Wadhwa & Company Nagpur, pg 501)



it must apply the same yardstick and norms and (c) The Committee or any member thereof cannot have any bias.

**(iv) Deputation:**

a) The consent of the employee and concurrence of lending authority is a well known position in law for deputation.<sup>46</sup>

b) A deputationist has no right to be absorbed in the borrowing department in the absence of statutory provisions.<sup>47</sup>

***The role of the Union Public Service Commission***

3.9 In accordance with the 1924 report of Royal Commission on Superior Civil Services of India, the first Public Service Commission was set up in 1924. This was replaced by the Federal Public Service Commission by the Government of India Act of 1935. The Federal Public Service Commission became Union Public Service Commission after independence and was granted constitutional status with the promulgation of Constitution of India on 26th January 1950.

3.10 Under the mandate of Article 320 of the Constitution, the Union Public Service Commission is to be consulted on all matters relating to methods of recruitment to civil services and for civil posts and on the principles to be followed in making appointments to civil services and posts and in making promotions and transfers from one service to another and on the suitability of candidates for such appointments, promotions or

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<sup>46</sup> e.g. R.L. Gupta Gupta, : AIR 1988 SC 968

<sup>47</sup> Kunal Nanda v. Union of India, ( 2000) 5 SCC 362

transfers. Under the scheme of the provisions of the Constitution, the executive decision contrary to the recommendations of the Commission are subject to legislative review. Under the provisions of Article 323, the UPSC presents annual report to the President covering annual work done by the Commission and includes cases with explanatory memorandum, where the advice of the Commission has been not accepted by the executive. The president causes to lay the report before each house of the Parliament. In practice, the provision acts as deterrence as too many disagreements with the Commission are not taken to be politically correct and helps in maintaining the independent and impartial status of the Commission.

3.11 Proviso to Article 320 (3) of the Constitution enables the President and the Governor to make regulations to take out particular classes from the obligation to consult the Public Service Commission under Article 320 (3). Accordingly, while the Commission is to be consulted on all civil posts, a number of posts have been excluded from the purview of the Commission under the Exemption from UPSC Consultation rules, 1958. The UPSC is broadly involved with direct recruitment to Gr. A posts and some Gr. B posts, through competitive examination method and selection method. Promotion to Gr. A from Gr. B and also within Gr. A falls within the purview of UPSC. Deputation and absorption in Gr. A and Gr. B posts where the State Officers or officers of Public Sector Units or other Autonomous organizations are to be considered, is within the purview of the Commission.

3.12 Based on judicial pronouncements, the grounds of review of the decision or act of a Public Service Commission by a court of law have been summarized by Basu<sup>48</sup> as follows:

- (i) That they were made in breach of the *Rules* relating to the matter.
- (ii) That they were vitiated by the influence of *extraneous* considerations.
- (iii) That, in the case of a composite written and viva voce test, an excessive percentage of marks was allotted to the viva voce test-unless the nature of the candidates calls for such a high standard of personality test.
- (iv) That, in respect of the viva voce test, marks were not separately allocated under the different heads of test, e.g., experience, personality, suitability.
- (v) That the decision of the Public Service Commission was actuated by bias or *mala fides* or that it was arbitrary.

3.13 Under Article 320(3) (a) of the Constitution the Commission is to be consulted on all matters relating to method of recruitment to civil services and for civil posts. Therefore though the government is empowered under Article 309, to make recruitment rules for various services or posts, the consultation with the Commission is mandatory in view of Article 320. Therefore scrutiny of the recruitment rules, except for exempted posts, of various Departments and suggesting any changes in them is an important function of the UPSC.

3.14 The constitutional provisions for functions of UPSC have been actualized through prescribed processes of appointment. The recruitment rules of a post have specific

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<sup>48</sup> Durga Das Basu, Shorter Constitution of India, thirteenth edition 2001. Wadhwa Nagpur. Pg1508.

provisions regarding consultation with UPSC in the matter of appointment.<sup>49</sup> Any appointment in contravention to such provisions would render such an appointment illegal. Consultation with the UPSC for the process of framing recruitment rules is also part of the guidelines<sup>50</sup> for framing of recruitment rules.

3.15 To summarize, the judicial approach towards the process of appointment in Central Civil Services is guided by the provisions of the Constitution, mainly the Fundamental Rights and is directed towards equal access and equal opportunity, equality before law, nondiscriminatory eligibility conditions, reasonableness and unbiased selection procedure, nexus of qualification requirements with the service to be discharged, and nondiscriminatory application of rules and procedures. Within the abovementioned principles, a lot of flexibility is also accorded to the executive for the discharge of its administrative functions. The choice of method of appointment, source of appointment, qualifications and other eligibility conditions have been generally accepted to be in the domain of executive provided they are reasonable.

3.16 The administrative process of appointment has also evolved and shaped to incorporate these principles in various rules and procedures prescribed for different methods of appointment. Open advertisement / publicity of vacancies, non discriminatory, codified rules on eligibility and consultation with Public Service Commission, and well defined and publicized selection procedure is the hall mark of any

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<sup>49</sup> DoP&T OM No. AB-14017/12/87-Estt.RR dated 18/3/88- Guidelines on framing amendment, relaxation of recruitment rules, Para 3.15.

<sup>50</sup> Ibid, Para 2.6

method of appointment in civil services. Barring the exempted categories, the recruitment from open market is through Union Public Service Commission and Staff Selection commission which are independent bodies and have evolved system of selection which includes calling for application from eligible candidates through advertisement, written exams, interview or both and merit based selection. As for the appointment through promotion, there are well codified guidelines for Departmental Promotion Committee (DPC) which ensures consideration of all eligible persons for promotion based on prescribed benchmark of performances.<sup>51</sup>

3.17 A strong legal base for civil service is one of the defining features of modern democracies. However, the need for effective delivery of government functions in an ever changing and complex external environment has resulted in debate and rethinking on the role and processes of organization of civil services, including the process of appointment. Policy issues involved in the recruitment process and trends of reforms are discussed in the next chapter.

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<sup>51</sup> DoP&T OM No. 22011/5/86-Estt. (D) dated 10/4/89- Guidelines on departmental Promotion committee.