Limitations of Judicial Analysis in Prosecution of Civil Servant's in India

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Abstract: *The masterpiece work has been to deal with various legal, constitutional and fundamental rights of a civil servant. But the picture would be incomplete without a statement of the remedies available where such rights have been infringed. The general rule is that where there is a right there is a remedy the maximum being 'ubi jus ibi remedium". Hence the problem of this branch of law requires besides an examination of the rights and obligations of the Government and the civil servant a study of the remedies available to each party if the other violates the obligations imposed on him. The enforcement of the formal rules of law on the civil servant is comparatively easy because the Government being the pay-master and the holder of the power of all grades of termination of employment up to dismissal can, generally speaking act on its own. In India the powers of such Judicial Review has been constitutionally mandated and expressly allowed through Article 32 before the Supreme Court and under Article 226 in the respective High Courts. By virtue of such provision it is considered that the judiciary is the safest possible safeguard, not only to ensure independence of judiciary, but also in order to prevent it from the vagaries of the executives because the judiciary corrects the executive abuse of power, or legislative excesses. In view of conferment of power of judicial review the Indian judiciary in the guise of interpreting the Constitution have started expanding and developing various laws and administrative actions, or quasi Judicial decisions.*

Keywords: *fundamental, constitutional, Government, administrative, judicial, executive, exclusively.*

1. Introduction

The primary concern of the citizens in a good civil society is that their government must be fair and good. For a Government to be good it is essential that their systems and sub-systems of Governance are efficient, economic, ethical and equitable. In addition the governing process must also be just reasonable fair and citizen-friendly. The administrative system must also be accountable and responsive besides promoting transparency and people's participation. The test of good governance lies in the effective implementation of it's policies and programmes for the attainment of set goals. Good governance implies accountability to the citizens of a democratic polity and their involvement in decision making, implementation and evaluation of projects programmes and public policies. In this perspective transparency and accountability become invaluable components of good governance as well as of good administration. Transparency makes sure that people know exactly what is going on and what is the rationale of the decisions taken by the Government or its functionaries at different levels. According to **George Washington**, "The administration of justice is the first pillar of good

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governance". For good governance people's faith in judiciary based upon its functioning is essential. Lord Denning once said "Justice is rooted in confidence and confidence is destroyed when the right minded go away thinking that the judge is biased. The judges should not be diverted from their duties by any extraneous influences nor by any hope or rewards, nor by any fear of penalties nor by flattering praise, nor by indignant reproach. It is the sure knowledge of this that gives the people confidence in judges. The only real source of power that the judge can tap is the respect and confidence of the people. The result of this would result in good governance. The welfare of citizens greatly depends upon speedy timely and impartial justice. James Bryce has rightly remarked that there is no better test of the excellence of a Government than the efficiency of its judicial system. The judiciary is the guardian of the rights of the people and it protects these rights from all possibilities of individual and public encroachments. "If the law be dishonestly administered says Bryce "the salt has lost its flavour, if it be weakly and fitfully enforced the guarantees or order fail for it is more by the certainly than by the severity of punishment that offenders are repressed. If the lamp of justice goes out in darkness how great is that darkness. Thus judiciary if functions faithfully are sure to promote good governance. In India it is becoming the practice under Articles 32 and 226 to pray "for such appropriate writ, order, or direction as this Honourable Court may be pleased to issue" or expressions of a similar nature. A petition need not be dismissed on the ground that the petitioner has not prayed for the proper remedy. Further, more than one writ could be prayed for in one petition. In *Somanath Sahu* v. *State of Orissa* the appellant whose services were terminated had preferred an appeal before the Government. In the writ petition he had challenged only the original order and not the appellate order and it was held that no writ could be issued to quash the original order which had merged in the appellate order. In *Raghavan Nair* v. *State of Kerala* the petitioner was refused the remedy as he had omitted to challenge subsequent promotions. Mathew J., who dissented held that as the petitioner had challenged the basis of the promotion itself *viz.* the seniority list, the remedy could not be refused. It is submitted that the Courts need not take a too narrow view on these technical aspects. In service writs, where seniority lists are challenged, all persons affected by such challenges ought to be made parties. Such a procedure would be difficult where parties are numerous and reside in different parts of the country. In such cases, the procedure under Order 1, Rule 8 of the Code of Civil Procedure, may be made use of. *In India there exists no specific judicial remedy*[8] *available exclusively to civil servants. Whenever an aggrieved civil servant wants redress he has to seek the general remedies available to all others and there exists no privileges or status in this regard. The present chapter is an attempt to draw out the practical implication of the judicial decisions explaining the extent and scope of judicial control in Government's relation to civil service matters. Any system of judicial control of administrative action is ultimately based on the wider concept of the rule of law. Since the judiciary has to uphold the law of the country the action of an authority contrary to law could be challenged in a Court of law. But the above statement does not mean that every person whose interest is adversely affected by an administrative order can approach the Court for redress.*

