

CHAPTER 3

Indian Constitution and role of UPSC

As mentioned in Chapter1, UPSC is one of the original Constitutional bodies along with other institutions like Comptroller and Auditor General of India and Election Commission of India. Therefore it becomes necessary to examination how the Constituent Assembly/ Constitution wanted the Public Service Commissions in India to function. To study this, we must see the various provisions in the Constitution. Article 315-323(Part XIV)¹⁴ which deals with Public Service Commissions. We reproduce *ad-vertim* the Articles below:

ARTICLE315. Public Service Commissions for the Union and for the States.—

(1) Subject to the provisions of this article, there shall be a Public Service Commission for the Union and a Public Service Commission for each State.

(2) Two or more States may agree that there shall be one Public Service Commission for that group of States, and if a resolution to that effect is passed by the House or, where there are two Houses, by each House of the Legislature of each of those States, Parliament may by law provide for the appointment of a

¹⁴ Durga Das Basu " Shorter Constitution of India (1960) ; S,C, Sarkar And Sons, Calcutta

Joint State Public Service Commission (referred to in this Chapter as Joint Commission) to serve the needs of those States.

(3) Any such law as aforesaid may contain such incidental and consequential provisions as may be necessary or desirable for giving effect to the purposes of the law.

(4) The Public Service Commission for the Union, if requested so to do by the Governor of a State, may, with the approval of the President, agree to serve all or any of the needs of the State.

(5) References in this Constitution to the Union Public Service Commission or a State Public Service Commission shall, unless the context otherwise requires, be construed as references to the Commission serving the needs of the Union or, as the case may be, the State as respects the particular matter in question.

ARTICLE 316:

Appointment and term of office of members.—(1) The Chairman and other members of a Public Service Commission shall be appointed, in the case of the Union Commission or a Joint Commission, by the President, and in the case of a State Commission, by the Governor of the State:

Provided that as nearly as may be one-half of the members of every Public Service Commission shall be persons who at the dates of their

respective appointments have held office for at least ten years either under the Government of India or under the Government of a State, and in computing the said period of ten years any period before the commencement of this Constitution during which a person has held office under the Crown in India or under the Government of an Indian State shall be included.

(1A) If the office of the Chairman of the Commission becomes vacant or if any such Chairman is by reason of absence or for any other reason unable to perform the duties of his office, those duties shall, until some person appointed under clause (1) to the vacant office has entered on the duties thereof or, as the case may be, until the Chairman has resumed his duties, be performed by such one of the other members of the Commission as the President, in the case of the Union Commission or a Joint Commission, and the Governor of the State in the case of a State Commission, may appoint for the purpose.

(2) A member of a Public Service Commission shall hold office for a term of six years from the date on which he enters upon his office or until he attains, in the case of the Union Commission, the age of sixty-five years, and in the case of a State Commission or a Joint Commission, the age of sixty-two years, whichever is earlier:

Provided that—

(a) A member of a Public Service Commission may, by writing under his hand addressed, in the case of the Union Commission or a Joint Commission,

to the President, and in the case of a State Commission, to the Governor of the State, resign his office

(b) A member of a Public Service Commission may be removed from his office in the manner provided in clause (1) or clause (3) of article 317.

(3) A person who holds office as a member of a Public Service Commission shall, on the expiration of his term of office, be ineligible for reappointment to that office.

ARTICLE 317:

Removal and suspension of a member of a Public Service Commission.—(1) Subject to the provisions of clause (3), the Chairman or any other member of a Public Service Commission shall only be removed from his office by order of the President on the ground of misbehavior after the Supreme Court, on reference being made to it by the President, has, on inquiry held in accordance with the procedure prescribed in that behalf under article 145, reported that the Chairman or such other member, as the case may be, ought on any such ground to be removed.

(2) The President, in the case of the Union Commission or a Joint Commission, and the Governor in the case of a State Commission, may suspend from office the Chairman or any other member of the Commission in respect of whom a reference has been made to the Supreme Court under clause (1) until the

President has passed orders on receipt of the report of the Supreme Court on such reference.

(3) Notwithstanding anything in clause (1), the President may by order remove from office the Chairman or any other member of a Public Service Commission if the Chairman or such other member, as the case may be,—

(a) is adjudged an insolvent; or

(b) engages during his term of office in any paid employment outside

the duties of his office; or

(c) is, in the opinion of the President, unfit to continue in office by

reason of infirmity of mind or body.

