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The Public Service Commission of Kenya VIS-A-VIS the Union Public Service Commission: A Comparative Study

Ratemo Tom Junior Ph.D., Research Scholar, Department of Post Graduate Studies in Law, Dr. Babasaheb Ambedkar Marathwada University, Aurangabad

ABSTRACT *Both the Constitutions of Kenya and India indisputably require the State to secure to all its respective citizens, "social justice, economic and political; equality of status and opportunity, and the rule of the law." The performance of this task therefore, calls for many hands and this can only be possible through recruitment of competent State civil servants. Recruitment process is generally carried out by independent constitutional bodies i.e., the Public Service Commissions. This paper establishes numerous similarities and dissimilarities existing in the civil service law both in Kenya and India as it relates specifically with the establishment, composition, terms of office, removal of members, functions and powers of the Public Service Commissions within the jurisdiction of Kenya and India.*

KEYWORDS: Recruitment, Commission, Kenya and India

1. introduction:

In any democracy, all eligible citizens have a constitutional right to be considered for recruitment to the civil service[1]. To ensure fair and just recruitment process, both the Constitutions of Kenya and India have incorporated candid provisions for the establishment of independent Public Service Commissions [*hereinafter referred to as PSC*] for the National/Union and for each County/State consisting of a body of experts to carry out the civil service recruitment process[2].

In this paper, a comparative analysis of various constitutional and legal provisions including judicial pronouncements relating to the key PSCs in Kenya and India shall be undertaken.

2. The public service commission: its Composition and terms of service:

The Public Service Commission of Kenya [*hereinafter referred to as PSCK*] and the Union Public Service Commission [*hereinafter referred to as UPSC*] are the core agencies in Kenya and India respectively that monitor recruitment, promotion, discipline, *etc.,* of civil servants. Under the new *Constitution of Kenya*, 2010 [*hereinafter referred to as COK*], the PSCK consists of a chairperson, a vice chairperson[3], a secretary[4] and seven other members appointed by the President with the approval of the National Assembly[5].

On the other hand, the chairman and the members of the UPSC are generally appointed by the president on the advice of the concerned Minister[6]. But as compared with the COK, the COI does not fix the number of members of the UPSC. That task is conspicuously left to the Central Government. Thus, the President may by regulation, determine the number of members of the Commission and their conditions of service subject only to the restriction that their conditions of service cannot be varied to the disadvantage of the members after their appointment[7].

A person is not eligible under Part 2 of Chapter 13 of the COK for appointment as a member of the PSCK if he/she has, at any time within the preceding five years, held office as a Member of Parliament or County Assembly or has at any time, held office in any political organisation that sponsors a candidate for election as a Member of Parliament or of a County Assembly[8]. No qualifications however, are prescribed for the membership of the UPSC except that, as nearly as may be, one half of members should be persons who have held offices for at least ten years either under the Government of India or that of a State[9].

Under Art.319(c) of the *Constitution of India*, 1950 [*hereinafter referred to as COI*], a member of the UPSC is eligible to be appointed as the chairman of either the UPSC or State Public Service Commission. In the guise of this provision, it is apparent that members, in the hope of being appointed chairperson of the UPSC or State Public Service Commission, they might try to please the Executive. This ultimately endangers the independence of the UPSC. It is therefore incumbent that there should be a constitutional amendment to prohibit members, like chairman,[10] from any further employment under Government of India or of a State.

Art.250(6) of the COK provides that the chairperson and the members of the PSCK shall be appointed for a single term of six years and shall not be eligible for re-appointment. The Constitution however, does not state whether the members of the Commission are barred from any other employment under the Government of Kenya or the County Assembly after the expiry of their terms. Moreover, the Article does not state the maximum age limit for their appointment to the civil service.

3. Removal of members of the commission:

A member of the PSCK may be removed from office only for serious violation of the Constitution or any other law, including a contravention of Chapter Six of the COK. In addition, a member may be removed for gross misconduct or because of incompetence or bankruptcy or physical/mental incapacity to perform functions of his office.[11]

Further, Art.251 of the COK provides that the President shall appoint a tribunal to investigate any matter concerning a member of PSCK. It may result that the tribunal so appointed will not be independent in that politics may play a center stage. A member who does not sway to the tunes of the Executive may maliciously be removed to create room for pro-executive members. Therefore, the best way out is to refer the matter directly to the Supreme Court of Kenya for its opinion instead of a tribunal.

Part XIV of the COI on the other hand provides that the chairman or a member of PSC can be removed only by an order of the President on the ground of misbehaviour. Such an order shall however, be passed after the President makes a reference[12] to the SCI, and the Court after holding an inquiry, reports to the President that the person concerned ought to be removed from office.[13] Moreover, the President of India is constitutionally empowered to remove the Chairman or a member of the UPSC without reference to the SCI if he/she is; adjudged insolvent,[14] or engages during his/her term of office in any paid employment outside the duties of his office, or is, in the opinion of the President, unfit to continue in office by reason of infirmity of mind and body.[15]

The procedural safeguards cited above are mainly meant to protect PSC members from undue political pressures or personal favouritism and vendetta, so that the Commission is able to discharge their constitutional obligations in full measure.[16]

4. functions and powers of the Public Service Commission:

The PSCK and UPSC perform various functions as laid down under various statutes and the COK and COI respectively. Under Part 2, Chapter 13 of the COK for *e.g.,* the functions and powers of the PSCK, *inter alia*, include: establishing and abolishing offices in the public service including appointing, controlling, disciplining, removing and/or confirming persons to hold or act in those offices. The Commission also reviews and makes recommendations to the National Government in respect of conditions of service, code of conduct and qualifications of officers in the public service, *etc.*

On the other hand, it is the duty of the UPSC to conduct examinations for appointment to the services of the Union[17]. The Commission may, if requested by two or more States, assist the States in framing and operating schemes for joint recruitment for any services for which candidates possessing special qualifications are required[18].