2. Literature Review

I have collected some information form the author- H. M. Seervai, (2008) Constitutional Law of India, Vol.-3.In the modern constitutional State, the principle of an independent Judiciary has its origin in the theory of separation of powers, whereby the Executive, Legislature and Judiciary form three separate branches of government, which, in particular, constitute a system of mutual checks and balances aimed at preventing abuses of power to the detriment of a free society. This independence means that both the Judiciary as an institution and also the individual judges deciding particular cases must be able to exercise their professional responsibilities without being influenced by the Executive, the Legislature or any other inappropriate sources. (N. Narayanan Nair, 1973) only an independent Judiciary is able to render justice impartially on the basis of law, thereby also protecting the human rights and fundamental freedoms of the individual. For this essential task to be fulfilled efficiently, the public must have full confidence in the ability of the Judiciary to carry out its functions in this independent and impartial manner. Whenever this confidence (Justice Rama M. Jois, , 2007), begins to be eroded, neither the Judiciary as an institution nor individual judges will be able fully to perform this important task, or at least will not easily be seen to do so. Consequently, the principle of independence of judges was not invented for the personal benefit of the judges themselves, but was created to protect human beings against abuses of power. (Goel S.L. 2007) It follows that judges cannot act arbitrarily in any way by deciding cases according

to their own personal preferences, but that their duty is and remains to apply the law. In the field of protecting the individual, this also means that judges have a responsibility to apply, whenever relevant, domestic and international human rights law.

3. Objectives of Study:

- *To study on practical implication of the judicial decisions explaining the extent and scope of judicial control in Government's relation to civil service matters.*
- To study on the role of administrative system for promoting transparency and people's participation.
- To study on the decision making, implementation and evaluation of projects programmes and public policies for good governance.

4. Research Methodology:

Research Methodology is most pivotal factor for research work.Basically,I have collected the information form secondary data like books,jounals,judiciary report, magazines as well as website. As a matter of fact, I have clearly illustrated the current issues in this paper.

5. Service Writs in the Supreme Court

The power of the Supreme Court under Article 32 of the Constitution is similar to that conferred on the High Courts under Article 226 except that a person is allowed to take his case direct to the Supreme Court only where his fundamental right is violated. As such civil servant's case under Article 32 have arisen mainly under Articles 14, 16 and 19 of the Constitution. In one case the petitioner challenged the validity of the service rule providing for compulsory retirement from service, under Article 32 of the Constitution. Because the State Government also wanted an opinion of the Supreme Court it did not oppose the petition. Regarding violation of fundamental rights the jurisdiction of the Supreme Court and the High Courts is concurrent. When the complaint is about the denial of a legal right the High Courts have exclusive jurisdiction. Experience shows that the remedy under Article 32 is not always preferred to that under Article 226 where a fundamental right of a civil servant is alleged to be infringed . Whenever any statutory rule is challenged under Part III of the Constitution or under Article 311 and when the allegation is proved to the satisfaction of the Court, the particular legislation is declared *ultra vires* and a writ of mandamus or a direction in the nature of mandamus is issued directing the State to forbear from enforcing the invalid law against the petitioner. Alternatively the Court can take out the alleged activity of the petitioner from the scope of the service rule as one not intended to be punished under the relevant rule as when the Court holds the petitioner's activity was not of "subversive character" to merit punishment. An administrative order may be challenged for mala fides.