(4) If the Chairman or any other member of a Public Service Commission is or becomes in any way concerned or interested in any contract or agreement made by or on behalf of the Government of India or the Government of a State or participates in any way in the profit thereof or in any benefit or emolument arising there from otherwise than as a member and in common with the other members of an incorporated company, he shall, for the purposes of clause (1), be deemed to be guilty of misbehaviour.

ARTICLE 318:

Power to make regulations as to conditions of service of members and staff of the Commission.—In the case of the Union Commission or a Joint Commission, the President and, in the case of a State Commission, the Governor of the State may by regulations—

(a) determine the number of members of the Commission and their conditions of service; and

(b) make provision with respect to the number of members of the staff of the Commission and their conditions of service provided that the conditions of service of a member of a Public Service Commission shall not be varied to his disadvantage after his appointment.

ARTICLE 319:

Prohibition as to the holding of offices by members of Commission on ceasing to be such members.—On ceasing to hold office—

(a) the Chairman of the Union Public Service Commission shall be ineligible for further employment either under the Government of India or under the Government of a State;

(b) the Chairman of a State Public Service Commission shall be eligible for appointment as the Chairman or any other member of the Union Public Service Commission or as the Chairman of any other State Public Service Commission,

but not for any other employment either under the Government of India or under the Government of a State;

(c) a member other than the Chairman of the Union Public Service Commission shall be eligible for appointment as the Chairman of the Union Public Service Commission or as the Chairman of a State Public Service Commission, but not for any other employment either under the Government of India or under the Government of a State;

(d) a member other than the Chairman of a State Public Service Commission shall be eligible for appointment as the Chairman or any other member of the Union Public Service Commission or as the Chairman of that or any other State Public Service Commission, but not for any other employment either under the Government of India or under the Government of a State.

ARTICLE 320:

Functions of Public Service Commissions :-

(1) It shall be the duty of the Union and the State Public Service Commissions to conduct examinations for appointments to the services of the Union and the services of the State respectively.

(2) It shall also be the duty of the Union Public Service Commission, if requested by any two or more States so to do, to assist those States in framing and operating schemes of joint recruitment for any services for which candidates possessing special qualifications are required.

(3) The Union Public Service Commission or the State Public Service Commission, as the case may be, shall be consulted—

(a) on all matters relating to methods of recruitment to civil services and for civil posts.

(b) 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 transfers;

(c) on all disciplinary matters affecting a person serving under the Government of India or the Government of a State in a civil capacity, including memorials or petitions relating to such matters;

(d) on any claim by or in respect of a person who is serving or has served under the Government of India or the Government of a State or under the Crown in India or under the Government of an Indian State, in a civil capacity, that any costs incurred by him in defending legal proceedings instituted against him in respect of acts done or purporting to be done in the execution of his duty should be paid out of the Consolidated Fund of India, or, as the case may be, out of the Consolidated Fund of the State;

(e) on any claim for the award of a pension in respect of injuries sustained by a person while serving under the Government of India or the Government of a State or under the Crown in India or under the Government of an Indian State, in a civil capacity, and any question as to the amount of any such award, and it shall be the duty of a Public Service Commission to advise on any matter so

referred to them and on any other matter which the President, or, as the case may be, the Governor of the State, may refer to them:

Provided that the President as respects the all-India services and also as respects other services and posts in connection with the affairs of the Union, and the Governor, as respects other services and posts in connection with the affairs of a State, may make regulations specifying the matters in which either generally, or in any particular class of case or in any particular circumstances, it shall not be necessary for a Public Service Commission to be consulted.

(4) Nothing in clause (3) shall require a Public Service Commission to be consulted as respects the manner in which any provision referred to in clause (4) of article 16 may be made or as respects the manner in which effect may be given to the provisions of article 335.

(5) All regulations made under the proviso to clause (3) by the President or the Governor of a State shall be laid for not less than fourteen days before each House of Parliament or the House or each House of the Legislature of the State, as the case may be, as soon as possible after they are made, and shall be subject to such modifications, whether by way of repeal or amendment, as both Houses of Parliament or the House or both Houses of the Legislature of the State may make during the session in which they are so laid.

ARTICLE 321:

Power to extend functions of Public Service Commissions.—An Act made by Parliament or, as the case may be, the Legislature of a State may provide for the

exercise of additional functions by the Union Public Service Commission or the State Public Service Commission as respects the services of the Union or the State and also as respects the services of any local authority or other body corporate constituted by law or of any public institution.

