

Enforcement of Civil Servants' Human Rights: An Overview

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I. Introduction:

The universal human rights are often expressed and guaranteed by law in the form of treaties, customary international law, general principles and other sources of international law². Both Kenya and India are signatories to three key United Nations backed Covenants that promote human rights of civil servants and other individuals *i.e.*, the *Universal Declaration of Human Rights*, 1948 [hereinafter referred to as *UDHR*]; the *International Covenant of Economic, Social and Cultural Rights*, 1966 [hereinafter referred to as *ICESCR*]; and the *International Covenant on Civil and Political Rights*, 1966³ [hereinafter referred to as *ICCPR*]⁴. Apart from these Conventions, there are various constitutional and legal provisions both in Kenya and India that promote and protect human rights of individual in general and human rights of civil servants in particular. All these shall be comprehensively analysed in this paper.

For the proper perception, this paper is divided into four parts. The *first* part is an introductory part while the *second* part deals with the concept and meaning of the terms 'civil servant' and 'human rights'. The *third* segment incorporates constitutional and legal provisions on civil servants' human rights while the last part is reserved for conclusions arrived at from the study.

II. Concept and meaning of the terms 'civil servant' and 'human rights':

The term 'civil servant' generally refers to a body of Government employees entrusted with the administration of the country, and mandated to carry out the policy of the

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² See, *United Nations Human Rights*, available at: <http://www.uganda.ohchr.org/EN/Pages/WhatareHumanRights.aspx.htm> (Last visited on April 1, 2013).

³ There are also other International Conventions that promote and protect human rights of individuals and groups *i.e.*, the *Convention on the Rights of Persons with Disabilities*, 2006; the *Convention Against Torture*, 1984; the *Convention on the Elimination of All Forms of Racial Discrimination*, 1965; the *International Convention for the Protection of All Persons from Enforced Disappearance*, 2006, etc.

⁴ Art.2 of the new *Constitution of Kenya*, 2010 allows any Treaty or Convention ratified by Kenya to form part of the law of Kenya under the Constitution.

Government of the day⁵. The term includes members of a civil service of the National/Centre and Counties/States, or all those who hold civil posts under the National/Centre or County/State Government. On the other hand, the term ‘human rights’ has not been expressly defined in any United Nations Convention nor under the *Constitution of Kenya, 2010* [hereinafter referred to as *COK*] or the *Constitution of India, 1950* [hereinafter referred to as *COI*]. Human rights are generally inalienable fundamental rights to which a person is inherently entitled simply because he/she is a human being⁶. In other words, they are rights interdependent, indivisible, inalienable and inherent to all human beings, whatever the nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status⁷.

III. Constitutional and legal provisions on civil servants’ human rights:

Both the COK and COI guarantee human rights in the Chapter on Bill/Fundamental Rights⁸. Besides, the Directive Principles of State Policy [hereinafter referred to as *DPSP*] under the COI supply the necessary guidelines for the effective implementation of fundamental rights⁹. Accordingly, there are a number of constitutional provisions that support, promote and protect human rights of civil servants both under the COK and the COI. They include:

III.I. Right to life:

The right to life is ordinarily the most fundamental right on the basis of which other rights accrue¹⁰. Chapter IV of the COK and Part III of the COI guarantees the right to life of all persons including civil servants by prohibiting arbitrary deprivation of life or personal liberty. Although both Constitutions expressly prohibit extra-judicial killings, they do not completely outlaw capital punishment. Deprivation of life can therefore be justified either be

⁵ *Civil Service*, available at: <http://www.businessdictionary.com/definition/civil-service.html> (Last visited on April 7, 2013).

⁶ Sepulveda Magdalena, Van Banning Theo, Gudmundsdottir Gudrun, Chamoun Christine & Van Genugten Willem J.M., *Human rights reference handbook 3* (3rd edn.), Costa Rica: University of Peace, 2004.

⁷ See, *United Nations Human Rights*, available at: <http://www.ohchr.org/en/issues/Pages/WhatAreHumanRights.aspx> (Last visited on April 8, 2013).

⁸ See, Chapter 4, *supra* note 5 and Part III, *infra*.

⁹ See, Part IV, the *Constitution of India, 1950*.