6. Civil Suits

Civil suits in the nature of declaration, injunction or damages are available to a civil servant to vindictive his right. He is at liberty to select either the extraordinary remedies or the ordinary ones and the one does not supplant the other. But prior to 1950 these writs were available only in Presidency towns and a civil servant in other parts of the country had to rely entirely on civil suits. Thus he may file an ordinary civil suit against an order of punishment for a declaration that the punishment was wrongful or illegal and that he continues in service claiming *inter alia* damages in the nature of arrears of salary on the basis of the period for which he was out of service. Such a declaration that he still continues in service is available to a civil servant by virtue of Article 311 of the Constitution of India. He may ask for declaration that a certain service rule pre-judicial to him is *ultra vires* and hence invalid and also for an injunction against enforcing an invalid service rule or order. The jurisdiction of the Court in India to issue declaratory judgement and injunction is derived from the Specific Relief Act, 1963.

7. Prosecution of Civil Servants by Judicial Process

A civil servant is answerable for his misconduct, which constitute an offence against the state of which he is a servant and also liable to be prosecuted for violating the law of the land. Apart from various offences dealt with in the Indian Penal Code, Section 161 to 165 thereof, a civil servant is also liable to be prosecuted under Section 5 of the Prevention of Corruption Act, 1947 (which is promulgated specially to deal with the acts of corruption by public servants). A government servant is not only liable to a departmental enquiry but also to prosecution. If prosecuted in a criminal court, he is liable to be punished by way of imprisonment or fine or with both. But in a departmental enquiry the highest penalty that could be imposed is dismissal. Therefore, when a civil

servant is guilty of misconduct which also amounts to an offence under the penal law of the land the competent authority may either prosecute him in a court of law or subject him to a departmental enquiry or subject him to both simultaneously or successively. A civil servant has no right to say that because his conduct constitute an offence, he should be prosecuted nor to say that he should be dealt with in a departmental enquiry alone.

8. Safeguards regarding prosecution of civil servants

Sanction mandatory : While it is permissible to prosecute a civil servant, in respect of his conduct in relation to his duties as a civil servant, which amounts to an offence punishable under the provisions of the Indian Penal Code or under Section 5 of the Prevention of Corruption Act, (hereafter referred to as the Act) no court is authorized to take cognizance of such an offence without the previous sanction of the authority competent to remove him from service. Civil servants are expected to discharge their duties and responsibilities without fear or favour. Therefore, in the public interest, they should also be given sufficient protection. With this object in view a specific provision has been made under Section 6 of the Act for the sanction of the authority competent to remove a civil servant before he is prosecuted. Therefore, when a civil servant is prosecuted and convicted, in the absence of the previous sanction of a competent authority as prescribed .under section 6 (1) of the Act, the entire proceedings are invalid and the conviction is liable to be set aside. The policy underlying section 6 is that a public servant is not be exposed to harassment of a speculative prosecution. The object of section 6 (1) (c.) of the Act or for that matter section 197 of the Criminal Procedure Code is to save the public servant from harassment, which may be caused to him if each and every aggrieved or disgruntled person is allowed to institute a criminal complaint against him. The protection is against prosecution even by a state agency but the protection is not absolute or unqualified. If the authority competent to remove such public servant accords previous sanction, such prosecution can be instituted and proceeded with.

Sanction by state government when refused by disciplinary authority : Though in the case of members of the subordinate service, disciplinary authority, having power to remove a civil servant is the appointing authority, the state government is also being a higher authority the authority competent to remove a civil servant. Hence, in such a case it is competent for the State Government to give sanction for prosecution after it has been refused by the disciplinary authority.

Sanction for prosecution being an administrative act no opportunity of hearing is necessary : The grant of sanction for prosecution of a civil servant is only an administrative act. Therefore, the need to provide an opportunity of hearing to the accused before according sanction does not arise. The sanctioning authority is required to consider the facts placed before it and has to reach the satisfaction that the relevant facts would constitute the offence and then either grant or refuse to grant sanction.

