

The Issue of Security of Tenure

1. Existing Law, Rules & Regulations

Elected representatives represent the will of the people. The executive, on the other hand, is only the implementing arm of the state. Theoretically, the Chief Executive gets elected on an agenda and the executive should be used as per the Chief Executive's desire. This is generally the argument that is put forth in defence of granting the sweeping powers of the Chief Executive with respect to posting and transfer of officers.

Legally civil servants have no right to remain at a post of his or her choice. The only words on a semblance of security of tenure can be found in **Establishment Division O.M. No.10/10/94-R.2, dated 22-3-1994, (i) "The normal tenure of an officer on the same post should be three years. Posting of an officer on the same post beyond the normal tenure will require concurrence of the competent authority in each case."** However, the aforementioned has no bite when read with the provisions of law.

Some of these provisions are reproduced for ready reference:

Civil Servants Act 1973

Section 4 TENURE OF OFFICE OF CIVIL SERVANTS "Every civil servant shall hold office during the pleasure of the President."

It is only in the Punjab Civil Servants Act 1974 that we do not find an echo of this clause. Section 4 of the Sindh Civil Servants Act 1973, Balochistan Civil Servants Act, 1974 replaces 'pleasure of the President' with 'pleasure of the Government' whereas KPK Civil Servants Act states that every civil servant shall hold office during the pleasure of the Governor. The underlying principle is that the Government may utilise the services of a civil servant in any way it deems fit, in public interest, according to the exigencies of service.

The most pertinent section of law is the following:

Civil Servants Act 1973

Section 10 POSTING AND TRANSFER "Every civil servant shall be liable to serve anywhere within or outside Pakistan, in any equivalent or higher post under the Federal Government, or any Provincial Government or local authority or a corporation or a body set up or established by any such Government:

Provided that, nothing contained in this section shall apply to a civil servant recruited specifically to serve in a particular area or region:

Provided further that, where a civil servant is required to serve in a post outside his service or cadre, his terms and conditions of service as to his pay shall not be less favourable than those to which he would have been entitled if he had not been so required to serve."

Section 10 of the Balochistan Civil Servants Act, 1974, KPK and Sindh Civil Servants Act, 1973 are replica of the aforementioned. Punjab Civil Servant Act 1974 retains the entire clause; however, the proviso "**Provided that, nothing contained in this section shall apply to a civil servant recruited specifically to serve in a particular area or region**" has been done away with.

At present, case law suggests that appeal against posting and transfer orders are generally not entertained by the competent forum. Law grants the Government complete power over the aforementioned issue. Even mala-fide intent or victimization is not considered a basis for an appeal. Law does not treat posting and transfer a matter of right of the civil servant.

2. View of the National Commission for Government Reforms (NCGR) on Security of Tenure & Recommendations

National Commission for Government Reforms (NCGR) in its Working Paper on Security of Tenure explains how important initiatives of the Government and the policies, programs and projects sometimes cannot be implemented within the stipulated time or within the projected cost because of the lack of continuity in the tenure of key civil servants. It has been argued by NCGR that lack of security of tenure has led to politicization of the cadre and non-cadre employees as they vie with each other for plum or prized postings. "Those who are unlucky in getting the postings of their choice or who do not align themselves with the political regime in power and therefore do not enjoy the patronage become resentful, demoralized and apathetic. The end result is a highly de-motivated workforce that operates sub-optimally, much below its given capacity" (NCGR 2008 Vol-I, p.194). One of the guiding principles of the NCGR under posting and transfer are as follows: "Security of tenure of office, for a specified period of time should be strictly observed and civil servants given legal protection against arbitrary acts that do not conform to due process of law." (NCGR 2008 Vol-I, p.195)

It has also been argued by the NCGR that when the criterion for promotion to a selection grade is job rotation i.e. variety of the job performed across business areas, officers suffer for no fault of their own (NCGR 2008 Vol-I, p.194). It is believed that security of tenure has to be coupled with a well thought out career progression plan for all officers. Otherwise posts that are significant in terms of public service delivery as well as exposure will remain limited to certain blue-eyed officers of one political group or the other. It might be relevant to mention recommendations of NCGR with respect to career progression of officers belonging to All Pakistan Service:

- "Citizen-State interface at the sub-division and district level, preferably in two or more provinces.
- Policy formulation and implementation/ regulatory functions at the Federal, as well as Provincial Secretariat levels, with emphasis on experience of working in regulatory Divisions/ Departments, such as Establishment/ Finance, as well as Social Sector Divisions/ Departments, such as Health/ Education.
- An instructional post at a well reputed training institution." (NCGR 2008 Vol-I, p.195)