¹⁰ Lumumba P. L. O., Mbondenyei M. K., & Odera S. O., *The Constitution of Kenya: Contemporary Reading* 66, Nairobi: Law Africa Publishing (K) Ltd., 2011. See also, Nmehielle O., *The African Human Rights System: Its Laws, Practice and Institutions* 85, 2001.

the Constitution or any written law¹¹. Art.21 of the COI, though couched in a negative phraseology, has received the widest possible interpretation by the Supreme Court of India [hereinafter referred to as *SCI*]. Under the canopy of the Article, so many rights have thus found shelter, growth and nourishment *i.e.*, right to shelter¹², right to livelihood¹³, right to receive timely medical treatment¹⁴, right to privacy¹⁵, right to good health, right to speedy trial and humanitarian treatment while imprisoned to all persons¹⁶, *etc.* All these rights are part and parcel of the human rights of civil servants.

III.II. Right to freedom:

Apart from the right to life, civil servants are also entitled to certain rights to freedom. Chapter IV of the COK and Part III of the COI guarantees various rights to freedom to all citizens *i.e.*, freedom of speech and expression¹⁷; right to assemble peaceably and without arms¹⁸; freedom to form associations or unions¹⁹; freedom of movement and residence²⁰; right to practise any profession or to carry on any occupation, trade or business²¹, freedom of religion²², *etc.* These rights are however, not absolute. The COK and the COI confer power upon the State to impose by law reasonable restrictions as may be necessary in the larger interest of the community²³. The grounds for imposing these restrictions vary according to the freedom sought to be restricted, and they include restrictions relating to decency or morality, security of State, defamation, public order, incitement to an offence, hate speech, propaganda for war, maintenance of sovereignty and integrity of the nation, contempt of Court, *etc.*

III.III. Right to equality:

¹¹ The use of the words “*except to the extent authorised by this Constitution or other written law*” under Art.26, *supra* note 5 and the words “*except according to procedure established by law*” under Art.21, *supra* note 10 justify this proposition/statement.

¹² See, *Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan*, AIR 1997 SC 152.

¹³ See, *Narendra Kumar v. State of Haryana*, (1994) 4 SCC 460.

¹⁴ See, *Paschim Bengal Khet Mazdoor Society v. State of West Bengal*, AIR 1996 SC 2426; *Pramanand Katara v. Union of India*, AIR 1989 SC 2039.

¹⁵ See, *Govind v. State of Madhya Pradesh*, AIR 1975 SC 1378.

¹⁶ See, for *e.g.*, *Govindaraju Alias Govinda v. State By Srirampuram Police Station and another*, (2012) 4 SCC 722; *P. Vijayan v. State of Kerala*, (2010) 2 SCC 398.

¹⁷ See, Art.33, *supra* note 5 and Art.19(1)(a), *supra* note 10.

¹⁸ See, Art.37, *supra* note 5 and Art.19(1)(b), *infra* note 22.

¹⁹ See, Art.36, *supra* note 5 and Art.19(1)(c), *supra* note 10.

²⁰ See, Art.39, *supra* note 5 and Art.19(1)(d), *infra*.

²¹ See, Art.19(1)(g), *supra* note 10.

²² See, Art.32, *supra* note 5 and Arts.25 to 28, *ibid*.

²³ See, Art.24, *supra* note 5 and Art.19(2) to (6), *supra* note 22. See also, Basu Das Durga, *Introduction to the Constitution of India* 99, (19th edn.) New Delhi: Wadhwa and Company Law Publishers, 2004; *Fundamental Rights in India*, available at: http://en.wikipedia.org/wiki/Fundamental_Rights_in_India (Last visited on April 8, 2013).

Every person is entitled to all the rights and freedoms set forth in the Constitution, without discrimination²⁴ of any kind, such as race, sex, health status, religion, national or social origin, birth or other status, *etc*²⁵. The right to equality is therefore an essential human right that the COK as well as the COI guarantees to all individuals including the civil servants for it affords protection not only against discriminatory laws passed by the legislatures but also prevents arbitrary discretion being vested in the executive²⁶ and more importantly, it can be enforced in cases of unequal scales of pay based on irrational classification²⁷.