Requirement of an order giving sanction of prosecution : The order giving sanction for prosecution should be based on the application of the mind to the facts of the case. If it sets out the facts constituting the offence and shows that a *prima facie* case is made out, the order fulfils the requirement of section 6 of the Act. But an order giving sanction only specifies the name of the person to be prosecuted and specifies the provisions which he has violated it is invalid.

Sanction not necessary for prosecution under section 409 IPC : Section 405 of the Indian Penal Code and Section 5 (1) (c.) of the Act are not identical. The offence under section 405 IPC is separate and distinct from the one under section 5 (1) (c.) of the Act and the later does not repeal section 405 IPC. Offence under Section 409 IPC is an aggravated form of offence by a public servant when committing a criminal breach of trust and therefore no sanction is necessary to prosecute a public servant for offences under section 405 and 409.

No sanction is necessary for prosecution after a person ceases to be a government servant : Under section 6 of the Act, sanction is not necessary if a person has ceased to be a government servant. The apex court observed thus : "when an offence is alleged to have been committed the accused was a public servant but by the time the Court is called upon to take cognizance of the offence committed by him as public servant he has ceased to be a public servant no sanction would be necessary for taking cognizance of the offence against him. This approach is in accord with the policy underlying section 6 in that a public servant is not to be exposed to harassment of a frivolous or speculative prosecution. If he has ceased to be a public servant in the mean time this vital consideration ceased to exist. As a necessary corollary, if the accused has ceased to be a public servant at the time when the court is called

upon to take cognizance of the offence alleged to have been committed by him as public servant section 6 is not attracted. This applies even to a retired as well as a reinstated civil servant.

First prosecution if invalid does not bar second prosecution : The basis of section 403 of the Criminal Procedure Code is that when the first trial against a person has taken place before a competent court and it records conviction or acquittal then there would be a bar for a second prosecution for the same offence. But if the first trial was not competent then the whole trial is null and void and therefore it does not bar a second prosecution. Therefore, when a trial against a civil servant under the provision of the Act has taken place there being no sanction by the authority competent to remove him as required under section 6 of the Act, the entire trial starting from its inception is null and void. Therefore, it is competent to prosecute such a civil servant for the same offence after obtaining necessary sanction under section 6 of the Act.

Section 5 A does not contemplate two sanctions : Section 5-A of the prevention of Corruption Act does not contemplate two sanctions, namely, one for laying the trap and another for further investigation. The order under this provision enables the officer to do the entire investigation.

Safeguards regarding investigation

Even in respect of starting investigation against a government servant relating to an offence punishable under the provisions of the Act protection is afforded under Section 5-A of the Act. Except with the previous permission of a magistrate no investigation can be started against the government servant by an officer below the rank of a deputy superintendent of police. It is a statutory safeguard to a civil servant and must be strictly complied with as it is conceived in the public interest and constitutes a guarantee against frivolous and vexatious prosecution. When a magistrate is approached for permission for investigation in respect of an alleged offence of corruption by a civil servant by an officer below the rank of a deputy superintendent of police as required under Section 5-A of the Act, the magistrate is expected to satisfy himself that there are good and sufficient reasons for authorizing an officer of a lower rank to conduct investigation. It should not be treated as a routine matter. Section -5 A of the Act provides a safeguard against investigation of offence committed by public servant by petty or lower rank police officer. It has nothing to do directly or indirectly with the mode or method of taking cognizance of offences by the court of special judge.