The recommendations of NCGR regarding security of tenure and the response of Government of Sindh and Balochistan on these recommendations are reproduced for ready reference:

"It is recommended that the Prime Minister/Chief Minister at the federal/provincial level should decide regarding posting of Secretaries/Heads of Departments and autonomous bodies/ District Coordination officers/ District Police officers at the federal/provincial/district level on the basis of consideration of a panel of three officers proposed by the Establishment Division or S&GA Department as the case may be. Once the officer has been selected through this process

he/she should not be transferred until the completion of the tenure i.e. 3 (three) years. Only in cases where a disciplinary action is initiated against the officer for corruption, negligence of duties, insubordination, misconduct or failure to meet the performance targets assigned to him/her etc and evidence has been established, the Prime Minister/ Chief Minister can decide that the officer should be moved out of the office before completing the posting tenure. The Minister In-charge or the Secretary can also move the Prime Minister/ Chief Minister for the transfer before completion of the tenure by reducing in writing the reasons for such an action. According to existing policy normal tenure of an officer on the same post is three years. Posting of an officer on the same post beyond normal tenure requires concurrence of the competent authority." (NCGR, Working Paper, Security of Tenure, p.3)

The aforementioned proposals of the NCGR were endorsed by the Government of Sindh, with the suggestion that a mechanism should be developed to make decisions in case of poor performance or serious complaints of mal-administration and corruption. Normal tenure of posting of a government servant on a post up to at least three years was supported by the Government of Balochistan with the suggestion that reduction in the tenure, if desired, may be made only after assigning special reasons. In any case the same should not be reduced to less than half of the prescribed tenure. They also agree that the provision in this regard may be incorporated in the Rules of Business, if required.

3. Discussion Question

In view of the aforementioned, the following scenarios might form the basis of the first discussion under Thinkers' Corner:

Case I- The situation at present

Should the right to post and transfer remain solely a matter of discretion of the elected representative?

Case II- Security of Tenure as a matter of right of the Civil Servant, appealable before the Service Tribunals

- a) Tenure as a right only in certain cases – No pre-specified tenure length (significant discretion of the Chief Executive)

Should tenure remain at the discretion of the elected representative, the only significant difference being a requirement of law that directs the political executive to record reasons, based on public interest, on the need for premature transfer?

In this case, security of tenure becomes a right only when there appears to be pre-mature transfer, which on the face of it is not based on public interest. In case an officer is aggrieved, he would have the right to agitate the matter before a competent forum i.e. Service Tribunal. This scenario strikes a balance between allowing enough flexibility to the elected representative while at the same time instituting a check on the unbridled power of the Chief Executive.

b) Fixed or Pre-Specified Tenure¹ with limited discretion of the Chief Executive

Should civil servants be allowed security of a fixed tenure i.e. should they as a matter of right, remain posted at a specific post for a pre-specified period of time?

In this case, tenure does not fall within the discretion of the elected representative. Pre-mature posting orders can only be an exception, issued on the basis of misconduct or irregularities. Tenure becomes a right of the civil servant and the onus of explaining the rationale of a pre-mature posting order rests with the Chief Executive. The competent forum remains the Service Tribunal.

Ancillary Issue:

If either Case II (a) or (b) are believed to be the way forward, it necessitates the setting up of an apolitical forum that entertains any potential grievances of the civil servant against pre-mature transfer orders of the government.

Article 212 of the Constitutionⁱⁱ, coupled with The Service Tribunals Act 1973, grants exclusive jurisdiction in all matters, relating to the terms and conditions of service of civil servants, to the Federal Services Tribunal. Similar acts have been enacted at the provincial level with Punjab Service Tribunals Act, 1974, Sindh Service Tribunals Act, 1973, The Balochistan Service Tribunals Act, 1974 and the N.W.F.P. (KPK) Service Tribunal Act, 1974.

Section 3 of the Service Tribunals Act 1973ⁱⁱⁱ grants the power to the President to establish a Tribunal. Section 3, Sub-Section (4), which states "The Chairman and members of a Tribunal shall be appointed by the President on such terms and conditions as he may determine" might require special attention. Although these are tenure posts (correct us if this is wrong), the terms and conditions of service are not pre-determined but can be varied on a case to case basis by the Government. How significant or prolonged an influence such a provision can have is a matter of further research, however, what does appear logical is the fact that principles of natural justice might not be fully adhered to under the current system. Service Tribunals need to be completely independent to be able to dispense justice to civil servants who are aggrieved by the same government that sets the terms and conditions of the dispensers of justice. In addition, the appointment of the Chairman and Members remains a matter of discretion. Appointing an 'excessively' upright Chairman or a Member might not be in the long term interest of a 'rational' Government. It is reiterated that any such effect is a matter of further research.