ARTICLE 322:

Expenses of Public Service Commissions.—The expenses of the Union or a State Public Service Commission, including any salaries, allowances and pensions payable to or in respect of the members or staff of the Commission, shall be charged on the Consolidated Fund of India or, as the case may be, the Consolidated Fund of the State.

ARTICLE 323:

Reports of Public Service Commissions.—(1) It shall be the duty of the Union Commission to present annually to the President a report as to the work done by the Commission and on receipt of such report the President shall cause a copy thereof together with a memorandum explaining, as respects the cases, if any, where the advice of the Commission was not accepted, the reasons for such non-acceptance to be laid before each House of Parliament.

(2) It shall be the duty of a State Commission to present annually to the Governor of the State a report as to the work done by the Commission, and it shall be the duty of a Joint Commission to present annually to the Governor of each of the States the needs of which are served by the Joint Commission a report as to the work done by the Commission in relation to that State, and in either case the

Governor, shall, on receipt of such report, cause a copy thereof together with a memorandum explaining, as respects the cases, if any, where the advice of the Commission was not accepted, the reasons for such non acceptance to be laid before the Legislature of the state. It may be noted that under Article 320(4) overriding importance has been given to

the Executive to frame rules under Article 16(4) and Article 335. We also look at these Articles to understand the mindset of our Constitution makers:

ARTICLE 16 (4): Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State. (The Article deals with Equality of opportunity in matters of public employment)

ARTICLE 335. The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State.

1. Provided that nothing in this article shall prevent in making of any provision in favour of the members of the Scheduled Castes and the Scheduled Tribes for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State.

DIRECTIVE PRINCIPLES OF STATE POLICY

Apart from above provisions which directly relates to UPSC/PSCs the Constitution has also issued directives to the State to enact policies towards the welfare of the people as enumerated in Part IV of the Constitution under the heading " Directive Principles of State Policy". We may look at the basis of these directives as stated in the Constitution:

Article 37.

The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

Article 38.

(1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

(2) The State shall, in particular, strive to minimize the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

Article 39.

The State shall, in particular, direct its policy towards securing—

(a) that the citizens, men and women equally, have the right to an adequate means of livelihood;

(b) that the ownership and control of the material resources of the community are so distributed as best to sub serve the common good;

(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;

(d) that there is equal pay for equal work for both men and women; and so on....

Thus the Constitution makers wanted State to give equal opportunities to all irrespective of caste, area, creed, religion or gender. Constitutionally mandated Public Service Commission's with their fair play and objectivity it was hoped will fulfill these directives as far as Civil Services recruitment is concerned.

India with its multi-ethnic, multi-religious society where people have aspirations to attain their dreams for a high quality of life led the Constitution makers realize the importance of free, fair, independent and honest civil service which can help in attaining the objectives as enshrined in the Preamble. For this they envisaged an independent and strong Public Service Commission's at both the Centre and the States. Nowhere in the world has so much importance and protection given by the Constitution as in this Country. From perusal of various provisions as mentioned above, following characteristics of UPSC (PSCs) emerge:

- UPSC must be an independent body. This has been ensured both administratively and financially.
- It has been ensured that removal of Chairman/Members are done through a procedure of President referring the alleged misconduct to the

Hon'ble Supreme Court which will investigate and on its report action will be taken(**ARTICLE317**). Also the Chairman/Members cannot take any job under the Government after demitting office (**ARTICLE 319**).

- As per Article **320** service of Chairman/Members cannot be varied to their disadvantage. This Article also envisaged that member's and staff regulation be made duly notified by the government. This ensures there no arbitrariness from either the Government or Commission's side.
- Vide Article **322**, expenses of the Commission are charged to the Consolidated Fund of India and hence not debated in the Parliament. Thus financial independence is ensured.
- Constitution envisaged that personnel policy be divided into multiple agencies and recruitment of any kind to the higher civil services of the Centre be entrusted to independent UPSC. This is because recruitment process can get mired into corruption and nepotism and hence an independent Constitutional body like UPSC is suitable for the purpose.
- Annual report of UPSC has to be laid on the table of both the Houses of Parliament detailing cases of disagreement along with the Ministry's reason(s) for not accepting the recommendations of the Commission. This has been done to ensure that the Executive does not ride roughshod over the UPSC.
- Although the mandate of UPSC is to recruit persons of merit and capability, the Constitution also expects UPSC to fulfill its desire and

Government's policy of affirmative action in respect of weaker sections like SC/ST/OBC as well as Minorities and Women.