9. Limitation of Judicial Analysis

The only possible exception could be under Article 136 by which a special leave appeal could be taken direct to the Supreme Court. Even here whether the Supreme Court would go into the merits unless outstanding reasons are shown is doubtful. The existence of such outstanding reasons could itself be termed as one of ultra vires or one based on extraneous consideration under Article 226 itself. Even where the proceedings have been set aside by the Court not on merits the State can start fresh proceedings against the civil servant. In a proceedings to set aside an order of punishment the High Court could not appreciate the evidence to see whether the civil servant merits the proposed punishment Regarding the imposition of punishment the selection of appropriate punishment under the relevant civil service rules is a discretionary matter left to the authorities The only proceedings where a petitioner can reach the merit of the case seems to be one challenging the vires of the rule itself. For example, in such a case the civil servant can show that the conduct for which punishment was imposed was one protected by the fundamental rights of the Constitution. There is a point of view that Article 311 of the Constitution of India gives only a procedural protection and where such procedural rules are followed meticulously the Courts power of review is ousted. This view is substantiated by cases where the authorities have started fresh proceedings after the Courts have quashed an order of punishment or where the punishment has been increased on appeal to a superior authority. But the above view is not wholly true. It is to be admitted that administration would suffer if the authorities are unable to deal with corrupt, inefficient insubordinate or anti-national elements inside the departments. But at the same time it is the bounden duty of the Court to see also that such a power is not abused or exercised to attain an ulterior purpose or on any extraneous consideration. Apart from the doctrine of abuse of power the Courts have entered into the matter in some instances and where the Courts have interfered on the merits of the case no fresh proceedings could be started on the same facts. The same result follows where a criminal Court acquits the civil servant on the merits of the case. The Court can intervene where the order is proved to be *mala fide* or where the order is based on no evidence The punishing authority cannot close its mind before the

representation made at the second show cause notice stage and if this fact appears from the record the Court would intervene. The power to impose penalties is for "good and sufficient reasons" So the punishing authority has to specify reasons or grounds for which the punishment is given. In order to take the order out of the protection under Article 311 of the Constitution the debarring provision was cancelled the Court held that the Governor possessed no such power. A complete order found *ultra vires* Article 311 cannot be subsequently validated by omitting the invalid part and construing the valid part only. The reliance on the principle that an order is not invalid simply because it is assailable on some findings only but not on others. clearly shows that the Court looks at the matter as one of substance and not of procedure only. The central problem of judicial review in civil service matters seems to be that even though the review goes only to legality and not to merit from the point of view of the Government it unduly interferes with the maintenance of efficient service while from the point of view of the employees there are not enough principles developed and procedures prescribed to render them substantial justice. This dilemma can be resolved by constituting an appeal tribunal with power to hear appeals from all civil service matters as suggested earlier. Being an independent body consisting of senior civil servants and persons eligible to be appointed as High Court judges such a tribunal can administer substantial justice to civil servants taking into consideration the efficiency of the service. Article 311 has created an environment of excessive security and made civil servants largely immune from imposition of penalties due to the complicated procedure and process that has grown out of the constitutional guarantee against arbitrary action rather tend to protect the civil servants non-performance and arbitrary risk- avenge. Suitable legislation to provide for all necessary term and conditions of services should be provided under article 309 to protect bonafide action of public servants taken in public interest, this should be made applicable to the states, necessary protection to public servants against arbitrary action should be provided through such legislation under Article 309.

10. Conclusion

Judiciary has played a great role in providing good governance to the people. Law and order is the biggest challenge for good governance as we witness daily the problems of rape thefts dacoity murders extortion etc. The police system was governed by outdated Police Act, 1861. *Hindustan Times* editorial (Sept. 28, 2006) Give them teeth not fungs rightly states a draft to a new Police Act which is being finalized by a committee set up in September 2005. After much nudging from the Supreme Court which has ordered the implementation of police reforms on or before December 31, 2006 to promote good governance the draft is to be converted into a Bill While reforms are likely to include the creation of separate institution for investigation and for law and order upgrading inter state links to tackle inter state crimes and incorporating modern methods to crack down on trafficking cyber crimes and economic crimes there is a fundamental flaw that desperately needs correction. It is time of appreciation that judiciary is playing an important role in providing good governance where legislature and administration are feeling hopelessness and are entrenched in poor politics of vote bank. They must understand that Government is not the monopoly of any party therefore all parties should come together to remove the irritants to citizens and make good governance a reality. People would be benefited in a big way and would start feeling the atmosphere of good governance emanating from all organs of Government.

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