III.IV. Right against exploitation:

Civil servants especially junior employees are often silently exploited by their seniors despite the existence of certain provisions in the COK and COI. Part II, Chapter IV of the COK and Part III of the COI for *e.g.*, contains certain provisions to prevent exploitation of the weaker sections of the society by individuals or the State²⁸. Human trafficking, forced labor or any act of compelling a person to work without wages where he/she is legally entitled not to work or to receive remuneration is prohibited²⁹. The prohibition against forced labour is however, made subject to one exception under the COI³⁰ *i.e.*, the State can impose compulsory service without pay for public purposes and in imposing such services, the State cannot make any discrimination on grounds only of religion, race, caste or class or any of them³¹.

III.V. Other constitutional and legal provisions that support, promote and protect human rights of civil servants:

Apart from the above fundamental rights, there are also some other rights under the COK and the COI that support, promote and protect human rights of civil servants. These are:

²⁴ The word 'discrimination' here means any distinction, exclusion or preference that has an effect of nullifying or impairing equal enjoyment of rights, *see*, Communication 241/2001, *Purohit and Moore v. Gambia*, Sixteenth Annual Activity Report of the African Commission on Human and Peoples' Right (Annex VII) Para 61.

²⁵ *See*, Art.27, *supra* note 5 and Art.14 to 16, *supra* note 22.

²⁶ Laski Harold Joseph, *Liberty in the Modern State* 25, New York: Harpers and Brothers, 1930.

²⁷ For *e.g.*, *Dhirendra Chamoli v. State of U.P.*, AIR 1986 SC 172; *Daily Rated Casual Labour v. Union of India*, (1988) 1 SCC 122, *Mewa Ram v. A.I.I. Medical Science*, AIR 1984 SC 1361, *etc.*

²⁸ *See*, Art.30, *supra* note 5 and Arts.23 and 24, *supra* note 10.

²⁹ *Ibid.* *See also*, *Suraj v. State of Madhya Pradesh*, AIR 1960 MP 303.

³⁰ *See*, Art.23(2), *supra* note 22.

³¹ Pylee, M.V., *India's constitution* 56, New Delhi: S. Chand and Company, 1999. *See also*, *The Right Against exploitation*, available at: <http://www.iloveindia.com/constitution-of-india/right-against-exploitation.html> (Last visited on April 4, 2013); Chaube, Shibnikinkar, *Constituent Assembly of India* 78, New Delhi: Manohar Publishers & Distributors, 2000; Jain M. P., *Indian Constitutional Law* 1304, (6th edn..) Gurgaon: LexisNexis Butterworths Wadhwa Nagpur, 2010; *Davendra Nath Gupta v. State of Madhya Pradesh*, AIR 1983 MP 172; Keith, Arthur Berriedale, *A Constitutional History of India* 16, London: Methuen & Co. Ltd., 1937.

- **Cultural and educational rights:** Chapter IV of the COK and Part III of the COI guarantee certain rights aimed to protect the rights of cultural, linguistic and religious minorities, by enabling them to conserve their heritage and protecting them against discrimination³².
- **Right to Constitutional Remedies:** A declaration of fundamental rights is meaningless unless there is effective machinery for the enforcement of the rights³³. Chapter IV of the COK and Part III of the COI incorporates provisions for the enforcement of fundamental rights³⁴. Superior Courts are generally designated Courts with power to issue writs, *namely; habeas corpus, mandamus, prohibition, certiorari* and *quo-warranto* for the protection and enforcement of fundamental rights under the COK as well as the COI³⁵.
- **Directive Principles of State Policy:** One of the important features which is not clearly incorporated in COK but emphatically finds its place in the COI is the DPSP³⁶. Although the DPSP are asserted to be fundamental in the governance of the country, they are not legally enforceable³⁷. They aim to ensure that the State provides free legal aid to guarantee equal opportunities for securing justice to all irrespective of economic or other disabilities³⁸. They also oblige the State to provide the right to work, education and to public assistance in cases of sickness and disablement, within the limits of economic capacity³⁹ as well as to provide for living wage, just and humane conditions of work and maternity relief, *etc*⁴⁰. All these principles generally promote and protect the human rights of civil servants.
- **Human Rights Commission:** Another aspect that is incorporated in Part 5, Chapter IV of the COK but does not expressly find place in the COI is the provisions relating to the establishment of the Human Rights Commission⁴¹. The Commission in India is

³² See, Arts.43 and 44, *supra* note 5 and Arts.29 and 30, *supra* note 31.