Chapter II, Part XIV of the COI further lays down advisory functions of the UPSC. The Commission is to be consulted on all disciplinary matters and matters relating to methods of recruitment of civil services and for civil posts.[19] This provision is however, directory and not mandatory.[20] The PSC however, need not be consulted while making reservations of appointments or posts in favour of any backward class of citizens which, in the opinion of the Government, is not adequately represented.[21]

Parliament of India is empowered by law to confer additional functions on the commission regarding services of the Union, public institutions, or a corporation created by law.[22] Such additional functions can be conferred on the Commission only by way of legislation and not by way of a departmental arrangement between the Government and the Commission.[23]

The role of the PSC has further been explained by the SCI[24] in the following words:
"… the duty of the PSC is confined to holding written examination, holding *viva voce* test and arranging order of merit according to the marks among the candidates who have qualified as a result of written and *viva voce* tests. Thereafter, the PSC is required to publish the result in the Gazette and apparently, make the result available to the Government..."

5. Remuneration:
Chapter fifteen of the COK and Part XIV of the COI *inter alia* provides that remuneration and benefits payable to members of the PSC shall be a charge on the Consolidated Fund.[25] Moreover, both Constitutions stipulate that conditions of service, remuneration and benefits payable to members of PSC shall not be varied to the disadvantage of the members during their term of office.[26] This provision is entirely meant to free PSCs from parliamentary pressures.

6. Conclusions:
A detailed study carried out in this paper acknowledges the President as the final authority for appointing members of the Commission. Besides, the grounds for removal of a member of the commission are similar, *i.e.,* the members can be removed only on the grounds of misbehavior, misconduct, incompetence, bankruptcy, *etc*.

It can however, be noted that the COK, unlike the COI does not fix the number of members of the PSC. Besides, the COK unlike COI dedicates a whole Chapter (Chapter Six) that sets a bar for integrity in leadership which is quite essential for appointment of the members of the PSC.

Another distinguishing factor as noted in the study is that the COK not only provides that not more than two-thirds of the members of the PSC can be of the same gender but it also states that the chairperson and vice-chairperson of the commission cannot be of same gender. This provision is however, not incorporated in Chapter II, Part XIV of the COI.

REFERENCES

1. See generally, T. R. Kapur v. State of Haryana, AIR 1987 SC 415. | 2. Chapter 13, infra and Part XIV, infra note 6. | 3. Art.250, the Constitution of Kenya, 2010. | 4. Art.233, (5), ibid. | 5. Art.233 (2), ibid. | 6. Arts.315 (1) and 316(1), the Constitution of India, 1950. | 7. Art.318, ibid. The Union Public Service Commission as on March 2013 consists of a Chairman and ten other members, see, Union Public Service Commission, available at: http://www.upsc.gov.in/ (Visited on 15th March 2013). | 8. Art.233 (3), supra note 3. | 9. Proviso to Art.316 (1), supra note 6. | 10. Art.319 (a), ibid, stipulates that the Chairman of the Union Public Service Commission is not eligible for any further employment either under the Government of India or Government of State on ceasing to hold office. | 11. Art.251 (1), supra note 3. | 12. For select few references made to the Supreme Court of India, see, In Re: Smt. Sayalee Sanjeev Joshi, (2007) 11 SCC 547; In the matter of Ref. under Art.317 (1), AIR 1983 SC 996, etc. | 13. Art.317 (1), supra note 6. | 14. Art.317 (3), ibid. | 15. The Supreme Court of India has held in Jai Shankar Prasad v. State of Bihar, AIR 1993 SC 1906, that the infirmities referred to in Art.317 (3), ibid, must be such as to disable the member from efficient discharge of his/her duties. The infirmity must also be post-appointment. | 16. See, Ram Kumar Kashyap v. Union of India, AIR 2010 SC 1151. | 17. Art.320 (1), supra note 6. See generally, Neelima v. State of Haryana, AIR 1987 SC 169. | 18. Art.320 (2), ibid. | 19. Art.320 (2) (a), ibid. | 20. M. C. Bindal (Dr.) v. R. C. Singh, AIR 1989 SC 134. | 21. Arts.320 (4) and 16(4), supra note 6. | 22. Art.321, ibid. | 23. Mira Chatterji v. Public Service Commission, AIR 1958 Cal 345. | 24. Neelima Shangla v. State of Haryana, AIR 1987 SC 169. | 25. Art.250 (7), supra note 3, and Art.322, supra note 6. | 26. Art.250 (8), supra note 11, and Art.318, supra note 21.