In any case, what remains apparent is the urgent need for an appeal forum to be as apolitical and neutral as possible. Announcing a uniform terms and conditions package for the Chairman and Members of Service Tribunals can be one such way to ensure neutrality. It can be argued that not all chairmen or members are of the same qualifications. Though this argument has weight, minimizing discretion in terms of terms and conditions can be achieved through standardization of the terms and conditions packages, applying a specific one to the candidate on hand. In addition, minimizing discretion in selection of the Chairman and Members of the Service Tribunals can be another significant step. This can be ensured through announcement of any vacancies in the Service Tribunal and then selecting candidates from a pool and not from a

¹ Fixed tenure of three years as per Establishment Division O.M. No.10/10/94-R.2, dated 22-3-1994.

panel of three names put forth by a government department (please correct Thinkers' Corner if this is not how it is done).

ENDNOTES

ⁱ Punjab Civil Servants Act, 1974

Section 9, POSTING AND TRANSFER "Every civil servant be liable to serve anywhere within or outside the Province in any post under the Government of the Punjab or the Federal Government or any Provincial Government or a local authority or a corporation or a body set up or established by any such Government:

Provided that, where a civil servant is required to serve in a post outside his service or cadre, his terms and conditions of service as to his pay shall not be less favourable than those to which he would have been entitled if he had not been so required to serve."

ii. Constitution of the Islamic Republic of Pakistan, 1973

Article 212 Administrative Courts and Tribunals

(1) Notwithstanding anything hereinbefore contained, the appropriate Legislature may by Act [provide for the establishment of] one or more Administrative Courts or Tribunals to exercise exclusive jurisdiction in respect of

(a) matters relating to the terms and conditions of persons [who are or have been] in the service of Pakistan, including disciplinary matters;

(b) matters relating to claims arising from tortious acts of Government, or any person in the service of Pakistan, or of any local or other authority empowered by law to levy any tax or cess and any servant of such authority acting in the discharge of his duties as such servant; or

(c) matters relating to the acquisition, administration and disposal of any property which is deemed to be enemy property under any law.

(2) Notwithstanding anything hereinbefore contained, where any Administrative Court or Tribunal is established under clause (1), no other court shall grant an injunction, make any order or entertain any proceedings in respect of any matter to which the jurisdiction of such Administrative Court or Tribunal extends [and all proceedings in respect of any such matter which may be pending before such other court immediately before the establishment of the Administrative Court or Tribunal [other than an appeal pending before the Supreme Court,] shall abate on such establishment]:

Provided that the provisions of this clause shall not apply to an Administrative Court or Tribunal established under an Act of a Provincial Assembly unless, at the request of that Assembly made in the form of a resolution, [Majlis-e-Shoora (Parliament)] by law extends the provisions to such a Court or Tribunal.

(3) An appeal to the Supreme Court from a judgment, decree, order or sentence of an Administrative Court or Tribunal shall lie only if the Supreme Court, being satisfied that the case involves a substantial question of law of public importance, grants leave to appeal.

iii Service Tribunals Act, 1973

Section 3 Tribunals

(1) The President may, by notification in the official Gazette, establish one or more Service Tribunals and, where there are established more than one Tribunal, the President shall specify in the notification the class or classes of civil servants in respect of whom or the territorial limits within which, each such Tribunal shall exercise jurisdiction under this Act.

(2) A Tribunal shall have exclusive jurisdiction in respect of matters relating to the terms and conditions of service of civil servants, including disciplinary matters.

(3) A Tribunal shall consist of:

(a) a Chairman, being a person who [is, or] has been, or is qualified to be Judge of a High Court; and

(b) such number of members not exceeding three, each of whom is a person who possesses such qualifications as may be prescribed by rules, as the President may from time to time appoint.

(4) The Chairman and members of a Tribunal shall be appointed by the President on such terms and conditions as he may determine.

(5) The Chairman or a member of a Tribunal may resign his office by writing under his hand addressed to the President.

(6) The Chairman or a member of a Tribunal shall not hold any other office of profit in the service of Pakistan if his remuneration is thereby increased.

(7) Notwithstanding anything contained in sub-section (3), subsection (4), sub-section (5) or sub-section (6), a Tribunal established to exercise jurisdiction in respect of a specified class or classes of cases may consist of one or more persons in the service of Pakistan to be appointed by the President.