³³ Jain M. P., *Indian Constitutional Law*, *supra* note 32 at 1428.

³⁴ See, Arts.22 and 23, *supra* note 5 and Arts.32 and 226, *supra* note 22.

³⁵ See, Art.23, *supra* note 5 and Arts.32 and 226, *supra* note 22. See also, *Romesh Thappar v. the State of Madras*, 1950 AIR 124, 1950 SCR 594; *Daryao v. State of Uttar Pradesh*, AIR 1961 SC 1457, 1461.

³⁶ See, Part IV, *supra* note 31.

³⁷ See, Art.37, *ibid*. See also, *What are Directives of State Policy*, available at:

<http://www.preservearticles.com/201012251613/directive-principles-of-state-policy.html> (Last visited on April 2, 2013).

³⁸ Art.39A, *ibid*.

³⁹ Art.41, *ibid*.

⁴⁰ Art.42, *ibid*. See also, *Essay on Directive Principles of State Policy in India*, available at:

<http://www.preservearticles.com/201103104435/essay-on-directive-principles-of-state-policy-of-india.html> (Last visited on April 5, 2013).

⁴¹ See, Art.59, *supra* note 5.

rather established under the *Protection of Human Rights Act, 1993*⁴² which is *in pari material* with the *Kenya National Commission on Human Rights Act, 2011*. In either case, the Commissions are autonomous bodies charged with protection and promotion of all human rights for all individuals and groups including civil servants.

- **The *Drugs and Cosmetics Act, 1940*:** This Act provides protection against injurious drugs as a result of onward march of science and complexities of living processes.
- **The *Drugs and Magic Remedies (Objectionable Advertisement) Act, 1954*:** The object of this Act is generally to control the advertisement of drugs in certain cases, to prohibit the advertisement for certain purposes of remedies alleged to possess magic qualities⁴³.

IV. CONCLUSIONS:

A detailed analysis carried out in this paper unveils major international, constitutional and legal provisions including judicial pronouncements relating to civil servants' human rights both in Kenya and India. It can specifically be noted that both countries' constitutional and legal framework are *in pari material* with the International Covenants on Human Rights. It can however, be noted that unlike the COI, the COK does not incorporate a separate Chapter of DPSP to further supplement fundamental rights that supports, promotes and protects human rights of civil servants.

Another distinguishing factor as noted in the study that emphatically finds its place in the COK but is not expressly addressed in the COI is the establishment of the National Commission of Human Rights. There is a separate Chapter under Part 5, Chapter IV of the new COK that is dedicated to the provisions relating to the establishment and functions of the Kenya National Human Rights and Equality Commission. Similar segment is missing under the COI. Further, while there is only one major and comprehensive legislation dedicated to the promotion and protection of human rights of civil servants in Kenya *i.e.*, the *Kenya National Commission on Human Rights Act, 2011*, there are a number of legislations both at the Centre and individual States in India for the promotion and protection of human rights.

It is a fact that there exist many challenges on the civil servants' human rights horizon today *namely*, poverty, food security, terrorism, arbitrary transfers, stringent restrictions on

⁴² See, Chapter II and V, the *Protection of Human Rights Act, 1993*. This Act was enacted pursuant to the directive under Art.51 of the *Constitution of India* and also the commitments taken at Vienna conference and it provides for the constitution of a National Human Rights Commission, the State Human Rights Commissions in States and Human Rights Courts for better protection of human rights in India.

⁴³ See, the Preamble, the *Drugs and Magic Remedies (Objectionable Advertisement) Act, 1954*.

forming unions, *etc.* To confront these effectively, revision of the existing legal provisions, free and frank exchange of views, coordination at various levels *i.e.*, national, regional and international levels, convergence in resources and technical cooperation, partnership with Non-Governmental Organisations and civil society groups is essential for better protection and promotion of human rights.