Thus the Constitution realized the importance of recruitment agency to be fair and just in its functions. Over the years UPSC has stood the test of times and currently enjoys the reputation of being one of the few institutions standing tall in today's polity of India. However to really understand whether UPSC has really fulfilled its Constitutional Mandate, we must first if see any restrictions have been put on the functioning of UPSC. At the present juncture we may briefly mention following restrictions (as we are going to delve deeply into them in subsequent chapters):

- i. In order to exempt some posts which for reasons of National Security or some other reasons may not be required to be referred to the Commission for their advice, the Union Public Service Commission (Exemption from Consultations) Regulations were issued on September 1, 1958,¹⁵ under Article 320(3) (a), (b) and below (e) of the Constitution. These Regulations are amended or revised as and when the need arises. But as we will see in subsequent chapters these Regulation has been used rather frequently even in the other functions of the Commission, leading to the question whether the mandate given by the Constitution has been diluted or otherwise.

¹⁵ O.M. No.18/4/51-Estt.(B) Government of India Ministry of Home Affairs New Delhi, the 1st September, 1958

- ii. Under Article 318, UPSC can make its regulation for Members and staff. UPSC has done so by making UPSC (Members) Regulations¹⁶ and UPSC (staff) Regulations¹⁷. However procedure entails that the proposal goes from UPSC to DOP&T and to ministry of Law for concurrence. This is not only time consuming but gives leverage in the hands of the Government to overrule the Commission.
- iii. Also in case of staff, the higher level comes on Central Deputation, while middle level is posted from Central Secretariat Service and only few technical posts are Cadre Posts. Thus the overall shortages in the Government are reflected in posting of staff in the Commission. In fact out of sanctioned strength of 2100 only 1674 were in position on March 31st 2011 i.e. a shortage of about 25%. This shortage has adversely been commented by Parliamentary Standing Committee which has advised the Government to make good the shortage. This is not the picture in Election Commission which can commandeer staff especially during Elections. The shortage of staff severely affects the UPSC's performance in discharging its duty of holding 14 major examination throughout the Country; scores of recruitment interviews and various promotions/deputations meetings. Furthermore the Commission

¹⁶ Accessed from <http://www.upsc.gov.in/general/rti/administration/mr.pdf>

¹⁷ Accessed from <http://www.upsc.gov.in/general/rti/administration/notification.pdf>

has to run after the Government (DOP&T) to get more staff posted.

- iv. Article 320 speaks about Functions of Public Service Commission. Sub Article 1 to 5. Sub Article 3 of Article 320 speak about consultation with the Commission from Clauses (a) to (e) with a proviso conferring the power of making Regulations by the Executive for the functioning of the Commission and such Regulations can be made generally, or in any particular class of case or in any particular circumstances not to consult the Commission in respect of services and post. But under article 320 sub Article 5 there is a rider which mandates that the Regulations should be laid before the State Assembly. The issue is whether Article 320 Sub Article 5 is mandatory or directory only. Supreme Court and several High Courts in several cases has held that the Article 320 Sub Article 3 of Clauses (a) to (e) are directory only and if accepted, whether the same view can also be taken in regard to laying of the said Regulations before the Legislative Assembly as directory only and not mandatory and that is the crux of the matter. This answer can be viewed from two angles.

Firstly, if we hold that the State Public Service Commission which our founding fathers of the Constitution intend to make the

Commission an independent Constitutional entity, than making the Sub Article 5 of Article 320 as only directory will defeat the very purpose and intention of the independent characteristic of the Commission, as in that case the Commission will be at the mercy of the State Executive which can change the Regulations to serve the selfish interest of those in power and the Commission will be only a lame duck serving the interest of those in power only, as there will be no opportunity for the Legislature to check the Executive power and List II entry 41 read with article 246 will have no meaning. In other words Article 246 read with List II entry 41 will give way to the Executive by the Legislature and the Executive will be the Law maker of the State and Sub Article 5 of Article 320 will be only a decoration piece in the Constitution. The issue is, was it the intention of the founding fathers of our Constitution to make the State Public Service Commission to be under the Executive?

Secondly, if we hold that Sub Article 5 of Article 320 is mandatory than it accords with the intention and purpose of our founding fathers of the Constitution as in that case there will be opportunity for the representative of the people to scrutinize the executive actions and the Commission will be free from the bondage of the Executive.